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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerability of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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- 9. *Child right to remedy (Article 13)*
- 10. *Child right to redress (Article 14)*
- 11. *Recommendations*

NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarmingly, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution it-self (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken threw national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarmingly, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* Criminal Application No. 185 of 2004). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- **Trauma:** Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- **Aggressive Behaviour:** In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- **Psychological and Social Problems:** Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- **Denial of justice:** Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- **Lack of education:** Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- **Medical and health risks:** Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- **Children engaged in manual labour** develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- **Denial of childhood:** The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

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

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerability of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that 'over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised'. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children's Home, which shelters rescued girls, that the Provincial Administration, Police and the Children's Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children's Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children's Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor's father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* Criminal Application No. 185 of 2004). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

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

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* Criminal Application No. 185 of 2004). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerability of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* Criminal Application No. 185 of 2004). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, *Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic* where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarmingly, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that 'over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised'. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children's Home, which shelters rescued girls, that the Provincial Administration, Police and the Children's Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children's Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children's Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor's father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution it-self (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken threw national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

- (a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or
- (b) who is found begging or receiving alms; or
- (c) who has no parent or the parent has been imprisoned; or
- (d) whose parents or guardian find difficulty in parenting; or
- (e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or
- (f) who is truant or is falling into bad associations; or
- (g) who is prevented from receiving education; or
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or
- (i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or
- (j) who is exposed to domestic violence; or
- (k) who is pregnant; or
- (l) who is terminally ill, or whose parent is terminally ill; or
- (m) who is disabled and is being unlawfully confined or ill treated; or
- (n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or
- (o) who is engaged in any work likely to harm his health, education, mental or moral development; or
- (p) who is displaced as a consequence of war, civil disturbances or natural disasters; or
- (q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or
- (r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or
- (s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;



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Violence against women and children in Kenya

An alternative report to the Committee Against Torture
November 2008

A report compiled by the World Organisation Against Torture (OMCT),
in collaboration with



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VIOLENCE AGAINST WOMEN AND CHILDREN IN KENYA

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NOTE ON THE AUTHORS

This alternative report has been prepared by a number of specialised Kenyan NGOs, with coordination by and technical input from the World Organisation Against Torture (OMCT).

Profile of the Coalition on Violence Against Women

The Coalition on Violence Against Women - Kenya , COVAW (K), is a registered, non-partisan and non-profit making national women's human rights non-governmental organization. COVAW (K) works to promote and advance women human rights through working towards a society free from all forms of violence against women. COVAW (K) was established in 1995 as a result of a workshop organized by WILDAF (Women in Law and development in Africa) that sought to strengthen the networking capacities of women organizations in Kenya .

COVAW is committed to breaking the silence on violence against women and girls in the Kenyan communities, and works towards building capacities of individuals, communities and the entire nation to recognise violence against women and take appropriate measures to stop it. Since its inception, COVAW (K) has continued to be instrumental in placing violence against women as a crime and a human rights violation in the public domain.

Profile of Member of NGO CRC Committee involved in preparation of CAT Report

The NGO CRC Committee is comprised of organizations in the children sector from all over the country with its secretariat at Kenya Alliance for Advancement of Children. The committee has four sub committees: Legal and policy, child poverty, child participation and rapid response committees. The committee has played an active role in the process of drafting the Shadow Report for the Convention Against Torture and was represented at the NGO validation workshop on the shadow report to the State Party report on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment held in Nairobi on 5 September 2008. In addition, the NGO CRC Committee has held several meetings gathering its members to compile information and draft the shadow report. This was done in consultation with the OMCT (Child Right Activities).

The NGO CRC Committee mandated the Legal and Policy Sub-Committee to gather as much information as possible as well as compile the same. Member organisations of the CRC Committee that provided information include ANPPCAN Kenya, Childline Kenya, CLAN, the CRADLE, KAACR, Save the Children Canada and Legal Resources Foundation.

This report covers the period up to June 2007 when the State Party Report was submitted. However, in a few instances, crucial information and statistics covering the period beyond June 2007 has been cited.

A brief on the members of the NGO CRC Committee:

Kenya Alliance for Advancement of Children (KAACR) is an alliance of child focused organizations committed to the implementation of the UNCRC. KAACR was established in 1989 with the primary duty of monitoring and evaluating the implementation and non-observance of the principles and provisions of the UN Convention on the Rights of the Child in Kenya. Since its inception, KAACR has been implementing programmes on child rights

with a special focus on promoting information exchange and cooperation among organizations working with children and to advocate for policy reforms which address the interests and well being of children in Kenya as reflected in the UNCRC.

ANPPCAN Kenya Chapter is the Kenyan National chapter of the African Network for the Prevention and Protection against Child Abuse and Neglect, a pan-African child rights organization with chapters in seventeen African countries. It is a charitable, non-profit organization and was registered as a Non-Governmental Organization in 1995. Like the other ANPPCAN chapters, ANPPCAN Kenya operates as a national resource centre on child abuse and neglect and children's rights. They provide information and technical expertise on child protection and child rights issues, carry out research on emerging children's issues and lobby governments, donors, other NGOs and communities on behalf of children.

The Children's Legal Action Network (CLAN) is a registered Charitable Trust formed in 1998 with the core mandate of provision of free legal aid to children who have been abused, those in need of care and protection and those in conflict with the law. CLAN's mission is to advocate for, protect and enhance the rights and welfare of children through the provision of free legal aid and related services by working together with frontline service providers including the Government Departments, Civil Society Organizations, individuals and children. CLAN has five core programme areas of intervention: Provision of legal assistance to children, Law and Policy Reform, Advocacy and Awareness creation on children's rights, Training and Capacity Building on child rights and protection, Research, Documentation and Information Sharing.

The CRADLE - The Children's Foundation is a non-profit making and non-governmental organization committed to the protection, promotion and enhancement of the rights of the child through court representation, advocacy and law reform. The CRADLE institutionalized in 1999 by setting up a pilot and the first legal aid clinic of its kind for children and has since continued protecting and promoting the rights of the child to date.

The Legal Resources Foundation was established in 1994, as an autonomous project of the Kenyan Human Rights Commission. In the course of 2000 it has registered as a trust and became an independent legal entity. LRF has grown into a renowned fully-fledged organisation, which has developed innovative methods to raise legal, and human rights awareness among the young, underprivileged and the undereducated classes in Kenya. Its programmes consists of community-based paralegal training, theatre for civic education, legal and human rights education for secondary schools, production of educational radio programmes and publication of materials to be used in its own and similar educational projects. After ten years of pioneering, LRF has analyzed its strengths and weaknesses, in order to redefine its role and to consolidate its achievements in line with the ultimate objectives of the Kenyan human rights and democratization sector.

Childline Kenya is a Non-Governmental Organization registered in 2004, and working in Kenya to protect and promote a culture of children's and human rights. Childline Kenya provides a nation-wide 24-hours toll-free helpline for counseling and referral services to children, young persons and their families in difficult situations. The organization brings together a variety of organizations that provide services in the areas of health, legal aid, counseling, rescue and emergency response, child welfare, child rights promotion and advocacy. Through the helpline, children can access essential services through an allied

referral system, thereby providing a platform for a coordinated response to children's concerns in Kenya.

Save the Children, Canada is an international non profit organization that fights for children's rights. Save the Children Canada delivers immediate and lasting improvements to children's lives in Kenya, fights for children's rights and delivers immediate and lasting improvements to children's lives.

PRELIMINARY REMARKS

The purpose of this alternative report is to address matters that make women and children vulnerable of women and children, as regards their exposure to torture, and other cruel, inhuman and degrading treatment and punishment. Furthermore, it draws attention to consistent human rights violations involving torture and ill-treatment inflicted on women and children by both State officials and non-State actors. It also addresses to what extent the Kenyan Government fails to protect women and children from torture. In this respect, the present report provides the Committee with a legal and practical overview on women's and children's rights in Kenya in the context of the implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention).

This report is based on the international legal obligations of Kenya under the Convention. In particular, it refers to the positive obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”¹ and “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment.”² Furthermore, this report refers to the Committee's General Comments No. 2, with a particular emphasis on the paragraph stating that, whenever 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 (...) under the Convention for consenting to or acquiescing in such impermissible acts. (...) The State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”³

¹ Article 2, § 2.

² Article 16, § 2.

³ General Comment N. 2: Implementation of article 2 by State parties

INTRODUCTION

Gender-based violence and violence against children represent a serious and persistent issue in Kenya. UNICEF reported that in Kenya the level of violence against children reached totally unacceptable levels, in particular as regards sexual violence. The UNICEF representative in Kenya further emphasised that “We need to get people talking, to break the silence around violence and make sure that everyone knows where to go to get help.”⁴ Street children are vulnerable to harassment, physical and sexual abuse; they are seen as offenders, criminalised and are frequently arbitrarily arrested, beaten and ill-treated by police officers.

As regards women, the persistence of certain cultural norms, traditions, and stereotypes as well as *de jure* discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. 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”.⁵ Most of gender-based violence cases remain unreported or at least unpunished, and this occurs in particular as regards sexual violence. Besides the fact that rape occurs regularly in Kenya, no effective system is foreseen to investigate allegations of sexual violence and consequently most cases are not referred to justice. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape, as a private matter. This has led to a lack of confidence in the Government’s response and has had the additional effect to further prevent women from denouncing or reporting violence inflicted on them.

The already vulnerable situation of women and children has been exacerbated by the post-elections crisis. On 25 January 2008, IRIN news reported that “children and women have borne the worst of the violence in Kenya”, emphasising that sexual violence has increased especially in camps set up for Internally Displaced Persons (IDPs), where girls and women exchange sex for biscuits, or for other services. Indeed, IDPs women are constantly exposed to violence. For example they are exposed to sexual violence while trying to get to a latrine during the night. The Gender Violence Recovery Centre in Mombasa reported that cases of sexual violence have doubled since the elections crisis and there have been an increase in sexual assaults whose victims are most predominantly girls under the age of 18.⁶

Ensuring adequate protection for women and children from ill-treatment and other abuses remains a challenge in Kenya. For that reason, the Government should take concrete steps to address human rights violations concerning women and children, and to protect them from all forms of violence. Furthermore the Government should also commit in training both the police and the judiciary on women and children’s human rights and advocate that violence against women and children is unacceptable.

⁴ <http://www.irinnews.org/report.aspx?reportid=59759>

⁵ Concluding comments of the Committee on the Elimination of Discrimination against Women: Kenya CEDAW/C/KEN/CO/6, § 21.

⁶ <http://www.un.org/apps/news/story.asp?NewsID=25414&Cr=kenya&Cr1>

PART 1
THE IMPLEMENTATION OF THE CONVENTION AGAINST TORTURE IN
RESPECT TO WOMEN

1. Legal and institutional framework related to the implementation of core United Nations Human Rights Treaties, including the Convention Against Torture

With regard to women's rights, Kenya ratified the CEDAW on 9th March 1984 and bound itself to the Beijing Declaration and Platform for Action (1995), the UN resolution 1325 on women and peace (2000) and the African Union solemn declaration on gender equality (2004).

Neither the Constitution nor other national legislation contain a definition of discrimination against women, a situation compounded by the fact that a general/working definition of torture is lacking in all Kenyan statutes, therefore creating a lack of basis on which to tackle issues of discrimination in all spheres.

The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution's guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.

Customary laws are still applicable in Kenya. In practice, they are to be used as a guide in civil cases affecting people of the same ethnic group as long as it does not conflict with statutory laws. Customary law in Kenya is applied most often in cases related to marriage, divorce, death and inheritance issues. For example, the current Kenyan constitution expressly states that in relation to use of land, rights held under customary law are to be respected and fully compensated, unless they are repugnant to written law.

Legislative changes with regard to gender issues have been impeded by the fact that there has been a lot of delays in passing gender related Bills, which if passed would go along way with cultural contexts in addressing some of the discriminatory issues affecting women with regard to matrimonial issues, property rights and inheritance⁷. The Matrimonial Property Bill and the Equal Opportunities Bill have been under preparation since 1999. The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002.

For example, the practice of payment of bride price and polygamy are indeed recognised, and are still widely practised largely by most of the communities in Kenya with no specific references or remedies from the law in instances where discrimination would arise from their application. If passed, the Matrimonial Property Bill (still pending) would go along way in addressing issues related to inheritance of property by women in polygamous situations. Another example shows that division of property under the relevant laws that govern succession and divorce are not clearly set out. Landmark cases on the issue have established that women are entitled to half of the property in a case of death or divorce, but only if they prove that they contributed to their households.

Thus, discriminatory laws especially in terms of property rights and inheritance and in marriage and family relations are still applied with the sanction of customary laws.

To that regard, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW), noting the delays in the passage of crucial laws, such as the Domestic

⁷ For more details in the denials of women property rights in Kenya, see *Addressing the economic, social and cultural root causes of torture in Kenya*, OMCT Alternative Report to CAT, November 2008, p. 25 and 26.

Violence Bill, the Matrimonial Property Bill and the Equal Opportunity Bill, requested the State to complete without delay its legislative reform⁸ (we underline).

Within the governmental structure, the Ministry of Gender was established in 2003 within the National Commission on Gender Development, as a parastatal which is an elevation of the women's bureau formed in 1976, and whose mandate is to spear head the gender issues at cabinet level. Following the 2007 election and the formation of the subsequent government, the ministry was renamed as the Ministry of Gender and Children Affairs. It is currently the only Ministry that is mandated to deal with gender issues specifically. However, other ministries such as the Ministry of Education, Ministry of Health, Ministry of Justice and Constitutional Affairs, Ministry of Special Programmes, and the Office of the President (Police Department) have made some attempts to include gender components; there have however been limitations in the applications of their mandates in this regard.

2. Practice of torture and other cruel, inhuman and degrading treatment or punishment

As recently recognized by the CEDAW, “adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life” persist in the Kenyan society⁹. This perpetuates discrimination against women, including in its worst form that is violence against them.

2.1. Violence in the context of conflict

The recently experienced post election violence in Kenya exposed to dangers and vulnerabilities women and girls in conflict situations. During the occurrence of the post election violence at the beginning of 2008, women and girls on the run from their homes and those who sought sanctuary in the internally displaced population's (IDP) camps were exposed to and experienced all forms of sexual abuse. The findings of a *Rapid Assessment of Gender Based Violence during the Post Election Violence in Kenya* undertaken by the Gender Based Violence Subcluster,¹⁰ an interagency assessment report, encamped women repeatedly expressed fears of sexual violence as a result of makeshift sleeping arrangements in the IDP camps where males and female (not of the same family), were forced to sleep together under one tent. There were also concerns expressed over the lack of regulations at the camp that allowed men from outside to enter the camp unchecked. Sexual exploitation was also a concern as women and girls were coerced into exchanging sex for basic resources such as food, sanitary supplies and transport.

The assessment sought to examine the nature and scope of sexual violence that occurred during flight of the victims of violence, as well as within IDP and alternate camps. It also evaluated the capacity of both community and camp based programs to prevent and adequately respond to cases of sexual violence.

The assessment was carried out in selected sites in North Rift Valley South Rift Valley, the Coastal Region, Nairobi and Central Province. The findings reported that in the course of the violence, perpetrators exploited the conflict by committing sexual violence in total impunity,

⁸ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §17-18.

⁹ *Idem*, §21.

¹⁰ Gender Based Violence Subcluster, *Rapid Assessment of gender based violence during the post election violence in Kenya*, January – February 2008.

and efforts to protect or respond to the needs of women and girls were remarkably insufficient. Sexual violence was used as a fear instilling tactic as women were told that they and their children would be raped if they did not abandon their property within a designated time frame; often the threat was actualised.

With regard to HIV/AIDS, many victims were raped and infected with HIV/AIDS, and were raped regardless of whether they had the HIV virus or not. This in turn caused many new infections.

To date, there is no case that has been prosecuted by the government regarding sexual violations that were meted out on victims as a result of the post election violence.

Case of 29 women of Kibera raped and sexually assaulted by Administration Police Officers and the Police Officers General Service Unit during the Post Election Violence.¹¹

General Facts: After the advent of the Post Election violence, 29 women from the Kibera area who were raped and/or sexually assaulted by either the Administration Police from the chief's camp, or General Service Unit officers reported their incidences of abuse to the Gender Based Violence Recovery Centre at Kenyatta Hospital. It was reported that, during the curfew imposed during the period of post-election violence, police officers engaged in patrols would break down doors of houses where women were known to reside alone (without an adult male presence). They would then assault and rape the women, sometimes in the presence of children. Given that police officers usually conducted these patrols in squads of ten, the assault they perpetrated was usually collective and the rape frequently took the form of gang rape. Women were either raped in their homes or in the surrounding neighbourhood.

Alarming, of the 29 women raped, 18 are HIV positive, some having contracted the virus before rape incidences, while a number contracted because of the rape incidence. One of the victims, who were already HIV positive and severely sick at the time, informed the rapists of her positive status, and the fact that she was visibly sick. The 10 A.P's from the chiefs camp however proceeded to rape her despite this fact. Another victim was raped in front of her 8 year old son and infected with the HIV virus during the incident. A third victim conceived during the rape episodes and is due to give birth in the month of October. Despite the fact that the perpetrators of the abuse are known by virtue of having worked at the Chief's camp in Kibera, none of them have been apprehended or charged with any crime.

The 29 women are getting medical support, PEP, ARV and Psychosocial Support from the Gender Based Violence Recovery Centre at Kenyatta Hospital. COVAW (K) is currently working together with the women and the GVBRC centre to look into the possibility of undertaking a Public Interest Litigation case.

At the moment, the women are being offered psychological support at the Kenyatta National Hospitals as efforts are directed into undertaking the collation of forensic evidence to proceed with the prosecution of the case.

¹¹ Cases reported to the Gender Based Violence Recovery Centre (Kenyatta Hospital), a one stop shop facility for survivors of sexual violence supported by Kenyatta Hospital and COVAW. The mentioned crimes were committed between 30th December and 1st January.

State violence occurs especially during armed conflicts. This is however largely disputed by security forces and undocumented. *A Situational Analysis on the Women and Children* undertaken in October 2007,¹² in the Mount Elgon District in Kenya, a region frequently plagued by land related conflicts, revealed that during the occurrence of violence, both the militia groups and the Government of Kenya security forces inflicted sexual violence against women and children. According to the assessment, security forces violated women and girls during the imposed curfew from 6 pm to 6 am. While it was in fact acknowledged that the curfew reduced the number of abductions and the killing of people by the militias groups, in the area in question, the most frequent complaints were that security forces harassed people by looting and confiscating their property, by illegally extorting them and even raping women and girls.

2.2. Domestic violence

Domestic violence is rampant in Kenya and despite interventions especially by Civil Society actors, there has been a steady increase in cases and severity of domestic violence in all regions in Kenya. A Research Report on Service Providers Response to cases of violence of women in Nairobi Province titled *In Pursuit of Justice* developed by COVAW¹³, reported that according to the Police Administration, women suffer more in domestic fights caused by their spouses than any other circumstances. Domestic violations accounted for 48% of all violations. The results of the research showed statistical prevalence of women and children suffering from violations from parents and husbands. The primary research indicated that the most prevalent form of abuse women go through is usually a combination of physical assault, followed by emotional stress, sexual violence and neglect.

2.3. Trafficking

The practise of trafficking is increasingly rampant in Kenya, both within and outside its borders.

Internal trafficking:

Despite the occurrence of international trafficking due to porous borders, weak immigration laws and corruption, internal human trafficking is the most identified form of trafficking in Kenya, with women and children commonly identified as victims and occurring primarily from rural areas to urban centres, particularly Kisumu, Malindi, Mombasa and Nairobi. Internally, the offence of trafficking is meted out on young, needy girls especially from the rural areas who are taken to urban centres to work as housemaids, usually at a fee or no fee at all. The young girls are usually lured with the pretext (usually from relatives) that they will be sent to school once they arrive in the towns. The main purpose of trafficking to Nairobi is domestic labour while trafficking to coastal region is predominantly for purposes of sexual exploitation because of the tourism sector. A report carried in the Daily Nation of December 15th 2007¹⁴, gave the details of a conviction of a Congolese woman who was charged in a Nairobi court for trafficking two girls aged 12 and 15 years for sexual exploitation. Internal trafficking also happens for purposes of forced labour in the agricultural sector, particularly on tea plantations and flower farms.

¹² COVAW, *Situational analysis on the women and children in the Mount Elgon District in Kenya*, October 2007.

¹³ COVAW, *In pursuit of justice, a research Report on Service Providers Response to cases of Violence against Women*, October 2002.

¹⁴ Daily Nation, December 15th 2007.

*Case: R. vs Hans Vreins*¹⁵

In the case of *R. vs Hans Vreins*¹⁶, the CRADLE, a Children's Rights Organization, held brief on behalf of 3 young girls who had charged the accused Hans Vreins with sexually exploiting them. This was related to a suspected case of trafficking in children that involved a Dutch national who was accused of exploiting several children in Kenya. He had established a school in one of the slums where he had recruited young children and hosted them in a boarding school where only girls were allowed. It was alleged that he had not only developed a list of over 70 girls against whose names were marked "virgin or non virgin" but he had also exposed them to pornographic material. It was further alleged that some of these girls were taken with him for holidays in Mombasa where he introduced some of them to his friends as 'spring chicken' which was incidentally the name of the School.

During the investigations, the police continually harassed the young girls who accused him, including continually arresting and charging members of their families with fabricated criminal charges. At one point, witnesses at the precinct of the court were arrested while they were coming to give evidence and this included 9 and 10 year old orphaned girls. Unfortunately, due to poor investigations and interferences by the police, the accused was acquitted on all counts. It is alleged that the accused has since moved to Western Kenya where he opened and is still operating a new school. Even if this case happened in 2001, the described facts still illustrate the current situation with regard to internal trafficking in Kenya.

International trafficking:

Regarding, international trafficking, a report on the Status of Human Trafficking in Kenya titled *Grand Illusions, Shattered Dreams* published by The Cradle, in 2006¹⁷, identified Kenya as a fast growing source, transit and destination country with regard to trafficking involving especially women and girls. The report further indicated that in cases of perceived trafficking of children in Kenya, the objective and method of trafficking frequently appeared to be illegal adoptions. For young children who may be trafficked for purposes such as removal of organs, religious rituals or witchcraft, gender criteria appear to be immaterial. It further revealed that children are at increased risk of trafficking especially through poor birth registration.

With regard to women, most of the time, they are being lured abroad in the pretext of being offered jobs, and are then kept in confinement with their identification documents confiscated. This practice is common with immigrants trafficked to the United Kingdom and Middle East countries such as Lebanon and Syria where they are offered jobs as teachers but are essentially employed as maids when they arrive at the countries of destinations.

2.4. Harmful traditional practices

Female Genital Mutilations are still widely practised, especially with the Maasai, Kisii, and Somali communities in Kenya. In spite of the enactment of the Children's Act (2001) which prohibits female genital mutilation, it is noted a continued prevalence of the practice in some areas of the country. In addition, women over 18 years of age are usually pressured or forced into undergoing the practice¹⁸.

¹⁵ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁶ *R. vs Hans Vreins*, CMC Criminal Case No 1380/2001.

¹⁷ The Children Foundation, *Grand illusions, shattered dreams, a report on the status of Human Trafficking in Kenya*, 2006.

¹⁸ See part 3 of this report on the current legislation with regard to female genital mutilations.

A newspaper article featured in the Standard Newspaper of 9th August 2008 reported that ‘over 90 percent of all women over 20 years in Laikipia North District in Kenya are circumcised’. Laikipia North District, in the Rift Valley Province of Kenya, is predominantly inhabited by the Maasai and Samburu communities who practise FGM. In the predominantly pastoralist communities, hundreds of girls undergo circumcision every school holiday. In these communities, it is generally by the parents that children may get pregnant before being circumcised, a situation considered a curse.

The initiative to eliminate FGM has been largely the efforts of the Civil Society Organizations. In addition, while some administration officers especially those in marginalised areas have been helpful in rescuing girls and apprehending those perpetrating FGM, a good number have indeed condoned the practise in their areas and even participated in celebrations of FGM. More concrete and practical efforts have to be made by the government on the issue, which will extend to provision of safe house facilities for girls who are under threat or who have been rescued and the punishment of administration and police officers found in condoning or participating in the practise. Stiff penalties should also be meted out to parents who are found having given away their daughter to be forcefully married.

As a result of the cultural belief that marriage of a girl must take place once she is circumcised, forced early marriages are still widely practised in most communities with the sanction of religion and culture, with most of the girls being married before the attainment of majority age (18 years) and without their consent and /or regard to their reproductive incapability that should be attributed to their ages. The process of early marriage which has made girls as young as 15 to become wives unwillingly, starts when they are forced to undergo female genital mutilation. Consequently, early marriages are more predominant amongst those communities that systematically practise FGM, such as the Maasai and the Samburu. In the above mentioned press article¹⁹, it was noted by Hellen Gathongo, a manager of Nanyuki Children’s Home, which shelters rescued girls, that the Provincial Administration, Police and the Children’s Department had failed to protect minors as the authorities were too lenient on parents who forced their daughters into early marriage.

The Standard Newspaper of 26th May 2008 carried 2 accounts of girls who had been rescued by the Police after being married off by their parents.

In one of the incidents, the girls aged 13 and 14 who were pupils at Ol Kinyei Primary School in Mukogodo in Laikipia North District of Kenya, were withdrawn from schools after their parents found them suitors. After being rescued, they were taken to Nanyuki Children’s Home, where the administrator confirmed that their middle aged husbands had taken off.

The second case related to the rescue of a six year old girl from a forced early marriage from Isiolo District in Kenya. The Children’s Department and the Provincial Administration police and the Child Welfare Society spent five days combing the remote Kipsing Location in Isiolo District where they rescued the minor who had been hidden by her would be husband. The minor’s father had given her out to a 55 year old man for marriage.

¹⁹ Standard Newspaper of 9th August 2008.

3. Definition and criminalisation of torture (articles 1 & 4 CAT)

Legislation does not clearly address all forms of gender based violence; it should specify criminal and civil law responses, unambiguously stipulate sanctions and include measures to prosecute state agents and private actors who are perpetrators of violence.

3.1. State Violence

Section 74(1) of the Constitution states that “no person shall be subject to torture or to inhuman or degrading punishment or other treatment”. There is neither a more detailed definition nor a clear criminalization of torture within the national legislation.

Section 24 of the Sexual Offence Act foresees the criminalisation of abuse of position of the superintendent or manager of a jail, remand home or any other place of custody or any other law enforcement officer. The offence can be to take advantage of this position to have sexual intercourse or to commit any other sexual offence under this Act. He/she shall be liable upon conviction to imprisonment for a term of not less than ten years.

3.2. Violence in the context of conflict

Kenyan laws and policies do not currently envisage such situations of violence in the context of conflict, including violence perpetuated by those in authority in such situations. Necessary amendments to legislation have to be in order to improve the situation of IDP women in accordance to international instruments and standards. The necessary amendments to legislation should also ensure that all victims of sexual violence committed during occurrence of conflict situations are compensated adequately and receive medical, psychological and social rehabilitation.

3.3. Domestic violence

The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with the issue of domestic violence. The current practice is to criminalise the offence under the Penal code as assault/ battery, but this usually disregards violence that is perpetrated in the home.

The adoption of the Domestic Violence (Family Protection) Bill has been pending since 2002. This Bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The Bill also makes provisions for counselling and psychological attention for the victims of domestic violence and provisions of safe houses for victims who are unable to remain in the violent domestic situations. It gives provisions for protection orders against perpetrators including denying them access to the matrimonial homes, provides for a ‘friend’ to make an application for application for protection orders on behalf of another and provides for rehabilitation and setting up fund for domestic violence victims.

One of the reasons that has occasioned delays in its passing into law is related to the provisions contained in the Bill that would criminalise marital rape. The offence of marital rape has not yet been expressly criminalised in any legislation, and is often used as a basis of delaying the adoption of any gender related bills.²⁰

²⁰ The Domestic Violence (Family Protection) Bill was not passed for (among other reasons), outlawing the offence of marital rape, the Sexual Offences Act 2006 was also passed only after a few provisions including that recognising the offence of marital rape was removed from the Bill.

3.4. Sexual violence

The Sexual Offences Act 2006 was enacted to comprehensively address the issue of sexual violence in Kenya. Prior to its enactment, there was no adequate legal framework to cover sexual related offences; provisions were scattered throughout various statutes including the Penal Code. The Sexual Offences Act became operational on the 21st July 2006. Civil Society organizations then embarked on capacity building of the police and judicial officers on its provisions and usefulness. Consequently, the Sexual Offences Act is increasingly being applied on sexual offenders by prosecutors, judges and magistrates. It is however too early to determine precisely its application and its impacts in practice.

Section 3(1) of the Sexual Offences Act foresees that:

“A person commits the offence termed rape if -

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of this Act.

Section 4 defines the attempted rape: “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape”.

As we notice it, the definition of rape and of attempted rape is not wide enough to take into account acts other than a penetration with a genital organ. Other situations are covered under Section 5, sexual assault which encompasses situations when:

(1) Any person who unlawfully -

- (a) penetrates the genital organs of another person with -
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

Gang rape is also introduced in this Act in Section 10:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement, is guilty of an offence termed gang rape.

A person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life; of sexual assault, liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life; and of gang rape, liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

Prostitution in itself is not criminalized but the fact to cause, incite to prostitution or control the activity of a prostitute is punished under article 17 of the Sexual Offence Act 2006, from imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

3.5. Trafficking in persons

There has also been delay in the adoption by the Parliament of the revised draft of the Trafficking in Persons Bill. If passed, it would be the first comprehensive law that would deal exclusively with the issue of trafficking and all its elements. Given that trafficking as a concept in Kenya is largely unknown, it is more subtle and often perceived as a moral and not a criminal issue.

However, this Bill should include prevention measures and provides for the effective prosecution and punishment of traffickers; as well as protection and support for victims. This was also the object of a recommendation by the CEDAW calling upon the State to expedite the adoption of the bill but also urging the State to include the elements mentioned above²¹.

As a consequence, the issue of trafficking is currently legally dealt with only partially. Other than the Children Act 2001 and the Penal Code, the Sexual Offences Act is the only other statute that contains provisions dealing with the issue of trafficking. But the disposition on trafficking for sexual exploitation targets all persons whereas the one on trafficking for all purpose targets only children.

Thus, Section 18 of the Sexual offence Act on trafficking for sexual exploitation states that:

- (1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -
 - (a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or
 - (b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

3.6. Harmful traditional practices

The government outlawed the practise of female genital mutilation under the Children's Act (2001). Section 14 of the Act provides that:

“No person shall subject a child to female circumcision, early marriage or cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.”

²¹ Concluding comments of the CEDAW: Kenya, UN Doc. CEDAW/C/KEN/CO/6, 10 August 2007, §30.

For women over the age of 18 years, the law envisages that it is their choice as to whether they should undergo FGM, as they are considered capable of making a choice. However, the pressure and sanction from culture effectively negates the issue of choice as most of the girls consider that they have to undergo FGM in order to be accepted within their communities.

As noticed, the practise of early and forced marriages is criminalised under Section 14 of the Children's Act. Also Section 29 of the Sexual Offences Act, which targets especially sexual acts within this context, provides that 'Any person who for cultural or religious reasons forces another person to engage in a sexual act or any act that amounts to an offence under the Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than 10 years'.

4. Measures to prevent acts of torture and other ill-treatments (Article 2 §1)

The challenge to deal with issues of sexual and other forms of violence against women relates to the lack of policy and framework, including legal framework, on violence against women. This means that relevant government departments are unable to formulate work plans and form an agenda specifically on the issue of the prevention of violence against women as it relates to torture.

In matter of trafficking, there is a National Plan of Action on Trafficking in Persons initiated by the IOM in collaboration with the Government of Kenya. A National Steering Committee to formulate and implement the National Plan of Action is also in place. The Steering Committee is currently hosted by the Ministry of Home Affairs under the Children's Department.

The State has been especially lethargic in setting up safe houses and boarding schools where the intended victims of FGM and early marriage can escape to in order to avoid victimization and pressure from their communities.

5. Education and information (article 10)

The insensitivity experienced especially by sexual abuse and domestic violence victims when reporting cases at Police Stations, and sometimes lack of appropriate and holistic assistance to the victim necessitates that the State ensures to undertake training and capacity building programmes for law enforcement officers, judicial officers, medical personnel, judges and magistrates to ensure they are sensitised to the rights and needs of the women victim of violence.

Currently there is no specific focus within the curriculum on issues of gender based violence. The Police training programmes should be specific with a particular focus on the elimination of gender based violation, so that they recognise and acknowledge it as a grievous human rights violation and act accordingly. In order to be more effective these trainings should be included in their training curriculum in order for every officer to be knowledgeable on how to deal with the issue of violence against women with the gravity it deserves.

Awareness raising campaigns on any issues touching on violence or resulting torture within the society and communities have been the initiative of civil society organizations. In such

initiatives, the civil society organizations have endeavoured to collaborate with various State departments to create awareness. The State has however not initiated or allocated resources to this regard.

6. Investigation (Article 12) and the right to remedy (Article 13)

6.1. General obstacles for women in their access to justice

Women are enormously disadvantaged, compared to men, in accessing justice, especially when dealing with domestic violence, as well as other forms of gender-based violence.

The issue of reporting is central in cases of violence against women. One of the obstacles is represented by women's economic dependence on men. According to the OMCT report *Addressing the economic, social and cultural root causes of torture in Kenya* the majority of women has limited access to resources for seeking justice, both in terms of legal services and costs of medical consultations.

To that regard, the National Legal Aid Scheme was launched by the Ministry of Justice on 18th of September 2008. When operationalised, the scheme is intended to offer legal aid with a national focus to the section of Kenyans who can not afford legal aid. Currently however, there is no legal aid being offered by the state neither for victims of sexual violations nor for victims of any other gender based violence in Kenya. Provision of legal aid in Kenya is still the preserve of Civil Society Organizations such as FIDA (K), COVAW (K), Kituo cha Sheria, CLAN and others.

Reporting sexual or domestic violence is further compromised by social obstacles. Many women do not report violence because they fear revenge, and social stigma, or they fear to lose custody of their children²².

With regard to the law enforcement staff's behaviour, there have been attempts by Civil Society Organizations and the Police Department to offer sensitization on issues of gender through training and capacity building of law enforcement staff.

Indeed, the Research Report on Service Providers Response to cases of violence of women titled *In pursuit of Justice* reported that in most Police Stations in Kenya, women reported their cases of abuse openly at the reporting desks and this exposed them to public scrutiny shame and intimidation. It was reported also that some police officers are quite negative about the issue of violence against women and in general, women's human rights. They still think that it is a family affair and that they do not have much to do with the case. Although there was an initiative by the Police Department (through the Office of the President) to initiate Gender Desks at selected Police stations as a pilot project, the initiative has not been very successful as there are not enough trained police officers to man the desks.

The Police Department through the Office of the President has also attempted to set up gender desks in selected Police stations. The Gender Desk Programme, established by the government in 2003 aims at mainstreaming the issue of violence against women. Thus, every police station is supposed to be endowed with a policewoman in charge of treating gender-

²² OMCT Alternative Report to CAT, *Addressing the economic, social and cultural root causes of torture in Kenya*, November 2008, p. 27.

based violence. This will have the secondary effect of promoting the recruitment of women police officers and sensitizing on gender violence, especially in rural areas.

However, the gender desk's operations have been wanting, as they are often unmanned or attended to by Police Officers who are not trained. The policy of transfer within the Police Force (every officer is mandatorily transferred after every three years) also affects the consistency of operations of the gender desks. As a consequence, the Government initiative to set up "gender desks" has been so far poorly implemented and publicised.

Reporting violence is challenged by the complicated procedure to file a complaint. In case of violence, women are required to produce three documents: a police abstract, a "P3" form, and a medical report. It is a long procedure and this clearly prevents women from denouncing violence.

As explained, the P3 Form²³ is one of the forms needed in order to file complaints related to violence against women. Only recently P3 Forms have been made more accessible; the police used to have the monopoly of the form whereas now, it can also be found in hospitals and can be downloaded on internet. However, women are still not fully aware of the existence of such a form. Policy changes should also dictate that the P3 form should be availed and duly filled and signed by the necessary officials free of charge. Currently the victims are charged for the filling and signature of the P3 Form. The law does not provide officially for the payment of the form. In practice, this becomes an impediment to the pursuit of justice for those who cannot afford payment, which forms the majority. The figure to be paid for the filling of the P3 Form is also not standardised and varies from station to station.

6.2. Specific issues related to some forms of violence

Violence in the context of armed conflict:

The government should put in place mechanisms to ensure prompt and effective investigation of all allegations of rape and sexual violence committed in conflict areas, and persecutes and punishes perpetrators with appropriate penalties. Regrettably, due to the atrocities witnessed and experienced by the victims at the time, many of these cases went unreported as the women and girls considered it a "lesser evil" to losing their lives, livelihoods and property. Further, it is impossible to obtain information on State officers who have been convicted of sexual violence crimes as the trials are conducted as Court Martial to which the public have no access. The decisions reached in the Court Martial are neither available in the public domain.

Domestic violence:

Attitudes of Police and other law enforcement officers with regard to the issue of domestic violence further compound the persistence of violence against women. In most Police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the case is asked what she did to provoke the violence and is encouraged to resolve the issue at home.

Sexual violence:

Attention should be paid to the procedure that has to be undertaken by rape and sexual abuse victims when abused. This includes the fact that the victims can only be attended to by one

²³ The P3 Form is a legally accepted written evidence of physical injury document that has to be filled to contain details of the offence.

government medical doctor who is also subject to court attendances. This process does not take into account the delicate nature of sexual abuse cases which dictates that the victim of the sexual abuse cannot take a bath or wash their clothes lest they lose crucial evidence.

The P3 Form that has to be filled to contain details of the offence is inadequate in terms of giving adequate details, for instance on the psychological condition of the victim. This is worsened by the fact that most of the officers are not sensitized enough to fill in the P3 Form correctly in cases of sexual abuse. The insensitivity sometimes encountered by the sexual abuse victims when reporting to the police, usually means the victim endure further torture to their ordeal.

It should be noted that in most cases, there are lengthy investigations undertaken for sexual abuse cases, and equally lengthy medical processes availed way after arraignment in court. The lengthy processes are attributed to the fact that in practice there is only one government doctor in every district in Kenya, who is mandated to attend to sexual violence victims and fill out the medical report detailing the victim's injuries. The same doctor is required to attend court session during the hearings in order to adduce evidence in the court. Proper forensic equipment to collect and store evidence necessary for sexual violence cases is also lacking. In most cases, sexual violence victims are neither able to pay for legal representation and are therefore largely unsure of how to proceed for quick resolution of their cases.

In addition, it has to be taken into account the fact that sexual offence cases are often thrown out of court, just on account of technicalities.

A digest on Judicial Attitudes of the Kenyan Bench on Sexual Violence Cases published by COVAW in 2005 detailed the case of *Dzitu vs Republic*²⁴, the appellant was charged with among other things, rape (Section 140 of the Penal Code) with the alternative charge of indecent assault on a female (section 144 (1) of the Penal Code). The second count related to attempted rape (Section 141 of the Penal Code). The Appellant was convicted and sentenced to serve four years plus three strokes of the cane with hard labor but he appealed. One of the grounds on which the court allowed the appeal and acquitted the appellant was that the case was prosecuted by a prosecutor below the rank of acting inspector.

Sometimes judicial attitudes with regard to sexual offence cases have tended to purport exercise of their judicial discretion in a manner that smacks of unreasonableness.

In the case *Matheka vs Republic*²⁵, in which the appellant was convicted of defilement of a girl under the age of fourteen years contrary to section 145 (1) of the Penal Code and was sentenced to 14 years imprisonment plus 8 strokes of the cane, it is said in his judgment of 8th October 2001 that:
“The evidence against the appellant was overwhelming [...]. The conviction was therefore proper and the appeal against conviction is therefore dismissed. On sentence, the appellant was awarded the maximum as provided by law. At this age of AIDS such offenders must adequately be punished. However, taking into account that the appellant is a first offender, the appeal against sentence is allowed”.

²⁴ *Dzitu vs Republic*, High Court at Malindi, Case no 73/02.

²⁵ *Matheka vs Republic*, High Court at Mombasa, Case Number 126/00.

6.3. The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violation when they are forced to return to the place they were violated due to lack of shelters and safe houses. Some victims opt not to report or pursue cases due to this reason.

Shelter provision for protection of victims of violations is still largely unavailable in Kenya and these services are mainly provided by Civil Society Organisations. In Nairobi, only WRAP exists as a shelter for women who have been violated and have got to be removed from their home situations.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases and includes minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation.

7. Recommendations

The NGOs recommend to the State to:

- Adopt a comprehensive legal framework to guarantee non-discrimination against women, firstly by deleting the exception to the principle of non-discrimination introduced in the Constitution itself (Article 82 (4 (b) and (c))), secondly by reforming all discriminatory laws and finally by adopting as soon as possible the Equal Opportunity Bill ready from 2000; make customary law in accordance with the principle of non-discrimination;
- Take all the measures necessary to eliminate violence against women, including by the adoption of a comprehensive legal framework on all forms of gender based violence; measures of prevention of all forms of violence against women must be taken through national plans or agendas on this issue;
- Take all the measures necessary to give an effective access to justice, especially by ensuring a prompt and effective investigation of the allegation, and provide the adequate redress (including health and social assistance) to the women victims of sexual violence in the context of the post-election violence; to that regard, the current legislation must be enhanced to address cases of violence in such situation and provide with the necessary protection and redress to victims; also the emergency plans of action should integrate specific measures related to gender based violence;
- Take all the measures necessary to end with the increase in cases and severity of domestic violence, especially by adopting the Family protection Bill which has been pending since 2002; to that regard, take measures to eliminate forced early marriages that are still widely practiced;
- With regard to sexual violence, address the inadequacy, in term of the needed information and of cost, of the P3 form and ensure training on this form of violence and on the way to

receive such victims; ensure a prompt and effective investigation and a legal and medical assistance;

- Take all the measures to end with the increasing practice of trafficking, both within and outside the borders, especially initiating early warning systems; the trafficking in persons Bill, which has been delayed in being passed, must be adopted as soon as possible in order to deal comprehensively with the issue and include clear dispositions on prevention, prosecution and protection measures;

- Implement effectively the prohibition of female genital mutilations which is still widely practiced in the facts, taking all the measures necessary to eliminate the practice; provide for and apply penalties to state agents who condone or tolerate such practices;

- Implement gender sensitive training in order to avoid situations of revictimization of women victims of violence and eliminate patriarchal visions on the relation between women and men; also, put in place raising awareness campaigns or support them when they are initiated by NGOs;

- With regard to the access to justice of women victim of violence, reinforce and develop the gender desks created in some police stations, especially by training the officers and avoid staff transfers;

- Ensure an effective protection of women victim of violence by creating shelters and safe houses;

PART 2
IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE BY
KENYA IN RESPECT TO CHILDREN

1. Overview and evolution of the child's right to be protected from torture and other cruel, inhuman and degrading treatment and punishment

1.1. Brief history on past and recent incidents of violence against children

During the colonial regime which preceded Kenya's independence in 1963, families were separated due to the fact that many fathers and husbands were placed in detention camps. Some wives and children were assaulted in order to disclose the whereabouts of the males.

Upon independence, the Kenyatta²⁶ regime (1964-1978) took power and this era was characterized by persecution of families of people perceived to be political dissidents. This period also included major child rights violations as the concept of child rights was yet to be fully understood.

From 1965 to 2003 when application of the Constitution was suspended in the North Eastern Frontier, excessive use of force, including torture and ill-treatment by the security forces was systematic. However, no inquests into arbitrary deaths, including those of many children were held.

During the Moi²⁷ era (1978-2002), torture became institutionalized and it was common place for young people, especially boys, to be tortured alongside other family members.

Both the National Rainbow Coalition (NARC)²⁸ and Kibaki²⁹ regimes (from 2002-2003) have witnessed cases of arbitrary arrests which have in some instances also targeted young people. This is especially the case when police have sought to round up members of proscribed sects such as *Mungiki*.

1.2. Widespread forms of violence that currently affect children

The violence experienced by children early in 2008 as a result of the post election incidents epitomizes the very worst that can happen to children. They experienced lack of shelter, clothing, food, access to education and health services. Protection of children in general was lacking. With regard to violence, it is noted that children were victims of widespread gender based violence including defilement, sodomy, forced circumcision and even mutilation of private organs³⁰.

As a consequence of these incidents, for those who ended up in Internally Displaced Persons' (IDP) camps, daily life has been difficult. Girls became easy targets for commercial sex work in order to earn a living or in exchange for food. This put them at risk of contracting HIV/AIDS, sexually transmitted infections and unwanted pregnancy. Both boys and girls were easy prey for child labour while in the camps. Even though many families have since moved out of the camps the situation still remains dire as they lost everything. Assistance from both government and development partners has helped but more is needed.

The main issues of concern with regard to the implementation of the Convention Against Torture to children are the following:

²⁶ First President of the Republic of Kenya.

²⁷ Second President of the Republic of Kenya.

²⁸ Coalition formed by several political parties to during the 2002 general election.

²⁹ Third President of the Republic of Kenya.

³⁰ Report of the Commission of Inquiry into Post Election Violence (CIPEV), October 2008 (Pg 241)

- harmful traditional practices,
- general practice of corporal punishment constituting daily degrading treatment against children,
- sexual violence and exploitation,
- trafficking of children

Any form of torture, cruel or degrading treatment to children results in a serious and long-term psychological consequences for the child's development. This impact includes, among others:

- Trauma: Any form of torture, cruel or degrading treatment to children results in trauma some of which may be life long. For example, it has been observed that street children who are arbitrarily arrested by police are treated in a cruel and degrading manner which permanently dents their physical and psychological development³¹.
- Aggressive Behaviour: In the middle of this year during the second term strikes occurred in various schools around the country and this was attributed to corporal punishment and degrading treatment of students by teachers. This resulted in missed classes and exams as well as damage to school property.
- Psychological and Social Problems: Girls who undergo female genital mutilation and child marriage suffer from physical, psychological and social difficulties. These include trauma and depression, difficulties passing urine, fear of sexual penetration and difficulties giving birth.
- Denial of justice: Victims of violence are reluctant to report the violence and may develop a fear for law enforcement officers especially when the latter are the perpetrators.
- Lack of education: Child marriages result in school drop outs which jeopardize child development and result in lack of appropriate parenting skills.
- Medical and health risks: Child prostitutes and those trafficked for sexual exploitation end up contracting sexually transmitted infections including HIV and AIDS. This results in permanent damage to their health and in certain cases death.
- Children engaged in manual labour develop life threatening health conditions such as stooped backs as well as damage to certain body organs especially where chemicals are inhaled.
- Denial of childhood: The overall effect of torture and ill treatment ultimately denies children the enjoyment of their childhood and the experiences that go hand in hand with it.

The State Party report mentions several instances with regard to information on the implementation of articles 10, 12 and 16 of the CAT. However, NGOs consider this information to limited.

³¹ See Law Society of Kenya (LSK), Nakuru report to IMLU.

2. Legislation and structure of implementation

2.1. Definition of the child

The Children Act³² defines a child as any human being under the age of eighteen years. Specific legal provisions with regard to minimum age are:

- The minimum age of criminal responsibility in Kenya is 8 years. It has not been reviewed despite repeated recommendations by the treaty bodies (CRC in 2001 and 2007 and HRC in 2005);³³
- The minimum age of sexual consent has been raised by the Criminal Law Amendment Act³⁴ to 16 years from the previous 14 years under the Penal Code.³⁵ However, the amendment only applies to girls younger than 16 years -old, therefore offering less protection to girls aged between 16 and 18 and to the boys;
- The minimum age for marriage: section 14 of the Children Act prohibits early marriage of any one under 18 years old. However, the Hindu Marriage and Divorce Act³⁶ allows girls aged between sixteen and eighteen years to get married. Under the various forms of customary law boys and girls under 18 years are allowed to get married.³⁷ NGOs remains extremely concerned that the Children Act, which outlaws early marriage, cannot be consistently applied because of several contradictory statutes that remain in force.
- The Employment Act of 2007 reduced the minimum age for admission into employment to 13 years. Prior to that that was set to 16 years.³⁸

2.2. Domestic legislation with respect to children and protection of their rights

Constitution:

Chapter V of the Kenyan Constitution protects fundamental rights and freedoms of every person in Kenya. In particular, section 74 (1) protects every person from torture and inhuman or degrading punishment or other treatment. Although the provisions do not specifically refer to children, their interpretation includes the protection of all children within Kenyan borders. A Draft Constitution³⁹ had been drafted in collaboration with the “children sector” and submitted to popular approbation in 2005. The draft extensively dealt with the welfare of children providing not only protective, but positive rights as well. However, it was rejected during the referendum. Since then, two other Bills have been drafted to jumpstart the process of constitutional review.⁴⁰

³² Chapter 586 of the Laws of Kenya (Act No. 8 of 2001) ; came into force on March 1, 2002.

³³ Committee on the Rights of the Child, Concluding Observations, Kenya, CRC/C/15/Add160, 7/11/2001, para. 22 and 23 (a) and Committee on Human Rights, Concluding Observations, Kenya, CCPR/CO/83/KEN, 29/04/2005, para. 24.

³⁴ Act No 5 of 2003; came into force on July 25, 2003.

³⁵ Chapter 63 of the Laws of Kenya.

³⁶ Chapter 157 of the Laws of Kenya, section 3 (1), lit. c.

³⁷ The Kenya Law Reform Commission is currently reviewing the various marriage laws.

³⁸ Section 2 of the former Employment Act, Chapter 226, Laws of Kenya.

³⁹ GoK 2005. The Draft Constitution of Kenya, Government Printer, Nairobi.

⁴⁰ The Constitution of Kenya Amendment Bill (2008) and the Constitution of Kenya Review Bill (2008).

Statutes:

- The 2001 Children Act:

The Children Act (No. 8 of 2001)⁴¹ aims at integrating the UN Convention on the Rights of the Child. The enactment of the Children Act was widely seen as a new beginning for the development and effective protection of Kenyan children. The Act establishes statutory structures to facilitate the administration and safeguards of children's rights.

According to most national NGOs, the Children Act has resulted in a great improvement in the promotion and protection of the children's rights. However, there are several gaps which should be addressed by the government to ensure that every child in Kenya enjoys full legal protection of his/her rights. These gaps are related to the legality of corporal punishment, the minimum age for marriage, the age of criminal responsibility to name but a few. In this regard, the Kenya Law Reform Commission (KLRC) whose mandate is to review laws in the country commenced a review of the Children Act in 2006. However, to date the exercise is yet to be completed.

- The Sexual Offences Act:

The Sexual Offences Act⁴² complements the Children Act with regard to the protection of children from various sexual offences. It provides for the prevention and protection of all persons from harmful and unlawful sexual acts. However, section 38 of the Act has been termed retrogressive as it seeks to criminalize making false allegations of a sexual nature. A complainant, including a child, can be penalized if allegations of a sexual offence are disproved later on, for whatever reason. The Act is strengthened by the Reference Manual that expounds the Act as well as setting standards and recommendations on best practices to various key service providers.⁴³ The Manual is a product of joint collaboration between the Office of the Attorney General in particular the Department of Public Prosecutions and an NGO Women in Law and Development in Africa (WILDAF).

Relevant bills under discussion:

It is hoped that once the Domestic Violence (Family Protection) Bill is finally enacted it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

The Anti-Trafficking in Person's Bill which was a culmination of a consultative processes in 2006, protects children from both international and domestic trafficking which processes result in exploitation and violations against children, such as child labour, child prostitution and child sex tourism. The Bill is yet to be published and deliberated by Parliament

⁴¹ Came into force on March 1, 2002. The Children Act codified and replaced three statutes: The Children and Young Persons Act (Cap 141), The Adoption Act (Cap 143), and The Guardianship of Infants Act (Cap 144).

⁴² The Sexual Offences Act came into force on 21 July, 2006.

⁴³ The Reference Manual on the Sexual Offences Act, 2006 for Prosecutors.

2.3. Structures of implementation, organizing and supervising children issues

The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the coordinating and unifying agency for children services in Kenya.⁴⁴ The Act also establishes institutions for the reception and care of children in need of care and protection. It requires local authorities to promote the best interests of children within their respective jurisdictions and prohibits discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, birth, social, political, economic or other status, race, disability, ethnic group, residence or local connection.

The Act also provides remedies for victims and penalties for perpetrators in cases of violation of rights including torture and other forms of violence. The Department of Children Services (DCS) through the Governance, Justice, Law and Order Sector (GJLOS) reform programme promotes the rights of children in conflict with the law in rehabilitation schools and is strengthening law enforcement and rehabilitation programs. A program for diverting children in conflict with the law from the judicial system is now in place. The aim of the Diversion Programme is to provide a practical and child friendly approach to cases involving children and to support efforts aimed at diverting larger numbers of children in conflict with the law away from the formal juvenile justice system and back to their communities and society.⁴⁵

It is acknowledged that the creation in 2008 of a new ministry for children, the Ministry of Gender, Children Affairs and Social Development is meant to further help in coordination of children issues. The position of Secretary, Children Affairs was also created.

2.4. Judicial authorities dealing with children issues

Children Courts are established under the Children Act (section 73). They are special courts that deal with child-related cases. They treat both civil and criminal matters that involve parental responsibility, custody and maintenance, guardianship, protection of children, foster care and child-related criminal matters whether the child is the victim or the offender (with the exception of murder and crimes jointly committed with adults).

Over 100 magistrates have been gazetted to hear children matters all over the country. For the moment, there are only two fully functional Children Courts in Kenya, in Nairobi and in Mombasa,⁴⁶ whereas in other parts of the country, ordinary courts are turned into Children Courts when a case involving a child arises. Children courts face certain challenges especially with regard to huge volumes of work. There is need for additional appointments of gazetted child magistrates. In addition, the Family Division of the High Court and the Kadhi's Courts may seek the views of the child, in the process of reaching a decision involving the child in civil matters such as personal status, marriage, divorce and inheritance. Kadhis Courts have jurisdiction where the parties profess to Islam.⁴⁷

Finally, in customary traditional law, local chiefs and village elders arbitrate complaints within communities. Those who cannot afford to travel to urban centres or to pay a lawyer

⁴⁴ Section 30 Children Act, No. 8 of 2001.

⁴⁵ For further details, see below section 5.4.

⁴⁶ Mombasa Children Court is operational due to efforts of the Kenya Alliance for Advancement of Children (KAACR) which provided funds for the rehabilitation of an old building to be turned into a children court. The court has been operational since 2006.

⁴⁷ *The place of children in Khadhi's Courts*, brochure of Kenya Alliance for Advancement of Children (KAACR), 2005.

may be able to refer to the traditional system. The traditional system may have positive effects for children, in particular when it seeks to avoid the deprivation of liberty and when it tries to find a penalty matching the interest of the child, those of the community and those of the victim.

3. The practice of torture and other cruel, inhuman and degrading treatment or punishment

According to the jurisprudence of the Committee Against Torture, the State Party is not only accountable for acts of torture and ill-treatments perpetrated by its own officials but also bears responsibility when failing “to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors.” (...) In such cases, “its (the State) officials should be considered as authors, complicit or other wise responsible under the Convention for consenting to or acquiescing in such impermissible acts.”⁴⁸

3.1. Excessive use of force by law enforcement officials

Although arbitrary killings of street youth by law enforcement officials are not as common as they were a few years ago, they still take place. This mainly takes place in urban centres. Street children have been shot by police officers in such circumstances on allegations that they were criminals resisting arrest. NGOs are of the view that whether or not street children are engaged in criminal activities, there is no reason for resorting to such methods.

In the case of 4-year-old Ian Macharia Githinji who was walking in the street, he was shot dead from a stray bullet when the police were apparently executing a 19-year old young man whom they seem to have disagreed with. The incident occurred around Bahati Estate of Nairobi. Even though the official statement from the police indicated that the death was accidental and that the police fired the shot in self-defence, eyewitness account indicated that the police shot carelessly into a crowd that was not violent and majority of who were children. The judicial authorities have not done anything to prosecute the policemen who killed Ian.⁴⁹

3.2. Corporal punishment

Corporal punishment at school:

In 2001, the Education Act was amended to outlaw corporal punishment in schools. Nonetheless, the practice remains common in schools and other educational institutions with cases of permanent injury and even death.⁵⁰ In a study that was carried out of the 65 teachers interviewed⁵¹, over 30% use the cane while another 23% resort to manual labour. Only 15% of teachers interviewed use guidance and counselling as an alternative. To most teachers and care givers interviewed, corporal punishment is the “efficient and most appropriate” form of punishment. School corporal punishment in Kenya has a high degree of cultural acceptance and approval⁵². Indeed, corporal punishment by teachers may result in beatings which endanger the physical integrity and health of the pupils. For example, on March 20th 2006, an

⁴⁸ UN Committee Against Torture, General Comment n° 2 on the Implementation of article 2 by States parties (CAT/C/GC/2), § 18.

⁴⁹ High Court, Criminal App. No 631/02

⁵⁰ OMCT’s alternative report to the Human Rights Committee “State violence in Kenya”, February 2005.

⁵¹ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 14.

⁵² An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 15.

irate teacher hit an 8 year old pupil with a bottle, breaking her nose. The pupil was admitted at Nakuru War Memorial Hospital⁵³.

Children lack capacity to seek redress and where redress is sought in a court of law, the culprits are either acquitted or fined minimal amounts as the act is treated as a simple offence. For example, in the case of the defilement of a 17 year old by a headmaster of a public institution on diverse dates between August 2006 and September 2006, the child victim conceived but the headmaster was acquitted (Criminal Case no. 230/07). In another case involving the physical assault of a 6 year old by a headmaster of a public institution in June 2006, the headmaster was acquitted due to lack of sufficient evidence (Criminal Case no. 6581/06 - physical).

The Teachers Service Commission (TSC) is a body corporate set up to employ teachers as well as discipline them⁵⁴. However, teachers accused of meting out corporal punishment hardly get punished. The legislation contributes to this situation: section 127 of the Children Act states that nothing takes away the right of a parent, guardian or custodian of a child to punish a child reasonably. Duty bearers including teachers see this provision as a justification to inflict different forms of corporal punishment.

CASES OF PUPILS' PROTESTS AGAINST CORPORAL PUNISHMENT AT SCHOOL:

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometres protesting the infliction of corporal punishment against seven of the students by the school administration⁵⁵. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in the media. He observed that despite the ban on corporal punishment, it was still being practiced in some schools.

Towards the end of the second term of 2008 many secondary schools in Kenya experienced cases of unrest and many school buildings were set on fire by striking students. In one case a male prefect died when he went to rescue his school mates who were locked up in a dormitory that had been set ablaze. The reasons given by the students ranged from excessive and sometimes degrading punishment to alleged high handedness by the school administration. A number of the students have been arraigned in court and the children sector is concerned that the laid down law and applicable procedure and safeguards applicable to child suspects was not properly followed. These and other issues concerning children and violence have been discussed in various child rights NGOs' meetings this year.⁵⁶

⁵³ An assessment of Corporal Punishment in Schools conducted by Kenya Alliance for Advancement of Children, 2007, pg 6.

⁵⁴ Teachers Service Commission Act, Cap 212 Laws of Kenya.

⁵⁵ East African Standard, 15th November, 2004.

⁵⁶ The NGO CRC Committee also issued a press release on the same during a well attended press conference. The Parliamentary Committee on Education, Research and Technology held meetings with stakeholders including children in most parts of the country in order to get views on how best to address such issues. KAACR was instrumental in organizing some children to present their views to the committee. The committee is yet to issue a report. Parliament was on a two month break and resumed sessions a week ago and hopefully this will be discussed by the whole House. ANPPCAN Kenya has in the past couple of years observed an annual "No Kiboko Day" where children and other stakeholders engage in activities to advocate for non violent ways of addressing discipline. The CRADLE - The Children's Foundation has handled 15 cases on corporal punishment between 2006 and 2008.

Corporal punishment at home:

Corporal punishment still takes place in many homes as various reports show⁵⁷. The Kenyan society strongly believes in corporal punishment as a means of educational discipline. It is often perceived as a corrective measure rather than physical violence or torture. Many parents and guardians, even those who may be aware that it has been banned in schools will still cane their children at home. This is due to poor parenting skills wherein many parents believe that it is the only way to discipline a child; parents who were caned when they were young believe they should do the same to their children.

3.3. Sexual violence and abuse

In September 2008 the Government through the Office of the Attorney General launched a team to work on Regulations under the Sexual Offences Act. It is hoped that this will help streamline the handling and prosecution of cases under the Sexual Offences Act. A Task Force to oversee the operations of the Act has also been set up.⁵⁸

The situation remains that incidents of sexual violence continue to be reported throughout the whole country.⁵⁹ The Nairobi Women's Hospital receives victims ranging in age from months old baby girls to women aged over 80 years old. Of late a number of young boys have also received treatment after being sexually assaulted. According to information from the Naivasha Disadvantaged Support Group (NADISGO)⁶⁰ most affected are children between the ages of 4 and 12 years. They generally fear exposing the culprits after being threatened.

It is important to clarify that any perceived changes or improvements, reduction in number of defilement cases can only be arrived at after thorough scientific findings. The mere enactment of a Sexual Offences Act in itself cannot serve to reduce incidents of sexual violence. Even though more cases of sexual molestation of girls are reported, boys are also increasingly being sexually molested.

There are reported cases of teachers sexually harassing female students. Unfortunately, it is often only when this leads to sexual intercourse and the girls get pregnant that action is taken by parents and guardians. A few teachers have been arraigned in court and others disciplined by the Teachers Service Commission. Sometimes the cases are settled out of court due to ignorance on the part of the parents or when they are coerced to do so under duress from authorities (practice of friendly settlement).

3.4. Sexual exploitation

Government has shown commitment towards addressing the Commercial Sexual Exploitation of Children (CSEC) through adoption of the UNCRC, the African Charter on the Rights and

⁵⁷ "Children's Rights in Kenya", a report by Save the Children, pg. 35.

⁵⁸ The Task Force's was appointed under Gazette Notice No. 2154 of March 23, 2007 membership includes representatives from the Office of the Attorney General, The Judiciary, Law Society of Kenya and Civil Society Organizations.

⁵⁹ For example, on 22nd September 2008, the East African Standard reported at least 4 cases of child sexual abuse. In one of the reported cases a brother defiled his 12 year old sister for months and also had his friends do the same. It was only discovered when she contracted an STI. The case is still pending in court.

A woman burned the private parts of her 12 year old daughter after the daughter said she had been raped. The case is still pending in court.

In 2007 a man is reported to have defiled his retarded step daughter for the whole year but relatives intervened when she developed complications. The mother was aware of the abuse. The case is still pending in court.

In September 2008, a 70 year old man was arraigned in court charged with defiling an 8 year old girl.

⁶⁰ The organization offers free legal and counseling services to victims. This has enabled many to seek help within reasonable time.

Welfare of the Child (ACRWC), and implementation of the World Fit for Children + 5 goals. The Kenyan government has agreed to the Commitment to the Stockholm Declaration and Agenda for Action⁶¹ followed by the 2nd World Conference on CSEC in Yokohama, Japan, 2001. However, Kenya lacks a National Plan of Action on CSEC matters although the country is among the few in Africa that have programmes and activities in the areas of protection, prevention, recovery and re-integration. NGOs have taken a lead role in this. The role of government has not been as much as expected⁶².

UNICEF in consultation with the tourism industry has developed a Code of Conduct to educate hotel workers and their guests on the need to protect children from commercial sexual exploitation. Indications are that this has raised awareness to all the stakeholders in the tourism industry⁶³.

According to a study conducted by Save the Children Alliance⁶⁴ many children in parts of Kenya become victims to commercial sexual exploitation. Sex tourism also promotes child prostitution, exploitation, abduction and trafficking. Research has shown that this is carried out by both locals and foreigners especially at the coast province. An estimated 10,000 to 15,000 girls in Malindi, Mombasa, Kilifi and Diani are involved, with the majority aged between 12 and 13 years⁶⁵.

3.5. Trafficking in children

Child trafficking⁶⁶ for both commercial and sexual exploitation does take place from Kenya to foreign countries. Young girls are especially vulnerable to commercial sexual exploitation and many have been trafficked out of the country on the pretence that their minders would get them jobs, or marry them, only to end up as sex slaves. The practice is rampant at the coastal province due to the tourism industry.

Even though there are reports that the State through various foreign embassies has intervened in such cases most of the efforts to assist such victims have mainly been from organizations such as Solidarity of Women in Distress (SOLWODI) which has offices in Mombasa and Germany. The organization has worked with officials from the Kenyan police and the immigration department to bring the girls back home.

However, these efforts by the State fall short of established standards for child protection of which the State bears a primary duty.

⁶¹ This was adopted during the 1st World Conference on Commercial Sexual Exploitation of Children in Stockholm Sweden, 1996.

⁶² A Situation Analysis of sexual exploitation of children in the Eastern and Southern Africa Region; *The vicious circle of sexual exploitation, HIV/AIDS, vulnerability of children and violations of children's human rights*, ANPPCAN Regional office, 2001.

⁶³ The code of conduct is implemented in collaboration with the Association of Hotel keepers and caterers KAHC, The Kenya Tourism Federation, Mombasa and Coast Tourist Association, the Kenya Tourism Board, The Association of Tour Operators, Hotels which are members and International Tour Operators. KAHC is the Lead partner.

⁶⁴ See "Children's Rights Report" by Save the Children Alliance pg 37.

⁶⁵ The Extent and Effect of Sex Tourism and Sexual Exploitation of Children on the Kenyan Coast; A study conducted by UNICEF and Government of Kenya in 2006.

⁶⁶ For basic information on child trafficking in Kenya, please refer to a recent IOM document: Introduction to Concepts and terminologies on trafficking in Persons, Presentation by Tal Raviv on 13th August 2008, IOM. Information on child trafficking as a cause of further violence against children is also documented in OMCT's alternative report to CAT (41st session) on the economic, social and cultural causes of torture in Kenya.

An Anti -Trafficking in Persons Bill has been drafted through efforts of both government and civil society groups. Several consultations have been held and the Bill has been forwarded to the Attorney General for purposes of publishing. NGOs are concerned over the delay in its enactment as children continue to be trafficked.

4. Definition and criminalisation of torture (articles 1 and 4)

4.1. Absence of definition, criminalisation of torture of children and inappropriate penalties

The Children Act prohibits torture and cruel treatment or punishment (Section 18 (1)) but does not provide any definition of torture when it is perpetrated against a child. Penalties for the commission of such acts are very low compared with what international jurisprudence prescribes (maximum of 12 months imprisonment or a fine of 50'000 Ksh or both).⁶⁷ Section 2 of the Children Act details child abuse as including physical, sexual, psychological and mental injury.

In the State Party Report, the Kenyan Government states that the Kenya Law Reform Commission is addressing the deficiency of definition of torture in the Kenyan Statutes. However, NGOs note that even though the Children Act is currently under review, conspicuously absent is a proposal to define torture. Courts of law have not developed any specific interpretation of torture when the victim is a child.

4.2. Criminalisation of acts not termed as such but that may amount to torture or other cruel, inhuman or degrading treatment

In addition to torture, the Children Act protects children from:

- “physical and psychological abuse, neglect and any form of exploitation including sale, trafficking or abduction by any person” (section 13);
- harmful cultural rites i.e. “female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development” (section 14); and
- “sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials” (section 15).

The same penalties like in the case of torture are applicable when those acts have been perpetrated against a child.

Section 127 of the Children Act also creates an offence of cruelty to and neglect of children by those having parental responsibility, custody, charge or care of any child and provides for a penalty of a fine of up to Ksh. 200,000⁶⁸ or imprisonment for a maximum term of five years or both. In cases of other forms of violence, the perpetrators are pursued under ordinary offences, not specifically targeting children as victims.

Moreover, the Sexual Offences Act⁶⁹ also protects individuals, particularly women and children, from sexual violations. It broadens the range of sexual offences and provides

⁶⁷ Section 20 of the Children Act provides that any person responsible for torture, cruel treatment or punishment is “liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

⁶⁸ Approximately equivalent to 2'665 USD.

⁶⁹ Act n°3 of 2006.

tougher penalties against sexual offences: rape is now punished from a minimum of ten years to a maximum of life imprisonment, and transmission of HIV/AIDS by a prison term of fifteen years minimum. Several offences focus on sexual violence against children such as defilement, promotion of sexual offences with a child, child trafficking, child sex tourism, child prostitution, child pornography, and incest among others.

Corporal punishment:

Corporal punishment is prohibited in schools (Children Act and the review of the Education Act), in the penal system as part of sentencing (section 191 (2) of the Children Act) and as a disciplinary measure in juvenile detention centres (Children Act and former legislation allowing disciplinary corporal punishment no longer applies even though it has not been repealed yet) and in care institutions receiving children (Children Act and repeal of former regulations).

However, despite encouraging legal amendments and recent case-law, there is no explicit legal prohibition of corporal punishment at home by parents. The repealed Children and Young Persons Act that allowed persons having care or control of a child to administer reasonable chastisement (section 23) has been replaced by the Children Act that provides for the protection of children from abuse and neglect (section 13). But a doubt still exists whether or not “reasonable” punishment may be used and about what “reasonable” means. Moreover, a 2004 judgment by the Kenyan High Court might be regarded as a landmark case (*Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004*). The case concerned a man convicted of subjecting his 3-year-old daughter to torture under the Children Act. Although the High Court did not condemn corporal punishment of children in general, it rejected the appellant’s argument that he was a parent disciplining his child as a mitigating factor, affirmed the right of children under the Children Act to be protected from torture and cruel, inhuman and degrading treatment and asserted that a parent’s behaviour under the guise of discipline can constitute such treatment. Until then, ill-treatment was judicially considered a crime that could be committed exclusively by the State and not private individuals. The High Court’s ruling also confirmed the power of the courts to examine the status of corporal punishment in the home.

It is also hoped that once the Domestic Violence (Family Protection) Bill will finally be enacted, it will also help protect children from violence at home. The Bill recognizes the psychological and emotional effects of violence.

Finally, the use of corporal punishment within the employment settings is not regulated and therefore not prohibited.

5. Measures to prevent acts of torture and other cruel, inhuman or degrading treatment against children (article 1, § 2)

5.1. Legislation and its implementation

As far as legislative measures to prevent acts of torture and other ill-treatments are concerned, one may refer to sections 2 and 4 of the present report where information on the legislation protecting children from violence has been provided.

Nevertheless, the current state of the legislation does not fully and adequately protect all children from violence. Several reviews of the legislation should be carried out. For example, there is a need to further define and legislate against all forms of violence, including in the family environment.

In addition, awareness raising and sensitisation of the population or targeted groups should be developed in order to inform and educate people to a free-violence environment. For instance, the government and the civil society organisations have proposed alternatives to corporal punishment such as the sensitisation of parents and children who generally are afraid to complain. NGOs are also engaged in this process and contribute by offering parents and children training and information.

5.2. Administration of juvenile justice as a means to prevent torture and other cruel, inhuman or degrading treatment of children

The juvenile justice system and particularly places and moments where children are deprived of liberty put them at higher risk of being victims of violence. Having a genuine juvenile justice system in compliance with relevant UN standards is clearly a factor that reduces this risk. Staff selection, training and remuneration, monitoring and investigation as well as complaints mechanisms may contribute to this.⁷⁰ In order to further protect children deprived of their liberty from violence, the Independent Expert on Violence Against Children recommended reduction of detention, reform of the law and establishment of child-focused juvenile justice systems.⁷¹

Minimum age for criminal responsibility:

OMCT and the NGOs' coalition are deeply concerned about the legal age for criminal responsibility. Indeed, according to section 14 of the Penal Code, "a person under the age of eight years is not criminally responsible" and from eight years to twelve "is not criminally responsible [...] unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission". Both the Committee on the Rights of the Child in 2001 and 2007 and the Committee on Human Rights in 2005 expressly recommended that the State take legislative measures to increase the legal age of criminal responsibility currently set at 8 years old.

Under the current review of the Children Act there is a proposal to revise the age of criminal responsibility upwards from the current 8 years to 12 years⁷². The justification for this is in

⁷⁰ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5.

⁷¹ Paulo Pinheiro, World Report on Violence Against Children, 2006, chapter 5, p. 218, 219.

⁷² Section 66, Children Law Amendment Bill Section 14 of the Penal Code is amended - in subsection (1) by deleting the word "eight" immediately after the words "under the age" and substituting therefore the word "twelve";

order to, among other things, reduce the number of children facing prosecution and thus being criminalized.

Administration of the juvenile justice system:

Procedure

According to the Fifth Schedule of the Children Act dealing with Child Offender Rules, once a child is arrested on suspicion of having infringed the law, he or she must be brought before the court as soon as possible. The period of custody must not exceed 24 hours without the leave of the court and the child must be informed of the charges as soon as possible. The parents of the child shall also be promptly informed and no police interview will take place in the absence of the child's representative. The schedule also requires children to be held separate from adult offenders. The Courts have the powers to send children to a remand home⁷³ during the period of investigation, but limits the period of stay to six months (in case of an offence punishable by death, in case of any other offence, the maximum time is three months). However, this provision has ever since been declared unconstitutional by the Court of Appeal⁷⁴.

Principles protecting children involved in the juvenile justice system:⁷⁵

- the Court may grant legal representation to an unrepresented child (section 77 (1) of the Children Act);
- legal assistance should be provided by the government if the child is unable to afford a lawyer;
- the child should be promptly and directly informed of the charges against him;
- the child has the right to a resolution of the case without delay;
- the child shall not be compelled to give testimony or confess guilt;
- the child has a right to a free interpreter;
- the child has a right to appeal if found guilty (first to the High Court and then to the Court of Appeal);
- the child's privacy shall be respected;
- children with disabilities have a right to special care and dignified treatment;
- the court is required to act in the best interests of the child and considering their welfare, feelings and needs;
- the child has a right to medical assistance

A child's right to assistance while being arraigned in court and taking plea is not always properly implemented in practice. There are several instances, particularly during the recent school strikes where pupils were arrested and prosecuted and interrogated in the absence of their parents/guardians/representatives.

⁷³ According to Child Offender Rules contained in the Fifth Schedule of the Children Act (point 10 (3)), in case of pre-trial custody, custodial measure should be carried out in a Children's Remand Home, except when the child aged over 15 years old proves to be of unruly or depraved character; if so, s/he could be sent to a borstal institution.

⁷⁴ Criminal Appeal 239 of 2004, Kazungu Kasiwa Mkunzo and Swaleh Kambi Chai vs The Republic where the court stated that a time limit cannot be set for the duration under which the court shall hear a matter and that the requirement is merely that the same is heard and determined within "reasonable time" as provided for under the Constitution of Kenya.

⁷⁵ Concern Children's Courts but also all other Court dealing with a case involving a child. See sections 186 and 187 of the Children Act.

Alternative to the formal criminal justice system: Diversion Programme

As far back as 2000, a review of the Juvenile Justice System in Kenya identified a number of shortcomings, among them the fact that 15% to 20% of children in conflict with the law actually turn out to have committed minor offences. In January 2001 it was agreed that children who have committed minor offences be diverted to other alternatives and a diversion framework was therefore developed⁷⁶. The diversion project is presently being piloted in 14 project areas. These areas are Kilimani, Kamukunji, Buru Buru, Kasarani (Nairobi); Naivasha, Nakuru, Bondeni and Kitale (Rift Valley); Busia and Kakamega (Western); Kisumu, Siaya, Kisii, Gucha (Nyanza). It is important to note that Kenya has eight provinces and only four have had an opportunity to participate in the diversion programme.

The Diversion Project aims to prevent children in conflict with the law from coming into contact with the formal justice system or from receiving custodial sentences to community penalties. Diversion is possible at different levels: at the community level (prevention), the police level (arrest), the court level (sentencing) and the institutional level (rehabilitation). At the police level, pilot child diversion desks have been set up in some police stations.⁷⁷ Proceedings have been set up in order to safeguard children's rights and to avoid abuse as much as possible. Some of the important aspects of diversion include separation from other inmates, police officers specially trained and who do not wear police uniform, and establishment of diversion committee to which civil society representatives take part among others. In order for a case to be considered by the diversion committee, the child has to admit guiltiness for the offence he or she is accused of.

This practice of requiring the admission of guilt prior to case consideration excludes groups of children like street children. Thus street children are unable to benefit from this system of diversion. The notion of 'admitting guilt' prior to case consideration should be treated cautiously so that all children can legitimately benefit from the diversion in full respect of their rights.

The Department of Children Services coordinates all the project activities from the national level through provincial, district and finally community level. The police Child Protection Units are in charge of coordination of all activities with regard to child protection. Various trainings for the stakeholders involved have been carried out.

Through the on-going review of the Children Act it is hoped that diversion will be incorporated in law as opposed to being implied as currently obtains. These efforts are spearheaded by the Children's Legal Action Network (CLAN) under the direction of the National Diversion Core Team.⁷⁸ In addition, CLAN prepared a "Draft Bill on the Diversion Concept" which has been incorporated in the draft Children Law Amendment Bill 2006. It is important that proper institutional frameworks to operationalize the concept and generate criteria for diversion be put in place.

There is a need for a judicial review of the diversionary process as it is practiced in Kenya. In this respect, a clear statutory directive should define the diversion, should clearly set the

⁷⁶ Children's Legal Action Network Concept Paper, *Update workshop for the National Diversion core team on the lobbying process for the enactment of the Children Law Amendment Bill 2006- in particular the concept of diversion* presented on 15th August, 2008 Hotel Intercontinental, Nairobi.

⁷⁷ 14 police diversion desks existed in May 2006 according to NCCS figures.

⁷⁸ CLAN presented a memorandum in this regard to the Kenya Law Reform Commission on 27th April, 2006.

profile of suitable cases and establish the availability of diversion structures at all levels, and most importantly, should establish which children are diverted from and to which structures.

Measures

The more respectful, educating and reinserting and the less isolating and confining the measures are, the more positive the impact will be on the successful reinsertion of the child offender.

Different measures are provided for as penalties towards a child offender.⁷⁹ Some are custodial measures like placing children in conflict with the law in a charitable children's institution, in a rehabilitation school (if the offender is above 10 years and under 15 years of age), in a borstal institution (in the case of boys who have attained the age of 16 years), in an educational institution or in a probation hostel. Non-custodial measures also exist: committing the child to the care of a fit person, whether a relative or not, ordering the child (in reality the parents/guardians) to pay a fine, compensation or costs, or any or all of them, placing the offender under the care of a qualified counsellor, following a vocational training programme or performing work under the community service orders.

The Children Act sets up some limits to the punishment of child offenders. Section 190 of the Children Act outlaws the imprisonment and the placement in a detention camp. It also states that a child shall not be sentenced to death and only children from 10 years old can be sent to a rehabilitation school. However, it is of concern that children can still get life sentences in cases of murder for example. Section 191 (2) of the Children Act additionally prohibits corporal punishment as a method of dealing with child offenders.

Alternative measures to detention

Alternatives to custodial sentences are possible upon the recommendation of a probation officer or children's officer. These require the child to be under close supervision or placement with a counsellor or a fit person determined by the court⁸⁰ and performing community services too.

There is need for the government of Kenya to: a) define alternative sanctions taking into account the special needs of children that are convicted under the criminal law according to the age, sex, offence and particular social background of each child offender and b) promote their use amongst the judiciary as an alternative to deprivation of liberty.

6. Education and information on child rights' safeguards (article 10)

In general, various sectors in the country have been trained on issues covering human rights. These educational and training activities have been carried out by both government and NGOs.⁸¹ They are aimed at raising awareness on human including child rights protection issues as well as how to address violations. Torture or CIDTP as a topic is thus addressed within this wider ambit. It is important to note that no training specifically based on the UN CAT has been provided. Officials from the police, judiciary, health sector, social work,

⁷⁹ See section 191 of the Children Act.

⁸⁰ Section 10 (6) of the Child Offender Rules in the Fifth Schedule of the Children Act.

⁸¹ Organizations involved in trainings are ANPPCAN RO, ANPPCAN K, CLAN, The CRADLE, IMLU and KAACR.

teaching as well as personnel in institutions, services and facilities working with and for children have benefited from training.

In addition, together with national and international development partners it has initiated reforms in the training curricula for law enforcement and public officials. The emphasis, as stated in the report, has been on human rights and prohibition of torture.⁸²

It is important, however, to ensure that these efforts are streamlined to ensure that all officers are reached, that appropriate methods are used for the various target groups, that the training curricula used is developed with the input of as many people as possible and also that evaluation of the training programmes is carried out regularly to ensure that the desired results are achieved. Evaluation of the trainings is important in order to gauge the effectiveness of the same as well as any necessary changes that may need to be carried out.

7. Treatment of children arrested and deprived of their liberty (article 11)

There is a variety of settings where children can be kept in Kenya. Children sent to places where they cannot leave at will fall under two categories: those in need of care and protection⁸³ and those in conflict with the law. Children in need of protection include orphans, abandoned children, street children and victims of abuse amongst others. Those in conflict with the law include juvenile offenders and those on remand awaiting trial.

⁸² Ibid paragraph 30.

⁸³ Section 119 (1) of Children Act defines and gives examples of what is a child in need of care and protection:

“(1) For the purposes of this Act, a child is in need of care and protection—

(a) who has no parent or guardian, or has been abandoned by his parent or guardian, or is destitute; or

(b) who is found begging or receiving alms; or

(c) who has no parent or the parent has been imprisoned; or

(d) whose parents or guardian find difficulty in parenting; or

(e) whose parent or guardian does not, or is unable or unfit to exercise proper care and guardianship; or

(f) who is truant or is falling into bad associations; or

(g) who is prevented from receiving education; or

(h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or

(i) who is being kept in any premises which, in the opinion of a medical officer, are overcrowded, unsanitary or dangerous; or

(j) who is exposed to domestic violence; or

(k) who is pregnant; or

(l) who is terminally ill, or whose parent is terminally ill; or

(m) who is disabled and is being unlawfully confined or ill treated; or

(n) who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; or

(o) who is engaged in any work likely to harm his health, education, mental or moral development; or

(p) who is displaced as a consequence of war, civil disturbances or natural disasters; or

(q) who is exposed to any circumstances likely to interfere with his physical, mental and social development; or

(r) if any of the offences mentioned in the Third Schedule to this Act has been committed against him or if he is a member of the same household as a child against whom any such offence has been committed, or is a member of the same household as a person who has been convicted of such an offence against a child; or

(s) who is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.”

7.1. Separation in detention according to the age, the sex and the legal grounds of detention

In Kenya, many children are considered and treated as child offenders because they come from deprived socio-economic backgrounds. Thus, many of them (including street children) are committed to the same settings as children in conflict with the law. Although, section 119 (2) of the Children Act states that children in need of care and protection should “be placed in separate facilities from a child offenders’ facility”, children are mixed sometimes. In this regard, there is an urgent need to separate the social welfare and criminal justice systems. Following the example of institutions receiving children, most police stations do not separate children in conflict with the law from those in need of care and protection. This increases the stigmatisation of children in need, who are treated as suspects by the police after arrest. For example, many street children are often beaten by police officers during the arrest and while in police custody.

On some occasions children have been held in custody with adults, constituting a violation of children rights. Per statistics from the Department of Prisons, in 2007 there were a total of 6681 children in custody.⁸⁴ Even though the current situation regarding the separation between adults and children is much better, there are situations where this still takes place. Indeed, some efforts have been made to separate children from adults in police stations, through diversion desks/programmes notably. However, there are cases where children who are temporarily held in custody have reported being subjected to violence from adult inmates in mixed populations. It would appear the wardens and police officers are generally aware of these violations but do little to prevent abuse of children by adult inmates. This problem is exacerbated by the fact that often due to lack of vehicles to transport children to court for trial, many end up staying longer thereby increasing their likelihood of being abused and ill-treated.

7.2. Arrest and excessive use of force

While making an arrest⁸⁵, police officers are not allowed to use excessive force. Nevertheless, both the Criminal Procedure Code and the Penal Code⁸⁶ have an exception: it is possible use force when carrying out an arrest on condition that it is reasonable and necessary regarding the particular circumstances. The respect of human rights, including child rights, and the legality of the arrest depends on its interpretation by the Kenyan Courts.⁸⁷ NGOs urge that the interpretation of the words ‘necessary’ and ‘reasonable’ should be limited to restricted cases and should be implemented in compliance with international human rights’ law, particularly the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁸⁴ “The Need for Diversion – The Prison’s Department Perspective”, a paper presented by Josphat Ituka, Assistant Commissioner, Prisons Department, on September 24, 2008 at a Multi Sectoral Forum on Diversion in Nairobi, Kenya

⁸⁵ According to the Children Act, children are not arrested but are apprehended.

⁸⁶ Section 21 of the Criminal Procedure Code, Chapter 75 of the Law of Kenya, and section 18 of the Penal Code.

⁸⁷ In a recent case, Antony Njue Njeru v Republic [2006] eKLR, July 14, 2006, the Court of Appeal of Nairobi decided that a “A police officer may use arms against any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person provided that arms shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise effect the arrest”.

CASE STUDIES:

In 2004, Kamau, a 17 year-old street boy was shot and wounded by police officers after he was accused of stealing a cellular phone. As a result of police brutality, he lost sight in both eyes after the attack. However, instead of arresting those responsible for such act and charging them with this crime, the boy was arrested on trumped up allegations and charged with robbery with violence (a non-bailable capital offence under the Constitution of Kenya). The CRADLE offered him legal representation and he was eventually acquitted, but only after under going a full trial. What remains disturbing in this case, is that the policemen who shot and wounded Kamau, have not been charged and the authorities have failed to offer compensation to Kamau for the loss of his eyesight.⁸⁸

In another incident reported by The CRADLE, a 7 year old boy was accused of having raped a 9 year old girl. He was locked up at Riruta Satellite Police Station together with hardened criminals who harassed him. Whilst at the police station he complained of feeling ill, but did not receive medical attention. He was then taken to court on the 5th of January 2004 but could not be charged with the offence of rape due to his low age (under the legal minimum age of criminal responsibility). However, he was remanded at Kabete Remand Home (in Nairobi) because his parents could not afford to pay the bond of Ksh. 20,000.00. This was a clear violation of section 14 of the Penal Code that establishes 8 as the minimum age of criminal responsibility and even 12 with respect to boys committing “carnal” offences.

7.3. Places where children are deprived of liberty in Kenya

Rehabilitation schools:

According to the Children Act, children above the age of ten can be sent to a rehabilitation school following a care order issued by a Children’s Court. Rehabilitation schools are institutions where children can stay, be taken care of and get rehabilitated⁸⁹ and have been established “to provide accommodation and facilities for the care and protection of children” (section 47 (1)). Rehabilitation schools receive children in conflict with the law aged between 10 and 15 years and who have already been convicted⁹⁰.

In rehabilitation schools, children are cared for, receive training and can follow an apprenticeship course to learn a vocation such as tailoring or masonry. The maximum time that a child can spend at a rehabilitation school is three years, and they cannot stay beyond the age of eighteen, except by order of the Children’s Court.⁹¹ Upon release from the rehabilitation school, the child remains under the supervision of a person appointed by the Director of the Children’s Services for a period of two years.⁹² A child can also be provided with medical treatment or professional counselling if the child is a drug addict or he or she is suffering from a mental illness. Despite the potential these institutions have, the teachers report that their work is often limited by lack of equipment.

According to section 55 (1) of the Children Act, children who abscond, or have difficult behaviour or exercise inappropriate influence can have their sentences increased. Indeed,

⁸⁸ Case Trends Monitor, The CRADLE, The Children Foundation, 2004.

⁸⁹ Definition found in *The Children Act Cap 586, Laws of Kenya*, an executive summary of the Children Act in English and Swahili, published by the Ministry of Home Affairs Children’s Department, German Technical Cooperation and Save the Children – Canada.

⁹⁰ Section 191 (e) of the Children Act.

⁹¹ Section 53 (3) of the Children Act.

⁹² Section 54 (2) of the Children Act.

those children under-16 risk seeing the period of committal increased (6 months maximum), whereas those over-16 can be sent to a borstal institution.

Children's Remand Homes:

Section 50 of the Children Act, establishes remand homes where children can be sent on the basis of a court order for a temporary period. Currently Kenya has 10 Remand Homes for children. The grounds on which a child is sent to these institutions have not been clearly set up. However, the practice shows that remand homes receive both children in need of care and protection and children in conflict with the law. Children in conflict with the law can be sent to remand homes whilst their cases are being investigated by the police. The period of remand varies from three months for petty crimes to six months for more serious offences.

*Case study: OMCT visit to the Nairobi's Remand Home*⁹³

Nairobi Children's Remand Home has a capacity of eighty children. The age of children is between 8 and 17 years old. It has a mixed population of children in need of care and protection and those in conflict with the law. The administration argued that it was necessary to maintain a mixed population in order to maintain confidentiality of cases. According to the administration children are separated at night according to gender and age group. In May 2006, there were 41 children in need of care and protection and 24 who were in conflict with the law.⁹⁴

The process of receiving children into the remand home requires the administrators to register the children upon their arrival, but it was not clear from OMCT's visit how this is systematically done. The time period spent in the home varies according to the nature of the offence. For a capital offence, it could be two or three years waiting for the end of investigation and trial. Officers working in the home try to promptly settle and investigate the cases involving children in need of care⁹⁵ so that they spend less time in the home.

Basic education and medical care are provided in the remand home by external and volunteer partners. According to the manager, children living in Nairobi's remand home do not undergo corporal punishment. However, some acts of violence exist, particularly sexual violence by teenage boys on other children. Indeed, girls and boys are mixed during the day and this situation leads to a situation where inappropriate contact between boys and girls has taken place, with some girls getting pregnant. When such acts happen, the rule is that the staff talks to the perpetrator and then informs the relevant authorities (this could include a magistrate) who decide on the best course of action. What happens in these scenarios after the magistrate is informed remains unclear. Obviously there is a need to examine the complaints mechanisms in remand homes, and other institutions, and take into account the victims' views apart from the fact that at the time when the alleged act was committed both children (the victim and the perpetrator) were in the home as defendants.

Children's Homes:

Children's Homes provide protection and care to young children. Children in need of special protection, for example, children who are abused, abandoned, victims of trafficking, sexually abused girls, children forced into domestic servitude or HIV/AIDS orphans amongst others, are sent to those institutions.

⁹³ Visited during OMCT's mission in Kenya in May 2006.

⁹⁴ Those figures will be up-dated during the session.

⁹⁵ Nairobi's remand home's officers are not competent to investigate cases of children accused of having infringed the law.

Children with HIV-AIDS may also access medical care but during OMCT's visit of the Nairobi Children's Home in May 2006, staff reported that there was a shortage of skilled staff to address and support their specific needs. There was also some concern expressed during the visit that staff working with children had not been provided with training on children's issues and remuneration was inadequate. Naturally, these factors impacted upon how the children were treated in the home.

Children are sent to the home only upon recommendation or request from authorized officers such as policemen, magistrates, staff from a public or a private hospital, and children's officers. The children's home represents a temporary place of safety, and after child's arrival, alternative placements are sought either with relatives or other guardians, in charitable institutions or through adoption.

The Nairobi Children's Home has a capacity for 50 children but in May 2006, it housed 112 children, which is clear overcrowding. The manager of the Nairobi home explained to OMCT's representative the challenges (i.e. discriminatory behaviours) that she faced in placing children in academic institutions: often neighbouring schools refused to accept children from the home and attempts to find external teachers to provide in-house education to children had been fruitless, which is a breach in the implementation of children's right to education and leaves a gap in terms of what the staff can do to constructively engage children during the period that they are in the home.

Charitable Children's Institutions:

The Children Act also provides for private institutions that give secure accommodation and care to children in need. Children in need of care can be sent to a charitable children's institution in an emergency situation or by way of a care order.

Borstal institutions:

The Borstal Institutions Act⁹⁶ provides for borstal institutions receiving youth offenders from 15 to 18 years old (boys exclusively). Borstal institutions are corrective and reinsertion centres. Section 6 of the Borstal Institutions Act states the legal grounds for sending a juvenile in such centres: judges/magistrates can send a juvenile to a borstal institution when "it is expedient for his/her reformation that a youthful offender should undergo training in a borstal institution [...] instead of dealing with the offender in any other way [...] for a period of three years." Juveniles serving custodial sentences can also be sent to a Borstal institution instead of a prison.

There are currently three borstal institutions in Kenya:

- Kamiti Youth Corrective Training Centre (Kiambu District, Central Province),
- Shikutsa Borstal Institution (Kakamega District, Western Province),
- Shimo-la-Tewa Borstal Institution (Mombasa District, Coast Province).

It is disconcerting that there are currently no borstal institutions for girls in Kenya.⁹⁷ In many instances they are mixed with boys in other institutions or detained in prison with adult women.

Youth offenders sent to borstal institutions are in detention and subjected to the borstal institutions discipline which includes restricted diet and even corporal punishment as a

⁹⁶ Chapter 92 of the Laws of Kenya.

⁹⁷ Kirigiti Girls Rehabilitation School is the only girls rehabilitation school in the country.

disciplinary measure. Indeed, the Prisons Act and the Borstal Institutions Act authorise the use of corporal punishment on boys⁹⁸: up to 10 strokes to children aged 15 and 16 and up to 18 strokes to children aged 17 and 18 years old.

In practice, corporal punishment is still extensively practiced.

7.4. Monitoring and supervision of institutions receiving children

One of the missions of the Kenya National Commission on Human Rights (KNCHR) is to monitor places of detention. However, on several occasions Commissioners have been denied access to visit certain places such as prisons and police cells. This is of concern especially because it is important to establish whether or not a particular prison or police cells have any children in their custody, and if they do, what the condition of these children are⁹⁹.

Section 68 of the Children Act creates Inspection Committees that are appointed by the Minister to inspect rehabilitation schools, children's remand home and charitable children's institutions. Following an inspection, the Committee makes recommendations which it presents to the Minister to be implemented by the Director of the Children's Services. According to section 24 of the Borstal Institutions Act, the Minister, a judge or a magistrate may visit any borstal institution for inspection.

Local Monitoring Committees have been created at the level of Area Advisory Councils. They are registered at the Ministry of Home Affairs and are composed of representatives from NGOs, public officials dealing with children, faith based organisations and the police, among others. The Local Monitoring Committees are able to receive and lodge complaints on a variety of issues (including child abuse) that occur in an institution. However, this monitoring system has not been operationalised yet.

In the past, there have been cases of abuse in child institutions, particularly sexual abuse.¹⁰⁰ Those cases highlight the urgent need to regularise charitable homes, vet the owners prior to establishment, monitor their running, subject them to random inspections, ensuring that they have adequate complaints and request mechanisms in order to protect vulnerable children from sex abusers who exploit the gaps in law by preying on vulnerable children.

8. Investigation of cases where the victim is a child and child remedy (articles 12 and 13)

In a few incidents where the perpetrators have been denounced, they can be arrested, charged and prosecuted except if there is an agreement by the victim, the family and the authors of the act. It is important to note that this kind of an arrangement is usually not in the best interests of the child and is not to be encouraged for that reason. Ultimately, penalties such as bonds, fail to act as a deterrent, for many perpetrators can easily afford the bonds.

The Department of Children Services receives complaints about child victims of abuse and neglect on a daily basis. In order to respond to the problem, the government has set up a crisis/help desk in police stations and a free phone number to report cases of child abuse.

⁹⁸ Article 55 of the Prisons Act and article 36 of the Borstal Institutions Act. Section 36 (3) of the Borstal Institutions Act prohibits corporal punishment towards girls.

⁹⁹ Legal Resources Foundation.

¹⁰⁰ For example, sexual abuse of children in a privately run institution "Spring Chicken" in 2002.

However, it could be argued that setting up a free phone number still fails to capture all those children who are victims of abuse, who live in rural areas where even basic telephony services are lacking.¹⁰¹

In addition many children fear to report abuse by caregivers and adults because in many ethnic groups in Kenya the child is not viewed as having equal rights to adults. Many acts of torture and other ill-treatments are committed against children by private persons whether they are relatives or not. Denunciations remain rare when the author is a relative of the child victim because of financial and emotional dependency of the victim with the author and due to possible pressure among family and community members.

There is lack of proper channels of reporting rape and sexual abuse. For example, victims can only be examined by one government doctor. This process does not take into account the delicate nature of sexual abuse. Moreover, the police agents receiving victims of sexual violence are often insensitive to such abuses.

Therefore, the government needs to go further than setting up help desks and lines and carry out proactive and direct awareness raising campaigns, which actively engage civil society and challenge perceptions of African childhood.

9. Child's right to redress (article 14)

In responding to the problem of violence against children, victims can be sent to Rehabilitation Schools, Charitable Children's Institutions or Remand Homes, where they receive assistance and protection. However, despite the provisions of the Children Act which provide that child offenders and children in need of care and protection should be kept separately, they are often mixed in these institutions.

Regarding victims of sexual violence, there is a clear need for additional adequate mechanisms to truly implement the Sexual Offence Act, particularly to end impunity and provide the child victims with effective recovery and remedies.

¹⁰¹ Child Line Kenya which operates the 116 free telephone service for children hopes to reach out to all children in the republic as they acknowledge that a large population is left out.

10. Recommendations

General implementation of the Convention towards children:

Capacity building

- Building the capacity of children, care givers, law enforcement agencies, teachers and health workers amongst others to understand the rights of the child against torture and help prevent the same.
- Training and capacity building for police officers who handle cases of gender violence especially cases of sexual assault
- With regard to corporal punishment, there is need to build capacity of the various stakeholders with regard to attitude change and alternative forms of discipline.

Policy and legislation

- To have a specific law in Kenya that addresses torture, and other cruel, inhuman or degrading treatment or punishment which also stipulates stiff penalties for those who torture children.
- Health workers and other service providers should be mandated to report cases of child maltreatment. This shall help curb the vice and assist the Government in documenting the progress on the fight against torture.

Torture or other cruel, inhuman or degrading treatment or punishment (including corporal punishment)

- Investigate and prosecute all cases of torture and ill-treatment of children;
- Ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard;
- Strengthen efforts to train professionals working with and for children;
- Explicitly prohibit corporal punishment in the home and in all public and private alternative care and employment settings;
- Conduct awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative non-violent forms of discipline;
- Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions;

Harmful traditional practices

- Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- Conduct awareness-raising campaigns sensitization programmes to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; as well as ;

Economic exploitation

- Develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;
- Strengthen the capacity of the institutions responsible for the control and protection of child labour;

Sexual exploitation and trafficking

- Strengthen legislative measures and develop a policy that addresses the sexual exploitation of children;
- Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims;
- Ensure enforcement of the law to avoid impunity;

Administration of juvenile justice

- Raise the age of criminal responsibility;
- Ensure that all minors, including those who have committed serious offences, are treated under the rules of juvenile justice and not in adult criminal courts;
- Establish children's courts in different places throughout the country;
- Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults unless it is in their best interest not to do so;
- Ensure that children in need of care are separated from children in conflict with the law;
- Implement and develop alternative measures to deprivation of liberty, such as diversion, probation, counselling and community services;
- Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- Make sure that street children are not systematically treated as children in conflict with the law;