



World Organisation Against Torture  
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# State Violence in Kenya

AN ALTERNATIVE REPORT  
TO THE HUMAN RIGHTS COMMITTEE

INCLUDING THE COMMITTEE'S LIST OF ISSUES AND  
CONCLUDING OBSERVATIONS

A project presented by

**COVAW**

Coalition on Violence  
Against Women



THE KENYAN  
SECTION OF THE  
INTERNATIONAL  
COMMISSION OF  
JURISTS



Child Rights Advisory and  
Advancement of Children  
Documentation Legal Centre



Kenya Alliance for Child Rights  
Advisory and Advancement  
of Children

and coordinated by



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## STATE VIOLENCE IN KENYA

### Foreword

Writing alternative reports is one of the primary activities of the World Organisation Against Torture (OMCT) and a vital source of information for the United Nations Treaty Bodies including the Human Rights Committee (HRC). This activity is complementary to giving direct assistance to the victims.

These alternative reports are a valuable source for Independent Experts who analyse the implementation of the United Nations Human Rights Instruments. With these reports, it is possible to see the situation as objectively as possible and take a critical look at government action to eradicate torture and other cruel, inhuman or degrading treatment or punishment.

Under the aegis of the European Union and the Swiss Confederation, the “State Compliance” programme presented this report on State violence and torture in Kenya at the 83rd session (14 March – 1 April 2005) of the Human Rights Committee, during which the official Kenyan State Report was reviewed.

This report was jointly prepared by three national human rights nongovernmental organisations (NGOs) in collaboration with OMCT:

- COVAW – The Coalition on Violence Against Women
- CRADLE – Child Rights Advisory and Advancement of Children Documentation Legal Centre
- ICJ – Kenya – Kenyan Section of the International Commission of Jurists
- KAACR – Kenya Alliance for Child Rights Advisory and Advancement of Children

Representatives from these NGOs attended the session, briefed the members of the Committee on the Human Rights situation in Kenya, and presented the alternative reports and highlighted their main concerns,

This analysis is divided in three parts (i) a general overview on the state violence in Kenya; (ii) state violence against women and (iii) state violence against children. The list of issues used for the dialogue between the official delegation and the Committee, and the concluding observations of the Human Rights Committee are also included in the document.

### Presentation of the coalition

- **THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA)** is a member-based, non-governmental, not-for-profit organization that has the tripartite role of promoting, enforcing and protecting human rights, democracy and the rule of law. ICJ is a member of the SOS Torture Network.

ICJ Kenya’s mission of promoting the adoption of systems that foster democratic governance, the rule of law and respect for all human rights is achieved through the organization of four programmes carried out by the secretariat under the guidance of the Council, which is elected by the members.

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These programmes are:

### 1. Policy Research and Advocacy Programme

The Policy Research and Advocacy Programme targets development, interpretation and implementation of official policy. Research studies and findings enable ICJ-K to carry out informed advocacy on matters pertaining to human rights, democracy and the rule of law.

### 2. Human Rights Education Programme

The Human Rights Education Programme has the objective of imparting legal and human rights awareness to the Kenyan citizenry. This is currently done through paralegal extension projects based in rural areas in 6 districts. The programme enhances access to paralegal and legal services for both legal empowerment of rural communities as well as access to justice goals.

### 3. Judiciary Programme

The overall objective of this programme is to work towards ensuring that the Judiciary is not only independent but is effective and accessible as the cornerstone institution for safeguarding the rule of law and protection of human rights. It has the following projects: Public Perceptions Index and Links for Action Project, Judicial Reform project, the Judicial Training Project and the Women's Property and Inheritance Rights Project.

### 4. International Co-operation Programme

The African Human Rights and Access to Justice Program: the primary objectives of this programme are to support, preserve and strengthen the legal protection and enforcement of human rights in sub-Saharan Africa under the rule of law; and to focus on strengthening legal institutions and structures that will guarantee impartial and effective protection and enforcement of human rights in the long term. This is a joint program of ICJ Kenya and ICJ Sweden, which will be supporting national human rights litigation and equal justice projects in 16 African countries in eastern, western and southern Africa.

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- THE COALITION ON VIOLENCE AGAINST WOMEN – KENYA (COVAW-K) is a women's human rights organization that is committed to the eradication of all forms of violence against women in Kenya.

Since its inception, COVAW-K has worked to create a conducive atmosphere for women to enjoy their rights in the private and public spheres through community mobilization and sensitisation so that communities can appropriately respond to violence against women and children in their midst. However, COVAW-K recognizes

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that it is impossible for communities to effectively prevent and respond to violence against women without appropriate legal and policy backing that can see perpetrators of violence effectively dealt with by the law, and discrimination against women eradicated so that women can enjoy the provision of security that can protect them in their vulnerabilities.

COVAW-K therefore advocates for the government's commitment to providing security for women and protection of their human rights through the domestic law and international law. Through its advocacy programme, COVAW-K constantly engages the government and other machinery to lobby for policy and legislative change and also for the government to commit itself to implementing provisions stipulated in different human rights instruments by ensuring that the government signs, ratifies and domesticates these instruments.

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- **KENYA ALLIANCE FOR ADVANCEMENT OF CHILDREN (KAACR)** was started in 1988, as a National NGO Liaison Committee on the rights of the child. The goal of the committee was to popularize the draft United Nations Convention on the Rights of the Child (UNCRC) and to lobby the Government to adopt and ratify the UNCRC after it came into force. KAACR, which is a national umbrella body, was registered under the NGO Coordination Act as an NGO in 1995. KAACR has membership of 180 NGO's and CBO's working with children.

KAACR's mission is to promote the realization of children's rights, both girls and boys in Kenya. Its vision is that girls and boys shall live in a society, which provides them with the right to survive, develop and participate in decision-making and enjoy special protection against all forms of discrimination, neglect, cruelty and exploitation.

KAACR believes that:

- Children are equal partners in all actions concerning their well-being and development;
- Children should grow in an environment that guarantees them full rights to survival, development and participation;
- Families are the basic unit of care and nurturing for a child but NGOs, civil society and government must support them in this task;
- Every child is entitled to equity and justice, irrespective of sex, age, colour, creed, religion, ability or disability; and
- It is the duty of the government to provide an enabling environment and an institutional framework for the full realization of children's rights in Kenya.

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- **THE CHILD RIGHTS ADVISORY DOCUMENTATION AND LEGAL CENTRE** (otherwise known as **THE CRADLE**) is a non-governmental, non-partisan and non-profit making organization committed to the promotion and protection of the rights of the child, with a focus on the girl-child. The CRADLE was founded in 1997 to respond to the need of providing legal aid to children in conflict with the law and those in need of care and protection of the law. It was thereafter officially launched in 1998 on the eve of the celebrations of the 50th anniversary of the Universal Declaration of Human Rights to symbolically mark the choice of a human rights approach to cases of child abuse. The CRADLE was institutionalized in 1999 by setting up a pilot legal clinic. The CRADLE has since continued offering legal services to children.

The CRADLE is an organization that is committed to the promotion, protection and enhancement of the rights of the child through legal aid, advocacy, law reform, rights monitoring and documentation. The CRADLE runs five programs in furtherance of its objectives namely:

- (a) The Legal Aid Program.
- (b) The Law Reform and Impact Litigation.
- (c) Legal Awareness/Education.
- (d) Human Rights Research, Monitoring and Documentation.
- (e) Advocacy, lobbying and networking.

The vision of the CRADLE is a just society that provides a protective and nurturing environment to the child. Its mission is to promote, protect and enhance the rights of the child and to contribute towards the promotion and enhancement of the status of women by improving the status of the girl-child.

The CRADLE objectives are the following:

- To promote, protect and enhance the legal status and human rights of the child, with a special emphasis on the girl-child.
- To influence policy, law reform and change in practices and traditions that are harmful to the child and discriminative of the girl-child.
- To lobby for a child-friendly justice system.
- To contribute to the general development of human rights in the country with a focus on improving the legal, economic, political and social status of women by improving the status of the girl-child.
- To work towards the eradication of violence against children.

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**STATE VIOLENCE IN KENYA**

**PART I**

**STATE VIOLENCE IN KENYA**



## 1. General background

### Mzee Jomo Kenyatta's tenure (1964-1978)

Kenya gained its Independence in 1963 and became a republic in 1964. Mzee Jomo Kenyatta was the first president of the Republic of Kenya. In his tenure, several political leaders were assassinated, these include, Pio Gama Pinto, Tom Mboya and Josiah Mwangi Kariuki. The government promised to investigate those deaths. In the case of Pio Gama Pinto, Mr. Kisilu was charged, convicted and sentenced with his murder while in the case of Mr. Mboya, Mr. Nahashon Njenga was identified as the one who pulled the trigger. The case of Mr. J M Mwangi remains unresolved to date and his killers have never been brought to justice.

President Kenyatta's regime did not tolerate dissent. It is reported that politician Martin Shikuku was sent to prison for proclaiming Kenya African National Union (KANU), the only political party then, dead in 1975. He was in prison at the same time with literary scholar Ngugi wa Thiong'o. Ngugi in his memoirs recounts that prison authorities used illness as a tool of oppression. Martin Shikuku was many times left for the dead, his condition worsening by the day. A few times Shikuku went on hunger strike to protest his ill-treatment.

### Hon Daniel Arap Moi's tenure (1978-2002)

For some long period of time Kenya was a *de facto* one party State but the Constitution was amended in 1982 to make it a *de jure* one party State till 1991 when Section 2A was repealed<sup>1</sup>.

During the one party KANU repressive regime in Kenya, those who were deemed to be a threat to the government of the day were held for many days incommunicado. This was operationalized by the now repealed Preservation of Public Security Act<sup>2</sup>, which even gave the president, and the minister of internal security the power to authorize the arrest and detention of an individual without trial. It was pursuant to this provision of the law that Raila

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1 Section 2A was repealed by Act 12 of 1991, s.2. Section 2A proclaimed Kenya a one-party State.

2 Cap 57 of the Laws of Kenya.

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Odinga, George Anyona, Kenneth Matiba and Charles Rubia were among others arrested and detained without trial during the clamor for multiparty democracy. Freedom of expression was not upheld; instead it was criminalized by sedition, incitement to violence and treason laws. Scores of Kenyan politicians and journalists deemed political opponents have been arraigned in courts for trials in relation to various charges.<sup>3</sup> Detention without trial and torture happened in what were known as *Nyayo House Torture Chambers*. State agents particularly the former Directorate of Security Intelligence otherwise known as Special Branch were accused of serious cases of torture in the chambers. In 1982 there was an unsuccessful *coup d'état* attempt against President Moi's government led by the Air force. The mutineers were tortured and the ringleader Hezekiah Ochuka and a few others were convicted of treason and sentenced to death. Indeed these are the last persons to have been executed before the moratorium.

In the early 1990's the clamor for multiparty democracy intensified in the country. Around the clamor there was a lot of torture by the police. Many opposition politicians were held and harassed by the police with a few opting to go into exile.<sup>4</sup> This torture and harassment extended to university students and their lecturers. Students thought to be anti-government were expelled from the university. When the NARC government came into power it dealt with this issue in a favorable way by allowing the persons affected by the expulsions a chance to go back to the university and complete their studies. Everybody including the civil societies and the media took up the clamor for multi-partysm. However, demonstrations and political rallies held around this issue were brutally dispersed by the police and scores of people are reported to have been shot dead after a rally held in Nairobi on July Seventh (*Saba saba*), a date still commemorated by human rights groups in Kenya to signify the struggle. The government bowed to the pressure and Section 2A of the Constitution was amended to allow for Multi-Partysm in Kenya.

In 1990, Hon. Dr. John Ouko a cabinet minister was found murdered. President Moi established a judicial commission of inquiry headed by Justice Gicheru to investigate the death but he disbanded the same before it had completed the inquiry. A Parliamentary Inquiry is still investigating the case.

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3 Mirugi Kariuki, 'Violations of Human Rights Against Political Opponents: The Kenya Experience' article published in OMCT/SOS-Torture publication titled "Africa: A new lease on Life."

4 Mr. Rumba Kinuthia gave his personal experience in an article titled Violations Against Specific Sectors, The Case of Political Opponents, published as in note 3 above.

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Another interesting aspect of President Moi's regime was the fact that the criminal justice system was also compromised. There was a political movement largely known as *Mwakenya* that the government insisted was working against it. *Mwakenya* suspects arrested were brought to court outside court official times and were prosecuted by Mr. Bernard Chunga of the office of the Director of Public Prosecutions. Most of the suspects were unfairly convicted and sentenced. President Moi later appointed Mr. Chunga Chief Justice. When President Kibaki took over office in 2003, the civil society and the media campaigned against having Mr. Chunga continue to serve as the Chief Justice, one of the accusations being his shady involvement in the *Mwakenya* cases in which gross violations of human rights were perpetrated.

The judiciary hardly came to the help of those politically persecuted. In the case of *R. v. Commissioner of Prisons ex-parte Kamonye and Others*<sup>5</sup>, the court sanctioned the incarceration of persons for as long as the detaining authority may wish before serving a Detention Order to them. Simpson C.J. was of the view that the government could not be guilty of the violation of Human Rights by holding a person in detention for purposes of inquiry before a formal Detention Order is made. He had this to say:

“Insufficiency of details in a statement furnished under section 83(2) [a] of the Constitution does not render the detention invalid since the object is to enable the detainee to know what is being alleged against him, the remedy is to seek further and better particulars.”

In the run up to the 1992 and 1997 Multi-Party elections there occurred land ethnic clashes in Molo and Likoni. Many people were killed and a lot of property destroyed. The government condoned the clashes in that it did not act to stop them. Government leaders who incited the people fanned the clashes. President Moi formed a commission of inquiry into the tribal clashes headed by Justice Akilano Akiwumi. For a long time the report of the commission was not made known to the public. A court order was issued for the report to be released. Most importantly is that those mentioned adversely in the report were never questioned or charged in court.

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5 The Nairobi Law Monthly, April/May 1991, p. 16.

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In its recommendations the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya stated:

“In our view it is not lack of adequate security personnel and equipment that contributed to the tribal clashes. The police force and the Provincial Administration were well aware of the impending tribal clashes and if anything connived at it. Human nature being what it is it was not easy for the members of the police force and the provincial administration after the long time one party political system which was the only regime under which they had grown up, operated, prospered and flourished, to now adjust to let alone completely and with wide arms welcome the introduction of a political system that was in principle not only contrary to what they had enjoyed but also one which on the face of it might adversely affect their status quo. They were to put it realistically an intrinsic system of the one party system.

The circumstances that initiated and fanned the tribal clashes were not so much logistical as the negligence and unwillingness on the part of the police force and the provincial administration to take firm and drastic action, which would surely have prevented the clashes from erupting and even if they erupted would have brought the initial clashes to a speedy conclusion and discouraged further clashes. Furthermore tribal leaders and politicians should not be allowed to get away with actions that will pit one tribe against another.

Incitement and abetment of tribal or inter-clan clashes by social and political leaders as well as by members of the security, police and administrative services should no longer be tolerated. And to show that the government takes this seriously those who have been shown to have in one way or another taken part in or aided and abetted the tribal clashes should as happened in the past, not be spared. Appropriate action as recommended hereunder must be taken against them. This will also deter those thinking of fanning tribal animosities and taking part in resultant violent clashes from doing so.”

The commission recommended several people be investigated regarding their role in the tribal clashes. The commission also recommended investigation of persons adversely mentioned by witnesses.<sup>6</sup>

President Moi’s government commented on the report of Judicial Commission criticizing the commission and how it conducted its proceedings

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6 Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July 1999, Printed by the Government Printer.



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and showed no action towards prosecuting the named individuals.<sup>7</sup> Since there has been a recurrence of tribal and clan clashes in Kenya the NARC government should seriously handle the issue as recommended by the Akiwumi Commission.

Father John Kaiser, an outspoken catholic priest who was a critic of Moi's government and some of the ministers was found dead in 2001 under mysterious circumstances. The Criminal Investigations Department together with the FBI concluded that he had committed suicide, an answer that was rejected by the Catholic Church. There is now on-going an inquest in court on the cause of his death.

### Mwai Kibaki's tenure (2003- )

The latest Multi-Party election of December 2002 culminated in the ouster of KANU Party from power. The ruling party in Kenya is now NARC.

The NARC government is more pro-human rights than both the Kenyatta and Moi regimes. However, the laws that were in place in the last two regimes are save for a few amendments the same ones as today, and so far, the police have used violence to disperse popular demonstrations which arose in the context of the draft constitution in October 2004. Though no persons were beaten or killed in Nairobi, press reports indicated that three people had been shot dead in Kisumu<sup>8</sup>.

The NARC government formed a Truth Justice and Reconciliation task force in 2003, which heard various complaints of rights violations by the previous regime. It recommended the formation of a Truth Justice and Reconciliation Commission but the government is yet to establish the same.

On a positive note the government has opened up *Nyayo Torture Chambers* to mark the end of an era, in a bid to show that State sanctioned torture of its critics would never again be condoned. Hitherto the torture chambers were secret. Only the select State personnel knew of their existence.

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7 Comments by the Government on the Report of the Judicial Commission Appointed to Inquire into to Tribal Clashes in Kenya (Akiwumi Report) printed by the Government Printer, Nairobi.

8 Incidents were reported in the Sunday Nation and Sunday Standard.

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The establishment of the Kenya National Commission on Human Rights (KNCHR) as a statutory body<sup>9</sup> whose mandate is to look into and spearhead human rights issues in Kenya is clearly another positive step of the NARC government. The statutory body was established in 2003 and though its presence can be felt it is yet to make an impact in the human rights sector. It has quite a wide statutory mandate to enable it to tackle human rights issues in Kenya. It is also a fairly independent body, however, there are queries as to its independence vis-à-vis the Ministry of Justice and Constitutional Affairs. The draft Constitution proposes it becomes a Constitutional Commission, which would strengthen its legal position.

KNCHR has people's confidence in its capacity to promote and protect human rights. It is yet to open branches in different parts of the country.

The functions of the Commission are set out in Section 16 (1). The relevant ones for our purposes are:

- To investigate, on its own initiative or upon a complaint made by any person or a group of persons, the violation of any human rights
- To visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon
- To recommend to parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families
- To act as the chief against of the government in ensuring the government's compliance with its obligations under international treaties and conventions on human rights
- To investigate and conciliate complaints on its own initiative where the nature of the alleged human rights violations makes conciliation both possible and appropriate

Section 19 provides that the Commission shall have the powers of a court. The Commission may if satisfied that there has been an infringement of any human right or freedom order:

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9 The Kenya National Commission on Human Rights Act, 2002.

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- The release of any unlawfully detained or restricted person
- The payment of compensation or
- Any other lawful remedy or redress.

According to the Act, KNCHR can play an active role in torture cases, receiving complaints, investigating them and making an order for compensation. KNCHR should recommend to parliament provision of a fund from which to pay compensation for human rights abuses.

## 2. Human rights legal framework

### 2.1. International human rights legal framework

Signature /ratification and entry into force of international human rights instruments:

	<b>Ratification</b>	<b>Entry into force</b>
<b>ICERD</b> <sup>10</sup>	13-Sep-01	13-Oct-01
<b>ICCPR</b> <sup>11</sup>	01-May-72	23-Mar-76
<b>ICESCR</b> <sup>12</sup>	01-May-72 <sup>13</sup>	03-Jan-76
<b>CEDAW</b> <sup>14</sup>	09-Mar-84	08-Apr-84
<b>CAT</b> <sup>15</sup>	21-Feb-97	23-Mar-97
<b>CRC</b> <sup>16</sup>	30-Jul-90 <sup>17</sup>	02-Sep-90
<b>CRC - OPT - AC</b> <sup>18</sup>	28-Jan-02 <sup>19</sup>	28-Feb-02
<b>CRC - OPT - SC</b> <sup>20</sup>	21	

10 International Convention on the Elimination of All Forms of Racial Discrimination.

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Due / overdue reports and treaty bodies' concluding observations:

ICERD	Due	Received	Examined
<b>Initial report</b>	13-Oct-02		
<b>Second periodic report</b>	13-Oct-04		

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- 11 International Covenant on Civil and Political Rights.
  - 12 International Covenant on Economic, Social and Cultural Rights.
  - 13 CESCR: reservations and declarations: "While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation."
  - 14 Convention on the Elimination of All Forms of Discrimination against Women.
  - 15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
  - 16 Convention on the Rights of the Child.
  - 17 CRC – acceptance amendment: Article 43(2) : 12-Feb-03.
  - 18 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.
  - 19 CRC-OPT-AC: reservations and declarations: "The Government of the Republic of Kenya declares that the minimum age for the recruitment of persons into the armed forces is by law set at eighteen years. Recruitment is entirely and genuinely voluntary and is carried out with the full informed consent of the persons being recruited. There is no conscription in Kenya.  
The Government of the Republic of Kenya reserves the right at any time by means of a notification addressed to the Secretary General of the United Nations, to add, amend or strengthen the present declaration. Such notifications shall take effect from the date of their receipt by the Secretary General of the United Nations."
  - 20 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
  - 21 CRC - OPT – SC – signature: 08-Sep-00.

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ICCPR	Due	Received	Examined
Initial report	22-Mar-77	15-Aug-79	30-Mar-81
Second periodic report	11-Apr-86 <sup>22</sup>	27-Sep-04	Pending March 2005
Third periodic report	11-Apr-91		
Fourth periodic report	11-Apr-96		
Fifth periodic report	11-Apr-01		

ICESCR	Due	Received	Examined
Initial report, art. 6-9	01-Sep-77		
Initial report, art 10-12	01-Sep-79		
Initial report, art. 13-15	01-Sep-81		
Second periodic report, art 6-9	01-Sep-83		
Second periodic report, art. 10-12	01-Sep-86		
Second periodic report, art. 13-15	01-Sep-89		
Initial report <sup>23</sup>	30-Jun-90	02-Aug-93	09-May-94
New initial report <sup>24</sup>	31-Dec-94		
Second periodic report	30-Jun-00		

22 The Human Rights Committee had set the date for submission of the second periodic report at 11 April 1986.

23 Post 1990 reporting schedule.

24 On 20 May 1994, the Committee on Economic, Social and Cultural Rights requested that a new initial report be submitted by the end of 1994.

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CEDAW	Due	Received	Examined
Initial report	08-Apr-85	04-Dec-90	25-Jan-93
Second periodic report <sup>25</sup>	08-Apr-89	04-Dec-90	25-Jan-93
Third periodic report	08-Apr-93	05-Jan-00	15-Jan-03
Fourth periodic report <sup>26</sup>	08-Apr-97	05-Jan-00	15-Jan-03
Fifth periodic report	08-Apr-01		

CAT	Due	Received	Examined
Initial report	22-Mar-98		
Second periodic report	22-Mar-02		

CRC	Due	Received	Examined
Initial Report	01-Sep-92	13-Jan-00	26-Sep-01
Second periodic report	01-Sep-97		
Third periodic report	01-Sep-02		

CRC - OPT - AC	Due	Received	Examined
Initial Report	28-Feb-04		

**Total overdue reports: 11**

25 The initial and second periodic reports were submitted together as one document: CEDAW/C/KEN/1-2.

26 The third and fourth periodic reports were submitted together as one document: CEDAW/KEN/3-4.

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Concluding Observations / recommendations:

Concluding Observations	
<b>CCPR</b>	CCPR A/36/40 (1981)
<b>CESCR</b>	CESCR E/1994/23, CESCR E/1995/22
<b>CEDAW</b>	CEDAW A/48/38 (1993), CEDAW, A/58/38 part I (2003)
<b>CRC</b>	CRC CRC/C/111 (2001)

#### Status of International Law

Kenya is a dualist State, the provisions of a treaty entered into by the government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void. This position that was contained in a decision of the court, *Okunda Vs Republic*<sup>27</sup> is still obtaining, hardly ever do our courts refer to International instruments in enforcement of fundamental rights.

## 2.2. National human rights legal framework

The Constitution guarantees fundamental rights and freedoms of the individual (section 70), protection of right to life (section 71), protection of right to personal liberty (section 72), protection from slavery and forced labour (section 73), protection from inhuman treatment (section 74), protection from deprivation of property (section 75), protection against arbitrary search or entry (section 76), provisions to secure protection of law (section 77), protection of freedom of conscience (section 78), protection of freedom of expression (section 79), protection of freedom of assembly and association (section 80), protection of freedom of movement (section 81), protection from discrimination on grounds of race, etc. (section 82) and enforcement of protective provisions (section 84).

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27 [1970] EA 453.

Sections 83 and 85 deal with state of emergency. On record no state of emergency has been declared in Kenya though curfews have been decreed for security reasons.

### 3. Right to life (Article 6 ICCPR)

#### 3.1. Death penalty

##### National Law applicable to the death penalty

Section 71(1) of the Constitution of the Republic of Kenya proscribes the deprivation of any individual's right to life but saves such deprivation in the execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which the offender has been convicted.

Section 72(5) of the Constitution (not strictly a statute) makes bail not available to capital offenders

Section 40 (3) of the Penal Code Cap. 63 of the Laws of Kenya providing for the death penalty for treason.

Section 204 of the Penal Code providing for the death penalty for murder.

Section 296(2) of the Penal Code providing for the death penalty for Robbery with violence.

Section 297 (2) of the Penal Code providing for the death penalty for Attempted Robbery with violence.

##### Method of execution

Hanging as provided for under section 69 of the Prisons Act<sup>28</sup>. When any person is sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the commissioner (of prisons) shall direct.

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28 Cap 90 of the Laws of Kenya.



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Access to government held information is problematic, and ICJ-K has been unable to obtain information or rules if any formulated by the Commissioner of Prisons as required under the Act on how the death penalty should be carried out. (Or was carried out)

**Moratorium**

Since independence in 1963 there have been 280 executions. There has been a *de facto* moratorium of the death penalty since 1987. The last convicts to be executed in Kenya were the leaders of the failed 1982 coup against President Moi's regime on 1<sup>st</sup> August 1982. They were executed at Kamiti Prison.

There are about 1300 death row inmates, who contribute to congestion in prisons as the courts continue to sentence people to death though execution is not carried out.

Although the death penalty exists in Kenyan statute books, Kenya is a retentionist State. As no steps have been taken to make the moratorium legal, this has translated into inhuman and degrading punishment in that the courts continue to sentence people to death but the execution does not take place. Death row convicts live a most torturous life of waiting for the hangman without knowing their fate.

**Appeals**

The death penalty has not been carried out pending any appeal or other recourse procedure though there is delay in hearing appeals some of which have been pending for as long as 16 years. The statistics listed below were obtained by courtesy of the Kenya National Human Rights Commission Annual Report of the year 2002/2003.

- William Wambiru a robbery with violence convict had his appeal (court of appeal criminal appeal no. 133 of 1987) pending for 16 years.
- John Mburu a convict had his appeal pending 13 years.
- George Gituara a robbery with violence convict had his appeal pending for 14 years.
- Phillip Odali had his appeal against a robbery with violence pending for 6 years.

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- Ronald Lusabe Masifwa a robbery with violence convict had his appeal pending for 5 years.
- Charles Malomere & others in high court criminal appeal no. 1386/98, 1393/98 & 165/99 had their appeal pending for 5yrs, 5 yrs and 4 yrs respectively.

All these people were in prison remand under some of the most appalling conditions.

**Clemency / mercy**

There is the right to seek pardon or commutation though the advice of the Advisory Committee on the prerogative of mercy to the president is not binding.<sup>29</sup>

By the year 2000 it is estimated that about 135 prisoners, mainly convicted for murder and robbery with violence, had benefited from presidential amnesty. There are no comprehensive statistics available at the time of completion of the research on the number of persons that have been pardoned or had their sentences commuted or have been subject to an amnesty. In fact the Advisory Committee and its sittings is information that is not within public domain.

There was a blanket commutation of death row convicts at the dawn of the new political regime in January 2003 but there is no comprehensive data on whose sentence was commuted.

As noted above, access to statistics on sentences, executions, pardons and commutations is problematic. The State agencies, e.g. the AG's Chambers, the Investigative agencies (the Criminal Investigations Departments), owing to the technological challenges, are not able to get a nationwide network to have a database on this. It is not possible, without employing massive resources to sieve through the entire data available for statistics purposes. The same would entail probably travelling around the country in court registries and investigative offices, not to mention the bureaucratic huddles of perusing files that are still undergoing trial. By and large obtaining any information from the government is an insurmountable task. Information recording and retrieval systems in government are very inefficient. But even where some information

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29 Section 29 of the Constitution of Kenya.

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exists, accessing it from government officials is equally difficult.

The number of death sentences handed down in the last five years is unknown. On the question of the average time a prisoner spends on death row, for some it has officially been since 1987 as stated in the government report to be the year when the *de facto* moratorium started. For all the other death row prisoners the date runs from when the death sentence is pronounced by the court. The death sentence has so far turned out to be like life imprisonment. Mr. Kisilu, the man accused of killing politician Pio Gama Pinto was on death row for 35 years. One of the inmates released when the NARC government came into power had been on death row for 29 years.

### The Criminal Justice System and the Death Penalty

For the offences that attract the death penalty, treason and murder cases are tried at the High Court which is a superior court of record with unlimited original jurisdiction<sup>30</sup>, whereas the Chief Magistrates Courts and the Senior Resident Magistrates Courts try robbery with violence and attempted robbery with violence.

In view of the severity of sentence, the robbery with violence and attempted robbery with violence cases should also be exclusively tried by the high court and prosecuted by the attorney general's office manned by qualified lawyers as opposed to the police prosecutors who prosecute the offences though they are not trained lawyers in the subordinate courts.

For murder cases, the accused persons are given counsel to represent them at the cost of the State however this facility does not extend to the robbery with violence and attempted robbery with violence suspects even though the punishment to be proscribed is the death sentence similar to the murder cases.

As far as the death sentence for robbery with violence and attempted robbery with violence is concerned, it has translated into a death sentence against the poor in the society. It is the poor who cannot afford to hire counsel to represent them in court and thus due to inadequate representation there is a great risk of their being found guilty. Besides, although crimes committed by the rich white collar are of much higher magnitude, they usually have lesser sentences.

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30 Section 60 of the Constitution of Kenya.

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Robbery is defined as use of force in stealing but if an accused person was in the company of another, or was armed or inflicted grievous bodily harm then he is guilty of the offence of robbery with violence. The problem in definition of the offence is the use of the term “or” so that if robbery suspects are two in number it can be robbery with violence whether or not they were armed and whether or not they injured anyone. Clearly there is a very thin line between robbery and robbery with violence. Basically the death sentence is not warranted for robbery with violence and more so for attempted robbery with violence. Robbery with violence in Kenya is not such a grave offence as to warrant capital punishment especially because the safeguards afforded to those facing trial for murder are not extended to robbery with violence or attempted robbery with violence suspects. Yet the mandatory death sentence applies to both.<sup>31</sup>

### 3.2. Extra-judicial killings<sup>32</sup>

As already mentioned, section 71 (1) of the Constitution guarantees that no person shall be deprived of his or her life save in execution of the sentence of a court in respect of a criminal offence, in which he or she has been convicted.

The Police Act<sup>33</sup> provides that the police may use firearms if in the mind of the officer it is the only way to either make the arrest or prevent escape. The

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31 The pertinent sections provide as follows:

**Section 296 of the Penal Code**

(1) “any person who commits the felony of robbery is liable to imprisonment for 14 years together with corporal punishment not exceeding twenty eight strokes”.

(2) “if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

**Section 297 of the Penal Code**

Creates the offence of attempted robbery which is committed by

(1) “any person who assaults any person with the intent to steal anything from him”.

(2) “if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Upon conviction on capital offences the death sentence is mandatory.

32 All cases in this section have been sourced from various organizations that have documented them, KHRC, IMLU, LFAT and the Amnesty International Reports.

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law states that the police officer should give a warning that they are about to use the firearm. However it is silent on whether the police should shoot to immobilize or kill. Kenyan law with particular regard to the Constitution states that a person can only be executed or receive a court sentence in respect of a criminal offence under the law of Kenya of which he or she has been convicted. It then follows that police should only shoot to immobilize, not to kill.

The police in Kenya are described in media reports and elsewhere as trigger-happy<sup>34</sup>, they shoot to kill even when suspects surrender and submit to arrest. This is often done on the excuse that they are wanted criminals or where suspects are escaping. The special police unit known as flying squad, made of officers dressed in civilian clothes, established in 1995 to respond to the growing spate of carjacking and violent robbery, is especially notorious for these shootings.

The officers do not wait to identify the suspects well as. Thus there have been instances when they have shot and killed innocent persons mistakenly. There is an instance where other than mistaken identity, the flying squad officers aimed wrongly and shot a mother of 3 children in the presence of her husband as they were going home in the evening.<sup>35</sup>

In February 2004, Mr. Richard Mburu and his wife Mrs. Purity Kanini Mburu were waiting for a matatu at a bus terminus in the city

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33 **Power to use arms under Section 28.**

A police officer may use arms against:

Any person in lawful custody and charged with or convicted of a felony, when such person is escaping or attempting to escape. Any person who by force rescues or attempts to rescue another from lawful custody. Any person who by force prevents or attempts to prevent the lawful arrest of himself and any other person.

Provided that arms shall not be used:

As authorised in paragraph a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he gives warning to such person that he is about to use arms against him and the warning is unheeded. As authorised in paragraph b) or c), 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 prevent the rescue or, as the case may be, effect the arrest.

34 Independent Medico-Legal Unit (IMLU), Country status report on the prevalence of torture, Extra-judicial killings, cruel, inhuman or degrading treatment or punishment and arbitrary arrests- Kenya 2003.

35 Incident reported in the Saturday Nation Newspaper of February 17, 2004.

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center on Thursday night, anxious to get home to their three children, when a motorist Mr. Michael Kung'u pulled up and offered to take them and four other passengers to Huruma. A man who failed to get space in the vehicle decided to ride in the boot of the car. As the vehicle raced Kariokor Market, a senior police officer attached to the Railway police station saw the car and alerted the duty officer at Pangani police station. The officer gave the registration number of the car and the direction it was heading. In turn, the duty officer circulated the registration number of his car on his walkie-talkie. On learning that the wanted vehicle was heading towards Juja Road, Flying Squad officers jumped into three vehicles and went and laid a trap at the Kariokor Juja roundabout. A few moments later, the officers spotted the vehicle and gave chase. Reportedly without signaling Mr. Kung'u to stop, they started spraying the car with bullets from behind. Mrs. Mburu was shot twice from behind. Her husband who sat next to her escaped unhurt. Another passenger who had just alighted from a matatu at the same spot was shot in the legs and admitted at Kenyatta National Hospital. Mr. Mburu said the shooting stopped only when Mr. Kung'u pleaded with them to save their lives. The two men alighted and went to ask the officers why they were being shot at. The man in the boot and the other three passengers fled as the two were talking with the officers. Mr. Mburu discovered his wife had been shot only when he returned to the car. The mother of 3 bled to death in the car as her distraught husband pleaded with the officers to help him save her life. Police agreed to take her to hospital after a 15-minute delay. Mr. Mburu and motorist Michael Kung'u raced her to hospital but doctors told them that the 43-year-old had died before they brought her in. And as if to add insult to injury, the officers- who were armed with AK-47 rifles and sub-machine guns- followed them and pitched camp as doctors examined Mrs. Mburu. When she was declared dead, the officers stepped in and said they were taking charge of the events, as it was now a police case. They then asked the two men to accompany them to the Flying Squad base next to Pangani police station. According to Mr. Mburu the car was old and moving slowly. Nation reporters found this death car parked at the Pangani police station. Its rear window had been shattered by bullets. The driver of one of the Flying Squad cars was arrested. It is reported that a senior officer in the vehicle had warned his colleagues not to open fire until they established the identity of the people in the car. But some of the officers defied the orders. Nairobi provincial police chief Jonathan Koskei

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summoned the officer from the Railways police station and senior officers from Kasarani police division for a crisis meeting in his office to discuss the tragic shooting.

Police kill several bystanders while exchanging gunfire with criminals.

In early January 2004 in East Baringo, police shot and killed 5-year-old Chesortich, when they fired on her family's home. Allegedly the officers suspected that the family was harboring cattle rustlers.

In February 2004 police fired at suspected robbers who were fleeing from police and seriously wounded a teenaged boy from Maragwa in Central Province.

To further illustrate that the government condones the shoot-to-kill policy of wanted suspects, the police bosses are captured in electronic and print media describing how they shot the suspects. Sometimes the clip is shot right next to the bleeding body of the suspect. Not once has the government castigated the police officers for not only shooting suspects they should apprehend but for going ahead to bask in their glory of such killings. It is not uncommon for such officers to actually be promoted.

A large number of extra-judicial executions are reported to have been committed for example in:

- April 2004: 13
- May 2004: 33
- June 2004: 11

There have been a number of questionable incidents and indiscriminate killing of suspects by police. The following instances address the killing of suspects by police unnecessarily:

On 17<sup>th</sup> November 2004 police from Rhino Squad (another unknown police unit, the government should clarify rhino squad's role) shot Peter Wainaina<sup>36</sup> in the head. They picked him and his cronies and took them to Pangani police station where they detained them. Though Wainaina wasn't dead, the officers at the station refused to take him to hospital. He was detained for three hours and he succumbed to the injuries. The body was taken to the city mortuary.

36 Complaint lodged with LFAT.

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Officers of the Rhino Squad were not co-operative and they declined to lodge investigations into the death. The family wants an inquest held, as the incident occurred in mathare slums. The case goes to show how inhuman and insensitive Kenyan police forces are, as they did not try to save Wainaina's life by taking him to hospital soonest possible.

In April 2004 in Makadara Nairobi, three police officers not in uniform were seen talking to three suspects prior to the killings. There was no sign of struggle. The officers allegedly shot the suspects after they had already surrendered and were lying on the ground face down. By the time the Kenya National Commission on Human Rights took up the matter, the police who shot the suspects had not been named.

In an equally incomprehensible incident nine police officers attached to the Anti-Stock Theft Unit (ASTU), killed a mentally sick man by clobbering him with clubs in Mwingi District. When Mwila Mutisya, aged 30 years, fell on the ground unconscious, the officers carried him to their camp and dumped him under a tree. They watched him as he bled to death at Ngomeni ASTU camp. A senior police officer said that the trouble started when Mutisya entered a house belonging to one of the traders in Ngomeni Trading Centre. The trader pleaded with him to get out but he locked himself inside. Some people decided to seek assistance from the nearby police camp. They returned with two officers. As the officers were allegedly trying to force Mutisya out of the house, he bit one of their fingers. The officer went to Ngomeni dispensary and the mentally sick man then left the house. On learning of the incident, nine police officers looked for Mutisya and attacked him. In this particular incident, the officers that killed Mutisya were arrested but it is not clear whether they have been released or charged.

Passing of sentences and carrying out of execution without previous judgment pronounced by a regular constituted court is prohibited but the Kenyan police continue to carry out extra-judicial executions. Although there are circumstances where a police officer must shoot out of necessity of saving his/her own life, many incidents over the past showed use of force grossly inconsistent with the criteria of absolute necessity and proportionality of force.

One such example of undue amount of force by police is the case of a suspected gangster. The then provincial boss Stephen Kimenchi said



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the suspect was cornered and fatally shot as he drove into Nairobi River to take cover. The fact that a police boss would openly admit to the press without any admission of wrong-doing on the part of his force suggests a laxity in attitude in taking the life of a suspect. There seems to be a conspiracy among government agents to perpetrate crime.

In mid-February 2003 in Laikipia District, a district officer shot a 17-year-old boy in the chest killing him on the spot. The killing occurred in operation to evict Samburu people from community conservation area. The D.O. admitted to killing the boy but said he did so in self-defense. Two weeks after the shooting the D.O was still in office while the Laikipia D.C said he was conducting investigations.

In the past quarter, out of the 22 people reported in the press to have been killed, six of these people were allegedly running away. This suggests that whether or not a police officer's life is in danger at the crime scene, priority is given to eliminating the suspect at any cost. It further suggests that the shots are not exclusively aimed at immobilizing the suspect they are aimed at killing.

Another disturbing incident is the wave of terror ignited by violence instigated by Mungiki<sup>37</sup> gang members beginning around the year 2000. In response, rift valley provincial commissioner, Peter Raburu, issued a shoot on sight order to the Kenyan police force. Regardless of the crimes the Mungiki may be guilty of, 'a shoot on sight' order is a blatant gross violation of human rights. In addition none of the government officials in charge of provincial administration or constitutional affairs opposed the order. Moreover, on January 31, 2003 it was reported that the government had given the Military's top brass three days to explain why 10 of their land rovers were given to the outlawed Mungiki sect.<sup>38</sup>

Over the past quarter, the Independent Medico Legal Unit (IMLU) received several cases of excessive use of force by authorities. In January IMLU recorded 10 cases that involved excessive use of firearms by the police. In three of the cases the gun wounds were fatal. Out of these 3, only one person killed was the target. The other 3 were victims of stray bullets aimed at robbers; included in those killed were a woman and students. In February, the cases decreased to

37 Mungiki is an outlawed, quasi-political/religious cult in Kenya. It behaves like a gang of criminals. Newspaper reports say that the movement's name means "multitude" in the Kikuyu language.

38 Reported in the Daily Nation of 31st January 2003.

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two. One of the cases involved an 11-year-old street child. In March the cases increased by one. In this particular case a member of the Mungiki sect was shot and killed.

Armed robbery comprises of the majority of people killed by police. Armed suspects were killed in alleged shoot-outs with the police though there were no reports of fatalities suffered by police. This observation suggests that it is possible and even probable that police officers often outnumbered armed crime suspects, possessed superior firepower but failed to shoot to maim or immobilize rather than kill. Illustrating this:

In an incident in Baba Dogo estate on 2004 new year's eve, the four suspect robbers were killed. However, no weapons were recovered from them.

On July 1, 2004, police in Nairobi fired on unarmed suspected car-jackers at a major traffic circle, killing the driver, Michael Ngigi, and seriously injuring the passenger, George Ngugi. Ngugi, a civil servant who owned the vehicle, reportedly begged police not to shoot before the officers fired at him. Several police officers were arrested; however, no charges were filed against them by year's end. There were reports that one of the officers involved in the incident fled the country.

On July 10, 2003, police in Kisii plucked two people, Thomas Asiago Osiemo and William Ongeni Guto, from the hospital and executed them on the suspicion they had committed a robbery. Since they were not armed this was spot execution.

On Feb 7, 2002, at corner Mbaya Timboroa, police ordered two couples returning home after a night out to stop their vehicle, which was reportedly stolen, but the driver, James Kariuki, did not stop. Police opened fire and the vehicle stopped. James Kariuki allegedly tried to flee to the nearby woods. They shot at him. The police later acknowledged that the vehicle was not stolen but the fleeing of James Kariuki in the woods was reason enough for them to shoot at him.

On Feb 21, 2002, Mary Njeri and an accomplice allegedly stole Ksh. 200 and fled when the officers caught up with them, prompting their shooting.

The shooting of unarmed civilians was not limited only to situations of alleged crime where victims were fleeing.

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On February 1, 2002, police shot and killed John Muruiki and Jane Wanjiru as they fled from the scene of demonstration that was violently disrupted in Nyeri town. The Kenya Human Rights Commission (KHRC) has since determined that a police officer ordered the anti-riot squad to shoot at the protesters when they allegedly refused to heed the orders to disperse. Police spokesman then, Peter Kimanthi, announced that the shooting would be investigated but no arrests were made.

On March 12, 2002, Jacob Odero Ogolla was shot and killed by administration officers. Ogolla was reportedly having a drink at the Nyama Villa Bar, when administration police walked in and demanded to know the whereabouts of two people he had allegedly been seen with. They reportedly shot Ogolla four times. According to his family, the officers planted a firearm on him.

Over the first six months of 2002 there was a public out-cry against the problem of extra-judicial killings. In October 2001 the police dismissed KHRC statistics on extra-judicial executions that police had killed over 1200 people over the last eight years, as selfish and exaggerated. In the same month the government pathologist Dr. Kirasi Olumbe and other leading forensic experts published a study on the rate of police killings over the past five years and their findings proved equally damaging. The study examined records of deceased persons that had been processed by the Nairobi city council and concluded that 60% of Kenyans shot in the past five years were killed by police officers; again the police department strongly rebuked the research.

The killing of Albert Mbogori illustrated the reckless use of firearms. According to his son, Christopher Munene, Mbogori was a victim of carjacking, which happened outside his home. Kasarani police division headquarters was contacted and dispatched flying squad members to the scene. Some of the gunmen who had abducted Mbogori and driven off in his own car engaged the police in a shot car chase which ended up violently after the officers indiscriminately opened fire on the car instantly shooting Mbogori and one of the suspects.

On February 17, 2001, police shot and killed a second year medical student Allan Mbito in Nairobi after stopping him and 2 friends on suspicion of theft. The police claimed Mbito had threatened them with a sword prompting the shooting. Two friends asserted that Mbito did not have a sword.

On July 26, 2001, police ordered 7 men to get out of an Athi River bound Kenya Bus Passenger Service Vehicle No. B423 and having ordered them to lay face down, executed them in cold blood.<sup>39</sup>

On the night of December 7-8, 2001, police shot dead 3 people whom they said were robbers, but independent investigations of the Presidential Committee for Human Rights revealed that the police allegations may have been false.

Police officers involved in extra-judicial executions continue to act with impunity since little remedial or punitive action is taken in such cases. KHRC documented only 2 cases in which police officers were arrested and charged. Further it was deduced that evidence, such as weapons from suspects was often mishandled.

The issue of extra –judicial killings evokes controversy in various sectors of the Kenyan society. The police and some members of parliament see it as the ultimate solution to the problem of increased insecurity and the influx of sophisticated arms in the criminal world. But to human rights defenders, killing of suspect, some of whom are unarmed, contradicts the rules of justice.

## **4. Prohibition of torture and other ill-treatment (Article 7 ICCPR)**

### **4.1. National legislation**

#### **Torture**

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force for Kenya on 23<sup>rd</sup> March 1997. There is however no domesticating legislation for the CAT.

The crime of torture is not specifically provided for in Kenyan penal laws and therefore it is not recognized as a crime per se. Persons who are subjected to

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39 Vide 6th Annual Report of the Commission on Human Rights of April 2002.

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torture have to bring their complaints under recognized crimes, which mainly falls under the domain of crimes relating to assault, battery, abuse of office, murder or manslaughter which are expressly provided under Chapter XXIV of the Penal Code.

Torture victims seeking compensation resort to civil actions and sue the State under vicarious liability for the torts of malicious prosecution or false imprisonment. There are many attendant problems of the civil process in Kenya, such as high court fees and long processes.

Torture victims may also pursue a constitutional case under section 74 of the Constitution that outlaws torture or inhuman or degrading punishment or other treatment. However constitutional remedies are usually limited to declarations of rights as opposed to monetary compensation like damages.

### Assault and battery

Section 250 of the Penal Code provides that any person who unlawfully assaults another is guilty of a misdemeanor, if the assault is not committed in circumstances for which a greater punishment is provided and is liable for imprisonment for one year. This is often referred to as common assault.

The most common charge leveled against the perpetrators of torture is assault causing actual bodily harm. This offence is provided under section 251 of the Penal Code. Which states that, any person who commits assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. From the wording of these two offences it is evident that the penalties put in place are a slap in the wrist compared to the lifetime of torment inflicted on the survivors of torture. The very classification of the offences as misdemeanors as opposed to felonies shows they are treated as minor offences thus light sentences.

Another point to note is that when proving any of these offences one must obtain a P3 form i.e. a medical document that is required in order to establish the extent of the injuries. Without this form the court cannot convict the suspects. These P3 forms are only obtained from Police stations. They are required to be filled and returned to the same Police stations. These medical forms are rarely granted when a complaint is lodged against Police officers and when granted occasionally go missing when the file is presented in court.

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Antony Maina<sup>40</sup> was one such victim. A suspect had broken into his shop and stolen some property. He relentlessly worked hard towards seeing the success of his case. When the file had disappeared, he had ensured that the file was recalled and a fresh hearing started, but before the case begun, flying squad officers arrested him and another person. They were accused of being a terror gang in Kiambu. At the time of arrest he was severely beaten and threatened with further torture. They were taken to Kiambu Police Station where they were tortured and their joints hit with runkus and gun butts. There was a beating every-day until they paid Kshs. 2,000 in exchange for their release. When they complained to the police about the beating, a police inspector told them he could not issue them with P3 forms since their complaint was against a policemen.

**Manslaughter and murder**

In extreme cases where the victims of torture succumb to death under the hands of their torturer, the Penal Code provides for the offences of manslaughter and murder, which are expressly provided for under section 202 and section 203. Section 202 states that any person who unlawfully causes the death of another person is guilty of manslaughter.

The penalties of manslaughter and murder are life imprisonment and the death penalty respectively. Murder is a bit more complex as it requires the ingredient of malice afore to be established. It involves proving that the accused had the intention to cause death or had knowledge that the grievous bodily harm would cause death.

It is however important to note that before these charges can be leveled against the Police officers concerned, consent is required to be obtained from the attorney general. Where the torture victims died under the custody of the Police, the courts first have to conduct inquests to their deaths. This involves investigations by the court as to the cause of the death in custody. Police are the ones who carry out the investigations into the inquests, which creates a problem. This is because the police are left with enough leeway, to change evidence and allege that other prison mates murdered the deceased or died of natural causes or committed suicide.

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40 Complaint lodged at Independent Medical Legal Unit a local NGO that handles torture cases.

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### Investigation and apprehension

Under the Police Act there are mechanisms of disciplining errant officers. This mainly is through a self-regulatory system, where senior officers have the power and mandate to order the investigations of officers of lower ranks. This is expressly provided under Section 34 of that Act which states that any gazetted officer or Inspector may arrest without warrant, or order the arrest without warrant of any police officer (not being of a higher rank) who is accused of any offence against discipline. The section goes on to stipulate that, the police on receipt of such order shall apprehend the police officer in question without a warrant and bring him before the investigating officer.

The problem, which creeps in with the system of self-regulation, is the notion of 'code of silence'. The disciplinary system involves calling of witnesses, hearing evidence and in most cases other police officers are the only witnesses to the crimes of torture and are usually reluctant to testify against their fellow officers.

Another problem that sets in is that the police are usually the custodians of all the evidence therefore they are most likely to tamper, destroy or conceal incriminating evidence.

It would also be very unlikely that the presiding officers of these investigation committees would be fair, just and impartial. Even though the chairman of the tribunal would be as impartial as he would hope to be, principles of natural justice foresee a situation of a likelihood of bias. Another area of concern is that this current system of self-regulation does not provide for senior officers investigation, therefore little or no action is carried out where the transgressions are carried out by high ranking officers in the police force.

### Offences against discipline

Under the same Act there are Police Regulations, which are provided for under the subsidiary legislation section. These Police Regulations enumerate offences against discipline. The ones of importance in relation to torture are: Regulation no. 17, which prohibits the unlawful striking of any person or the use of unlawful violence to any person and Regulation no. 19, which creates an offence for the discharge of any weapon without the orders or without reasonable or lawful cause. Also of importance is the creation of an offence relating to negligent behavior in the performance of an officer's duties.

Though there are regulations that create offences relating to the prohibition of excessive force they are rarely implemented. This is because these regulations are mainly administrative in nature and like many administrative rules they are rarely invoked and are usually moribund.

### Agents' liability

Section 62 of the Police Act provides for the liability of police officers in relation to prosecution under any other laws for the acts or omissions constituting an offence. This allows an aggrieved party to place a complaint and the alleged police officer can be tried for crimes relating to torture like assault with battery, murder or any other offences stipulated under the Penal Code.

This section 62 however has a provision, that no police officer shall be punished twice for the same offence. Therefore those officers who are considered to have committed human rights abuses are protected by their superiors under the guise that administrative disciplinary measures have been leveled against them.

Another statute that provides for disciplinary measures against the Police is the Administrative Police Act. Part V of this Act provides for disciplinary measures. In particular Section 20 sets out the penalties for the offences and states that any officer who willfully disobeys any lawful order or who is guilty of any act or conduct to the prejudice of good order or discipline shall be liable to be punished by the District Commissioner or District Officer.

The section goes further to list the various forms of punishment, which include reprimand, confinement to the barracks for a period not exceeding 14 days, fines not exceeding 14 days pay, stoppage of salary increment, and reduction in rank and dismissal from the force. In relation to fines section 20(4) of the relevant Act limits the fine to one third of the officer's salary.

It is clear from these forms of penalties that most of them are too lenient and neither act as a deterrence to officers who flout the rules relating to their conduct. There is need to revise these rules to conform to present times. Most importantly to come up with stiffer and harsher penalties that will seek to deter repressive and inhuman acts of torture among the Police.



### Corporal punishment

This punishment though viewed as inhuman and degrading in nature was applied by the judicial system and administered for many years and was also a means of disciplining applied in schools.

The Criminal Law (Amendment) Act<sup>41</sup>, which came into force on 25<sup>th</sup> July 2003, outlawed corporal punishment, which had been at the center of legal and sociological debate about its retention in the Penal Code<sup>42</sup>. The abolition of the same, therefore, was a major credit to the regime's commitment towards abolition of cruel, inhuman, and degrading treatment, which is proscribed by virtue of Section 74 of the Constitution.

Change of law in this instance was a great step but the government has not taken active steps to train its officers and personnel on change of law. The government has not taken concerted measures to publicize to its prison officers the change in law especially those in rural areas. There was no government circular or notice issued in the mainstream press. It is not far fetched to imagine that some prison officers may be using the whips still in their possession.

### 4.2. Emerging trends leading to torture

One emerging trend, since the coming into force of the Criminal Law (Amendment) Act<sup>43</sup> that removed from the purview of police powers the duty of taking confessions from suspects in criminal cases, is that of torturing suspects to produce exhibits and name accomplices.

Another emerging trend is found in the connection between torture and corruption, especially on the part of the police. Suspects who refuse to bribe the police are subjected to torture. The bribery is sometimes to obtain liberty or to be charged with a lesser offence. In the case of robbery one may bribe to be charged with robbery as opposed to robbery with violence. As the police can arrest on mere suspicion, people have to choose between bribing the officers to have their freedom back and being taken to court and staying in remand for very long. The police force has sort of formed extortion cartels to get money from the citizenry.

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41 Act No. 5 of 2003.

42 Cap 63 of the Laws of Kenya.

43 Act No. 5 of 2003.

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Another trend that is leading to torture is the incidence of community policing to counter insecurity. Vigilante groups have been formed in different areas to take care of security within their jurisdiction. The existence of these groups is known both by the police and provincial administration. These groups have been known to torture suspects in their localities. The police, chiefs and assistant chiefs are under the mistaken notion that any violence perpetrated by these groups is not State sanctioned.<sup>44</sup>

District Security Committees were also created, who could order the arrest of any person under the so-called “swoops to flash out criminals”. People who in most cases are incompetent and lacking the necessary administrative acumen run the committees. Although the police commanders are usually members and have a right to override the committees’ decisions, they usually just oblige to the decisions of the committees.

It is not clear how the decision to prosecute suspects and charge them in court is made at the police department. The government should shed some light on this, as the process seems amenable to manipulation and abuse of rights for the citizenry. It has a bearing on torture since it is when police are finished with investigations concerning a suspect that they charge them. Some investigations are indeed coupled with torture. To illustrate that the police perform shadowy operations and can arbitrarily choose to sue anyone for extraneous reasons is the case of Peter Njuguna<sup>45</sup>.

Peter Njuguna was arrested and his name not entered into the Occurrence Book until hours later. He was beaten and tortured. The incident occurred on 10<sup>th</sup> October 2002 and, after a lot of complaints, he was set free with bruises and black spots all over his body. He complained of the torture and Police Constable, Evans Machuki, was charged in court for assault and battery in Kiambu. As soon as the consent to prosecute the police officer was received from the attorney general’s office, Mr. Peter Njuguna, the complainant was picked up and charged with robbery with violence. Mr. Peter Njuguna was charged 5 months after the alleged date of the offence.

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44 ICJ-K’s position is that the government is liable for any acts of torture committed by these vigilante groups. As it condones their existence and activities and fails to stop them even when it ought to. Most of these vigilante groups are found in slum dwellings.

45 Case reported and complaint lodged at the Litigation Fund Against Torture.

Similar to Peter's case is the case of Naomi Nyambura Wakaara<sup>46</sup> arrested for stealing a mobile phone belonging to Mr. Oyor. The 30-year-old businesswoman never lived to tell her ordeal in the hands of policemen. Her mother went to the Ongata Rongai Police Station and demanded to see her daughter but she was told that Nyambura had developed stomach problems and had been rushed to Kenyatta National Hospital. The police alleged that Nyambura had taken poison after being put in a cell, but post mortem examinations results showed no foreign substance in the body at the time of her death.

After a frantic search, Nyambura's mother was finally to find her daughter's body at the City Mortuary. The post mortem results confirmed Nyambura had been tortured to death. Nyambura's woes with the police had started earlier when they impounded her Peugeot 504 for no reason and she tried in vain to get it back for almost four months. The car subsequently disappeared from the police station yard. Nyambura's case also shows that the police can improperly hold suspects incommunicado.

## 5. Arrest, bail and pretrial custody (Article 9 ICCPR)

### 5.1 Arrest

Relevant legal provisions include section 72 (1) of the Constitution which enunciates all the cases in which a person may be deprived of liberty. More particularly, section 72 (1) e)<sup>47</sup> sanctions arrests on mere suspicion and subjects the same on the standard of reasonableness, which are dependant on the facts of each particular case.

Section 72 (2) of the Constitution provides that a person who is arrested or detained shall be informed as soon as is reasonably practicable and in a language that he understands, of the offences he is suspected to have committed.

<sup>46</sup> Case highlighted in the Daily Nation of 11th October 2004.

<sup>47</sup> **Section 72 (1) e) of the Constitution:** "upon reasonable suspicion of his having committed, or being about to commit, a criminal offense under the law of Kenya".

Moreover, several sections of the Criminal Code of Procedure deal with arrest.<sup>48</sup>

## 5.2 Bail and pretrial custody

Section 72 (3) of the Constitution<sup>49</sup> provides that the police can detain somebody for a maximum of 14 days in the event of the person being detained on

### 48 Cap 75 of the Laws of Kenya.

**Section 21:** (1) In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action. (2) If a person forcibly resists the endeavour to arrest him, or attempts to avoid the arrest, the police officer or any other person may use all means necessary to affect the arrest. (3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

**Section 22** authorises a police officer to search a place entered into by a person sought to be arrested without a search warrant if obtaining the warrant would afford the person sought after an opportunity to escape.

**Section 25** provides that whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or without warrant, the police officer may search the person and place in safe custody all articles, other than necessary wearing apparel found upon him.

**Section 28:** the officer or other person making an arrest may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the court or officer before which or whom the officer or person making the arrest is required by law to produce the person arrested.

**Section 33:** if a person is arrested without a warrant he must be taken before a magistrate or officer in charge of a police station as soon as possible.

**Section 107:** the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and if so required, shall show him the warrant.

### 49 Section 72 (3): A person who is arrested or detained-

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

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the suspicion of having committed a capital offence and 24 hours in the event of suspicion of having committed any other offence.

As stated in the case of *Stephen Wamwea Kabue*<sup>50</sup>, courts would question long delays in custody before one is arraigned in court for levying of charges. However, as a matter of practice, police have been reported to hold suspects for periods longer than statutorily allowed without giving them reasons for their arrests.

The courts following the decision in *Daniel Mwirigi M'Kirimania*<sup>51</sup> can give anticipatory bail before arrest especially where the suspect is being harassed for unknown offences. A similar decision granting anticipatory bail was arrived at in *Samuel Muciri W'Njuguna Vs Republic*<sup>52</sup>.

There is no provision for the concept of “extra detention” but instead what exists is denial of bail whereby upon being produced in court, if the suspect is charged with a capital offence, he shall automatically be remanded either at a police station or prison remand as the court directs and if charged with an ordinary (non capital) offence, the prosecution could, with good reasons, object to his release on bail.

Bail is ordinarily applied for before the court to which the accused person is produced for plea taking and the same could be denied on the following grounds:

- Real likelihood of the accused absconding.
- Real likelihood of the accused committing further offences.
- Real likelihood of accused interfering with witnesses.
- Nature and seriousness of the offence.
- Severity of punishment.
- The accused's character and antecedents.

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50 *Stephen Wamwea Kabue & 4 others vs. Republic High Court Miscellaneous Criminal Application No. 294 of 1996* (Published in the ICJ-Kenya ‘Constitutional Law Case Digest, Fundamental Rights and Freedoms’ 2004).

51 *Republic vs. The Attorney General and the Commissioner of the police ex parte Daniel Mwirigi M'Kirimania High Court Criminal Application No. 998 of 2001* (Published in the ICJ-Kenya ‘Constitutional Law Case Digest, Fundamental Rights and Freedoms’ 2004).

52 *Nairobi High Court Miscellaneous Criminal Application No. 710 of 2002* (Unreported).

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No evidence is ordinarily called for this but the prosecution is under a duty to demonstrate by way of submissions that reasons exist that warrant denial of bail to an accused person.

Though bail should be granted for bailable offences sometimes the court gives stringent bail conditions that the accused person cannot satisfy and is thus remanded in prison. This has in turn led to overcrowding in cells.<sup>53</sup> In view of the long period of time it takes to conclude cases, many more people should be granted bail.

The most common types of victims of torture in Kenya are persons belonging to economically disadvantaged sectors of the society. A recently launched Society for International Development Report on inequality in Kenya bears testimony to this<sup>54</sup>. They cannot afford bail and preferential treatment, thus their suffering. This is borne of a combination of factors. The gap between the rich and the poor in Kenya is very large. Crime is largely a consequence of unemployment and depravity. Thus, those arrested with crimes are usually poor and crime rates are highest in the slums.

Upon arrest and arraignment in court, economically disadvantaged accused persons cannot afford legal representation. They most times are unable to post sufficient bonds to secure their coming to court for trial. The absence of legal aid administered by the government is sought to be corrected by the Draft Constitution that proposes to create the office of the public defender, which will defend all persons especially against violation of their rights.

Though the Constitution details how an accused person should be treated to restore his dignity, this is not always the case.

On 10<sup>th</sup> July 2003, Lomack Bogomba, Tengeya Abele, Morenga Mekenye and Robert Kimori Ombogi<sup>55</sup> were arrested on allegation of having committed a burglary. They were taken to Ogembo police station but they were not booked in the Occurrence Book as required. They were repeatedly tortured for six days. During this heinous act of torture by the police, the suspects were tied with ropes and suspended

53 See the Report on the Meru Prison.

54 Pulling Apart : Striking facts and figures on inequality in Kenya, Society for International Development (SID) 2004.

55 Complaint lodged at the Litigation Fund Against Torture Organization.

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on the roof, they were lashed with electric cables and their private parts pierced with razor blades and pliers.

On 16<sup>th</sup> July 2003, Lamack Bogomba Tengeye and Abel Moranga succumbed to the torture and died in custody. The suspects were held contrary to the Constitution for more than 48 hours. Families were denied access to the victims and the suspects had declined to bribe police officers for their release.

This case is of particular importance as it comes after the coming into force of the Criminal Law (Amendment) Act<sup>56</sup> that removed from the purview of police powers the duty of taking confessions from suspects in criminal cases. The relevant section of the Evidence Act<sup>57</sup> was amended such that no confession other than a confession made before a magistrate was admissible in evidence.

Prior to this amendment, the Kenya police, as an investigative agency, had become notorious in squeezing and forcing confessions from suspects after inflicting torturous pain and intimidations to the suspects. There were many instances of suspects' torture while in custody as the police tried to extract confessions. If the suspects complained in court and denounced their confessions, the court would order that a trial-within trial be held to investigate the voluntariness of a confession thus its admissibility. The issue with the trial within trial procedure is that it would only determine the voluntariness of the confession not punishment or charging of the officers involved in torturing the suspect.

The Criminal Law Amendment Act has now made this procedure inoperative. But problems still exist despite the commendable changes in law.

As seen in the case of Lamack Bogomba above, the police are still torturing suspects. The issue of training criminal justice officers on changes in law and human rights violations has been raised. The government has reported that the police curriculum now includes a course on human rights.

After the passing of the progressive law making it difficult for the police to torture suspects for confessions, the emerging trend is that suspects are now tortured to produce exhibits and implicate their accomplices. Basically torture

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56 Act No. 5 of 2003.

57 Cap 80 of the Laws of Kenya.

as part of police investigation is still not 100% eliminated, it is only reduced. As shown in the case of Lamack Bogomba, the police even refuse to book suspects into the Occurrence Book so that it is difficult to establish when they were arrested thus going round the protection of producing suspects in court within prescribed time.

## 6. Detention (Articles 7 and 10 ICCPR)

### 6.1. Prison conditions

The Prisons Act Cap 90 regulates prisons and prison officers, but more problems are with the practice.

Prison conditions in Kenya amount to cruel, inhuman and degrading treatment or punishment as will be evidenced by the case study of Meru prison that was conducted after five prisoners died therein in September 2004.<sup>58</sup> There has not been an in-depth study of all the other prisons so that the case for Meru could be on the extreme side. The other prisons are congested too, but no prisoners have died yet as happened in Meru.

Kenya's prisons, described as death chambers, are overcrowded and unhygienic. Prisoners sleep on dirty and damp cement floors. The communal cells are often poorly ventilated, badly lit, and lack adequate washing facilities. Overflowing buckets in one corner of the cell usually serve as the only toilets. Acute water shortages in some prisons have exacerbated the unsanitary conditions.

Infectious diseases such as diarrhea, typhoid, tuberculosis and HIV/AIDS spread easily, and are inadequately treated. Medical care for prisoners has not yet been adequately addressed.

Torture and ill-treatment are widespread and are used to discipline prisoners. Indiscriminate attacks also occur in prisons. Prisoners are beaten for failing to obey orders. One ex-prisoner expressed the fear that warders are spreading HIV/AIDS by using hippo hide whips consecutively to punish prisoners.

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58 See the Report on the Meru Prison.



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The problem of excessive violence in the prisons was highlighted in September 2000 when six death-row prisoners were killed at the high security King'ong'o prison. The Prison Department alleged that the prisoners had tried to escape and that they died in their fall from the high perimeter walls. The Kenyan police alleged that the six had been shot dead to prevent their escape – a measure provided for by the law. However medical examinations shortly after their deaths found no evidence of gunshot injuries, but found instead that their eyes had been gouged out. A post-mortem revealed that their skulls had been crushed with a blunt object, inconsistent with a fall from a height, and that several of their limbs were fractured. The bodies were hurriedly buried following the post-mortem, but as a result of pressure from Kenyan and international human rights groups they were exhumed, and an inquiry into their deaths was initiated. Two other inmates had attempted to escape with the six. One was injured during the escape attempt and was subsequently arrested and severely beaten by police during interrogation, the other prisoner who managed to escape was shot dead by police during a raid on a town bar.

Prison population<sup>59</sup>

STATION	ACTUAL CAPACITY AS AT 29/10/04	RECOMMENDED CAPACITY PER 40 SQ FT.
<b>NAIROBI AREA</b>		
Nairobi Remand		
Allocation	3751	2230
Nairobi West	306	121
Langata Women	627	216
Kamiti Main	4180	929
Kamiti Medium	900	386
Kamiti YCTC	93	268
Nairobi S S	675	137
Jamhuri S S	146	42
<b>Total</b>	<b>10578</b>	<b>4329</b>

59 Sourced from Legal Resources Foundation, a local NGO that has a prisons programme.

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STATION	ACTUAL CAPACITY AS AT 29/10/04	RECOMMENDED CAPACITY PER 40 SQ FT.
<b>CENTRAL PROVINCE</b>		
Nyeri Main	1513	676
Nyeri Medium	184	90
Nyeri Women	71	43
Thompson Falls	669	107
Muranga	434	150
Maranjau	254	86
Mwea	523	174
Kerugoya	416	68
Thika Main	775	121
Thika Women	67	21
Kiambu	220	63
Ruiru	484	120
<b>Total</b>	<b>5610</b>	<b>1719</b>
<b>NORTH EASTERN PROVINCE</b>		
Garissa	297	110
Mandera	90	70
Wajir	88	108
<b>Total</b>	<b>475</b>	<b>288</b>
<b>NYANZA PROVINCE</b>		
Kisumu Main	151	645
Kisumu Women	95	40
Kisumu Annexe	391	85
Kisii Main	1184	162
Homa Bay	429	162
Kibos Main	807	364
Kibos Annexe	341	120
Kisii Women	133	79
Siaya	222	30
Migori	474	175
<b>Total</b>	<b>5625</b>	<b>1862</b>

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<b>WESTERN PROVINCE</b>		
Kakamega Main	1359	132
Kakamega Women	216	48
Bungoma	1081	90
Shikusa S S	823	121
Busia	489	97
Shikusa B I	397	226
<b>Total</b>	<b>4365</b>	<b>714</b>
<b>COAST PROVINCE</b>		
Shimo Main	2094	1032
Shimo Women	128	131
Shimo Annexe	465	360
Kwale	256	12
Kilifi	309	60
Malindi	643	382
Hola	43	30
Manyani	635	262
Wundanyi	116	32
Voi	115	29
Hindi	159	142
Taveta	104	26
Shimo B I	302	171
Kingorani	29	40
<b>Total</b>	<b>5398</b>	<b>2710</b>
<b>RIFT VALLEY PROVINCE</b>		
Naivasha Main	1866	952
Naivasha Annexe	401	198
Nakuru Main	1973	259
Nakuru Women	188	76
Eldoret Main	1659	447
Eldoret Women	124	51
Kitale Main	1010	437
Kitale Annexe	140	52
Kitale Remand	226	93

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Kitale Women	68	22
Ngeria	166	105
Kapsabet	354	170
Kapenguria	256	204
Lodwar	257	201
Kericho Main	571	92
Kericho Annexe	222	150
Kericho Women	73	52
Athi River	532	160
Maralal	178	48
Rumurutu	353	100
Kajiado	102	34
Nanyuki	281	72
Narok	371	54
Kabarnet	164	40
Eldama Ravine	64	14
Bomet	130	17
Tambach	93	86
<b>Total</b>	<b>11826</b>	<b>4168</b>

<b>PROVINCE</b>	<b>ACTUAL CAPACITY AS AT 29/10/04</b>	<b>RECOMMENDED CAPACITY PER 40 SQ FT.</b>
NAIROBI AREA	1078	4329
CENTRAL PROVINCE	5610	1719
EASTERN PROVINCE	4083	1078
NORTH EASTERN PROVINCE	475	288
COAST PROVINCE	398	2710
NYANZA PROVINCE	5625	1862
WESTERN PROVINCE	4365	714
RIFT VALLEY PROVINCE	11826	4168
<b>TOTAL</b>	<b>47960</b>	<b>16868</b>

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Prisoners population as at 29/10/04

CONVICTED PRISONERS	28673
UNCONVICTED PRISONERS (REMANDS)	19287
TOTAL	47960

Staff establishment as at 29/10/04

MALE UNIFORMED STAFF	12,778
FEMALE UNIFORMED STAFF	1841
TOTAL	14,619

There have been improvements since the vice president launched a campaign on prison reforms. Food and clothing are the most notable ones. Willing prisoners are able to pursue their studies and sit for national examination. Prisoners are also informed of what is happening in the society via access to televisions and radios.

## 6.2. Deaths in custody<sup>60</sup>

There are frequent occurrences where detainees die in custody. Although there is no comprehensive documentation in respect of this, the piecemeal documentation available from Human Rights NGOs points to the existence of cases where detainees die in custody. The most recent one in September 2004, being that of Meru.

In 1999 at least 10 prisoners were reported to have been killed in prison and 6 on death row were killed by torture at the King'ong'o Prison, Nyeri.

In the King'ong'o prison case, prisoners on death row attempted to escape from prison but their escape bid was foiled by the prison wardens who proceeded to torture and bludgeon them to death. The causes of death were first explained as suicide and falls from the high prison walls but a post-mortem conducted revealed that the prisoners were tortured to death. 8 prison wardens were later charged in court with

60 Cases sourced from organizations that document torture violations, IMLU, KHRC and LFAT.

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murder and the trial is on-going. This case points to another of the issues that show the government's lack of commitment in addressing torture. While the attorney general's office charged the wardens with murder admitting they committed an offence in torturing the suspects, in the civil suit for compensation, the attorney general denied the allegations of torture. The government's defence states that the prisoners were escapees and authors of their own misfortune. In view of the criminal suits instituted by the same government it should willingly compensate the victims of torture or their family.

A death incident is reported of one Ephantus Njagi Nyuthi who suffered a fractured skull and had, according to witnesses, extensive injuries in his genitals. Fortunately the two officers suspected of torturing him were arrested, interdicted and are awaiting trial.

In another incident, Peter Muraya was arrested at an illegal brew spot by a chief and taken to Buru Buru police station. His mother had been visiting him in custody and she always inquired why her son was not being charged. On a particular day she reported to the police station and asked to see her son. A taxi was called for her and she was taken to Kenyatta National Hospital. She says there was a bullet hole in his neck but police contend that Muraya committed suicide in the police cell using a piece of jagged glass. The post mortem report agreed with the police report. This is a clear indication of coalition between government officials and the police.

The Provincial Administration<sup>61</sup> is another notorious State agency as far as torture is concerned. The direct culprits are usually chiefs, their assistants and administration policemen who man the chief's camps. Some District Officers have also been reported to engage in acts of torture. Victims are reported to have died while held in chief's camps as a result of torture. The higher levels of the provincial administration are implicated for the reason that they take no action to punish their juniors when allegations of torture are leveled against them. Below are some incidents of death in custody.

On January 15, 2004, a police officer from the Mukuruwei-ini police station allegedly beat to death Philip Machau after he was caught stealing a piece of second-hand clothing. According to press reports, the police officer severely beat Machau despite onlookers' protests. Machau died at the police station that night. An inquest into the case by the Chief Magistrate in Nairobi was ongoing at year's end.

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On March 23, 2004, Philip Kipkoech Kirui, a brother of a nominated local councillor, died after being transferred from prison in Londiani to the local hospital for treatment; allegedly he had been tortured. 5 police officers based at the Londiani Police Station, Dickson Liyayi, Peter Chelanga, Isaac Walimbwa, Robert Ombui Onyancha, and Boniface Onyango, were charged with Kirui's killing after a march was held to protest the alleged abuse of Kirui in Londiani. The case was pending in the courts at year's end.

On March 26, 2004, a police officer in Meru reportedly killed Wallace Kiogora. The officer was arrested for Kiogora's murder on March 29, 2004.

On April 30, 2004, there were reports that Sophia Nyaguthii Mbogo, a pregnant 21-year-old woman, died in custody at the Kagio Police Post reportedly after a policeman beat her. No arrests were made in the case, though an inquest was held before the Principal Magistrate's Court at Kerugoya.

#### 61 PROVINCIAL ADMINISTRATION

Kenya is divided into eight provinces. The principal representative of the central government in a province is the Provincial Commissioner. A province is divided into districts and for each district there is a District Commissioner. The District Commissioner has the assistance of the District officer who is assigned to posts in the Divisions. The divisions are finally divided into Locations and Sub-locations that are manned by a Chief and Sub-chief respectively. The Provincial Administration is in charge of the maintenance of law and order.

It is the duty of every Chief and Assistant chief to maintain order in the area in respect of which he is appointed and for such purpose he shall have and exercise the jurisdiction and powers conferred on him by the Chiefs' Act (Cap128) over persons residing within his area. **(Section 6 of the Chiefs' Act)** The Chief may employ a person to assist him in carrying out the duties imposed upon him by the Chiefs' Act. **(Section 7 of the Chiefs' Act)** The chief or the Assistant chief may employ an Administration Officer to assist him in carrying out his duties. **Section 8 of the Administration Police Act (Cap 85)** provides for the duties of the administration police namely; when called upon by any chief or sub-chief to assist him in the exercise of his lawful duties, obey and execute promptly all orders and warrants lawfully issued to him by any competent authority and preservation of public peace, prevent the commission of offences and apprehend all persons in respect of whom he holds a valid warrant of arrest. The District Commissioner of any district within which a Minister has by notice in gazette approved the appointments appoints the Administration Police. **(Section 4 of the Administration Police Act (Cap 85 of the Laws of Kenya).**

Sometimes deaths in custody occur as a result of police negligence.

In Thika Police Station, 5 people died in the police cells when a fight broke out between the inmates who were overcrowded. Policemen on duty did not come in time to restore calm. The police officers on duty that night were charged in court.

In Ogembo Town, Gucha District in June 2003, 2 inmates died at the police station at 12 a.m. after fellow prisoners sodomised them. The police failed to prevent the murders. The post mortem report showed that the suspects died of suffocation in a room after collapsing as a result of the sodomy. A policeman who was in charge of the police cell and 7 remand prisoners were charged with the murder of the 2 suspects.

## 7. Complaints investigation, punishment and reparation (Article 2 §3 ICCPR)

### 7.1 Complaints investigation and punishment

The legal basis for complaints investigation and punishment are found in the Police Act<sup>62</sup>, whose Part IV provides for Discipline.<sup>63</sup>

In practice,<sup>64</sup> some official efforts have been made to investigate and punish police abuses.

In August 1999, police killed 5 Muslim worshipers in the Anas Bin Malik Mosque in Chai village, near Mombasa. Within 1 month of the killing, the government charged 2 police officers, Julius Mugambi M'nabere and Stephan Musau Kilonzo, but they were released on bail pending trial at year's end.

In November 1999, a trial began against Justus Munyao Kovu and Gabriel Muendo, 2 Makueni police officers accused of killing Mwendu Kiema during detention in July 1999.

On September 6, 1999, Godwin Mukhwana, a member of the Presidential Escort, was convicted of manslaughter and sentenced to 8



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years in prison for killing Jamal Abedi and Henry Musyoka, the driver and tout of a passenger van, in December 1998.

In December 1998, Ephantus Njagi Nguthi died from injuries that he reportedly received while in custody in Matanya, Laikipia district. Police reportedly had beaten his testicles. 2 police officers, Christopher Mugeru and Muiruri (who died before year's end), were arrested in the case.

62 Cap 84 of the Laws of Kenya.

63 **Section 34:** any gazetted officer or inspector may arrest without warrant, or order the arrest without warrant of any police officer (not being a police officer of a higher rank) who is accused of any offence against discipline, and any police officer may, on receipt of any such orders, apprehend such police officer without a warrant, and shall forthwith bring him before a gazetted police officer or an inspector, who may confine such police officer in any building set apart as a guard room or cell.

**Section 38:** every fine imposed for an offence against discipline shall be recovered by one or more deductions from the gross monthly salary payable to the officer on whom the fine is imposed, the amount of each deduction being in the discretion of the officer imposing the fine. Provided that no deduction, nor the aggregate of the deductions if more than one fine is outstanding at the same time, shall exceed one half of the gross salary payable in any month.

**Section 40(2):** any police officer who contravenes these sections shall be liable to be dismissed from the force and to forfeit all rights to any pension or gratuity.

**Section 44:** where any police has, in accordance with force standing orders or any other written law, been interdicted from duty, he shall not by reason of such interdiction cease to be a police officer. Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance, but he shall continue to be subject to the same discipline and penalties, and to the same authority as if he has not been interdicted.

**Section 62:** nothing in this act shall exempt any police officer from being proceeded against under the provisions of any other law in force in respect of any act or omission constituting an offence under any provisions of this act. Provided that no police officer shall be punished twice for the same offence.

**Section 64:** every police officer shall be subject to force standing orders and to the provisions of the code of regulations for the time being in force, so far as the same are not inconsistent with the provisions of this act or of any regulations or standing orders made there under.

64 All the cases cited in this section are sourced from the following organizations that register and receive torture complaints:

IMLU (Independent Medical Legal Unit)

LFAT (Litigation Fund Against Torture)

KHRC (Kenya Human Rights Commission).

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3 Flying Squad officers, Isaiah Muoki Musyoka, Kenneth Kaunda Obiero, and Andrew Kimungetich Koros were found guilty of manslaughter and sentenced to 15 years imprisonment for the July 1998 killing of James Odhiambo.

On June 29, 1999, the High Court sentenced police constable Felix Nthiwa Munyao to life in prison for beating his wife to death in July 1998. Munyao beat his wife so severely that she went into a coma and died 5 months later. The case was publicized widely because the police refused to charge Munyao with a crime until his wife had died.

On June 7, 1999, police officers Jackson Parsalach and Austine Kabarayo were found guilty of manslaughter and sentenced to 2,5 years imprisonment for the death in custody of 60-year-old Job Cherutich; police constables Michael Chebon Chelimo and Chebon were acquitted.

In December 1999, an inquest was completed into the January 1997 death of Catholic lay brother Larry Timmons in Njoro, which concluded that a police officer should be prosecuted for the killing; the status of the prosecution was not known at year's end.

In May 1999, a court in Nairobi sentenced to death police constable Martin Kimeu for the November 1995 murder of a petty theft suspect, Kennedy Omondi Omolo, whom he shot and killed while in custody.

However, there were no effective police investigations into many cases of killings by members of the security forces. The authorities sometimes attribute the absence of an investigation into an alleged extra-judicial killing to the failure of citizens to file official complaints. But the form required for filing complaints is available only at police stations, which often lack the forms or are not forthcoming in providing them. Besides, there is considerable public skepticism of a process that assigns the investigation of police abuse to the police themselves.

There were no reported investigations into the following 1999 cases during the year:

The September killing of Mwanzia Mutuku, who was killed when police opened fire on the night club below his apartment; the September killings of 2 armed men at a bank in Nairobi; the July killings of Peter Kariuki, Jacob Anaseti, and Ramadhani Barula while

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in police custody; the June killings of Victor Polo and Vincent Odhiambo, 2 suspected robbers; the April killing of Ahluwalia Subir Ahluwalia; the February killing of Elijah Kimani Mwaura, who allegedly was tortured and beaten to death while in police custody; the March killing of Ibrahim Kullow Hussein; the February killing of David Muragi, a grammar school student, who died after a night in police custody where he allegedly was beaten; and the January killing of 2 rice farmers in Mwea.

There were no reported investigations into the following 1998 cases during the year:

The police shooting death of Simon Githinji Kigera, also a policeman, in Nairobi, police maintain they shot in self defense; the killing of Vincent Nyumba Kiema due to a police beating; the killing of Sheik Mohammad Yahyah, who was tortured by army personnel; the killing of Muthoka Mukele after he apparently was beaten in police custody; and the killing of Alfred Kang'ethe after he was beaten by the Uthiru police.

Several 1998 cases of extra-judicial killings remained unresolved at year's end.

Police continued to investigate the June 1998 shooting death of Pastor Simeon Kiti Mwangoma (or Mwangalee) by Kilifi police, but took no further action during the year; police maintain Mwangoma was the leader of a notorious gang. Army officer Aden Almi and police officers Faneis Malaba Mbiya and Kennedy Bitange faced charges of murder in connection with the death in police custody in Garissa of Ali Hussein Ali; the High Court in Nairobi was scheduled to hear the case in March 2001. Kitui authorities charged assistant chief Simeon Mwanginda and 4 other persons with inciting or participating in the 1998 mob killing of Kamwila Kamungu. 2 persons were sentenced to 3 years' imprisonment; Mwanginda and 2 other persons were acquitted. Another assistant chief, Josephine Matalu, was acquitted of instigating the 1998 beating to death of Kiema Mwisuve. The trial of the suspects in the 1998 murder of Seth Sendashonga was ongoing at year's end. A hearing before the Senior Resident Magistrate in Kitale in the 1997 deaths in police custody of Moses Macharia Gicheru and Lomurodo Amodoi was scheduled for early 2001.

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A major problem of the reporting and charging in court is the fact that consent to prosecute and institute charges against torture perpetrators must be obtained from the attorney general. This is usually either not forthcoming or takes too long.

Further since the investigations and prosecution are done by the police, the process is not in public domain. Information around such issues is usually concealed and not availed to the victims and to the populace at large. It is only when the suspects are arraigned in court that the case is given media coverage.

Where the government promises to conduct an investigation, it takes too long and in the meantime, the errant officers continue in office. If the case is very severe, then the said officer can be interdicted but not taken to court while if the pressure is mild the errant officer is only transferred to a different and far off part of the country. Any police officer suspected of illegal use of firearms should be suspended pending investigation. An independent body should carry out the task of investigation so that it can be more impartial and objective. The results of such investigation should be released and appropriate actions taken. This will ensure more transparency in the operation of the police force whose activities in the past have been suspicious. Even where perpetrators of torture are known and identified by the victims or their relatives the government is slow to act, no action is taken against any such errant officers.

At times as seen from several cases, the government may institute proceedings against officers alleged to have tortured any persons.

The problem is that even in the severest form of torture perpetrated the said officers are only charged with the offence of assault and battery carrying a maximum of five years imprisonment sentence. This is rather light compared to the fact that some of the injuries they inflict last a lifetime while some of the victims die at the hands of the torturers.

For perpetrators of torture within the provincial administration, they are charged with abuse of office.

Isaac Muraya Gakuru, a 61-year-old man who was on 17<sup>th</sup> November 2003 arrested by an assistant chief at Muira village, Kamuchege Sub-Location on allegation of stealing firewood. The assistant chief allegedly knocked him down with a piece of wood breaking his left thigh. The

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said old man was admitted at Kiambu District Hospital. The said chief was charged at Githunguri Law Courts on 24<sup>th</sup> November 2003 for abuse of office and is out on bail.

In the case of women, the police can be charged with rape or indecent assault if their behaviour is such.

In the case of Betty Mukami the 2 officers are facing rape charges in Kitale.

Sometimes investigations are not done properly leading to acquittals of officers.

Just recently police, alleged to have tortured 3 suspects charged with the death of former university don, Dr. Chrispin Odhiambo Mbai, were cleared of assault charges. A Nairobi court acquitted former policemen, John Kariuki Njagi, Samwel Kimtai, Stephen Ndegwa, Bernard Kaloki, Boaz Obeto and John Kiptarus Chemweno. They were accused of assaulting the suspects Collins Ketore, Ramadhan Karume Otieno and Moses Gitogo on diverse dates between September 15 and 30. The suspects claimed that the police tortured them and forced them to implicate some individuals in the matter. This was a high profile case receiving media coverage thus the police had to prosecute the police officers even though the evidence was not sufficient to lead to a conviction. The point in suing them may have been nothing but a public relations gimmick that resulted into an acquittal, the only punishment the officers suffered was interdiction from work. In many other low profile cases without media coverage, the police do not even bother to prosecute the torturers.

To further illustrate the inconsistency of government in acting on torture suspects is the case of Stephen Wainaina.

He was arrested by the assistant chief Kihumbuini Location, Thika on allegation of stealing a goat on 30<sup>th</sup> September 2001. He was tied with a rope and led down a river valley and tied to a tree. He was beaten with a piece of wood till he lost consciousness. He lapsed into a coma and later succumbed to injuries. The assistant chief was arrested and released without a condition after four days and the matter seemed to end there.

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In the case of torture victim Isaac Mwaniki Gitari, 2 officers were charged and released under mysterious circumstances. There is no success for torture victims who manage to have police officers taken to court as they are sometimes released as happened in the case of Said Mahine Mohamud. The seventeen-year-old boy was killed on 31<sup>st</sup> December 2001. 2 officers were arrested on 23<sup>rd</sup> January 2003 and arraigned in court before Chief Magistrate Wanjiru Karanja at Kibera Law Courts. They were discharged and the family is still wondering how this came and on what grounds the suspects were released while there was sufficient evidence from eyewitnesses that the police had shot at the vehicle carrying Mohammad and his friends for no tangible reason. The police report on investigation had even indicated he had been a victim of accidental police shooting. His family should have been compensated. The family home was also broken into by masked gangsters who threatened the family not to pursue the matter further.

Sometimes the government does make concerted efforts to bring torture perpetrators to book. This chance action poses a problem. Action should be taken in all torture cases and all perpetrators should be rounded up and arraigned in court.

In September 1999, a senior Administration Police Officer and a constable had been arrested following the torture to death of a farmer in Tarakwa area, Uasin Gishu District. Security officers in the District intensified a manhunt for 4 other Administration Police Officers alleged to have been involved in the incident. The arrests followed a complaint by the Center for Human Rights and Democracy.

Another positive aspect in recent times as far as governmental structure is concerned is that orders from above are not a defence any more. Every government officer is individually responsible. This should be applied in torture cases, all officers, senior and junior, involved in torturing a suspect should be punished together. In the case of deaths in custody say at a police station, the police officers on duty together with the officer commanding the station should all be brought to account

## 7.2. Reparation

There exists no clearly established or specific mode of reparation in Kenya for torture victims but there are different ways of asking for compensation. The Kenya National Commission on Human Rights does have powers to receive complaints and make orders for compensation but there have been no successful compensation cases emanating from it reported so far. Largely most victims use the civil process based on the torts of malicious prosecution or false imprisonment. Hence, they do not receive direct compensation for torture injuries and attendant medical costs.

The way the State's attorney general chambers handle compensation cases is problematic. Hardly does the department agree to settle out of court even when the torture perpetrators have been charged in court or interdicted, a clear admission of their misconduct. Failing to settle out of court means that the suit delays for long due to the backlog of cases in Kenyan courts. It also unnecessarily lengthens the trial process. One of the defences raised by the attorney general is that there was reasonable and probable cause to arrest the suspect and torture victim. The handling of the cases does indicate that the government is only paying lip service to handling and eradication of torture but is not really committed to addressing the same.

There are very few cases documented in which the government has paid or committed to paying compensation.

One such case is that of Wafula Buke who was tortured for political reasons. In the suit that lasted for seven years he was awarded around Kshs. 500,000 as damages for illegal detention among other injustices.

The government also paid close to Kshs. 9 million to Wallace Gichere, a journalist and torture victim in an out of court settlement preceded by his hunger strike outside government offices.

Wanyiri Kihoro, a former detainee and torture victim, was awarded Kshs. 400,000 by the court but he has not taken his money for the reason that he wanted cases for other detainees and torture victims addressed too.<sup>65</sup>

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65 Information sourced from Litigation Fund Against Torture Organization.

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In *Felix Njage Marete case*<sup>66</sup>, the applicant was awarded damages by court for inhuman and degrading treatment. Felix, a government official, appealed against his purported dismissal but he was suspended. He was ordered not to leave his duty station without permission neither was he to receive a salary during suspension. From January 1983 to 1985 he was without work and pay. He was awarded damages including those for servitude. This is the spirit Kenyan courts ought to have continued with noting that this case was in the eighties.

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66 High Court Miscellaneous Civil Case No. 668 of 1986.



**PART II**

**STATE VIOLENCE AGAINST WOMEN  
IN KENYA<sup>67</sup>**

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67 A team of COVAW consisting of staff members and consultants prepared this report. Information was collected using a variety of methods. Firstly, the team reviewed key events influencing and contributing to violation of women's rights in the last one-year. Secondly, the team reviewed daily newspapers, weekly periodicals and reports from various women's rights and human rights organisations. In addition, current Kenya Government policy documents were reviewed to understand and reflect current policy commitments to protect women from ill-treatment and violations against their human rights.



## 1. General Background

Despite the recent political changes in the country ushered in by new political leadership, women in Kenya continue to suffer various forms of violence. In the absence of the much-awaited new Constitution, Kenyan women have no constitutional guarantees to better and improved status or institutional safeguards for their fundamental human rights. The changes achieved through the 1997 Inter Parliamentary Party Group (IPPG) reforms was to explicitly outlaw sex as a basis of discrimination, through amendment of section 82(3) of the Constitution. However this was not properly followed through with review of subsidiary legislation. Furthermore, section 82(4) of the Constitution creates an exception that allows discrimination in matters of personal law.

The adoption of the new Constitution is subject to further debate and amendment by Parliament as proposed by the Consensus Bill 2004 which came into law in January 2005.

International agreements, such as the Convention on the Elimination of All Forms of Discrimination against Women, are not directly applicable in Kenya. The obligations have to be transformed into domestic law. Some important obligations such as the prohibition of gender based violence remain largely unregulated in Kenyan law.

United Nations Conventions are recognized as a source of law at two levels. For example the Children's Rights Convention has been domesticated into National law<sup>68</sup>. However the same has not occurred for CEDAW.

There are increased numbers of reported cases of violence against women in 2004. However, the number of successfully investigated and prosecuted cases is not available. This is an area of ongoing research. The increased numbers of reported cases may be attributed to the fact that increased political democratic space and the government's reform in governance, law and public order sector initiatives have given women more confidence and hope in reporting cases of violence. For example the Kenya Police Annual Crime statistics 2000-2004 show an increase of reported rape cases from 2005 cases in the year 2002 to 2308 cases in the year 2003. However, the numbers of reported cases reduced

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68 The Children Act, Act No. 8 of 2001.

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to 2185 at the end of 2004. Whether this decline is as a result of improved and better policing is a matter of more inquiry through research and analysis.<sup>69</sup>

The 2003 Kenya Demographic and Health Survey notes that about 49% of Kenyan women report experiencing violence and one in four have experienced violence in the past 12 months<sup>70</sup>. Furthermore, the report highlights through in-depth research and analysis that women in urban and rural areas and across wealth and educational levels experience similar patterns of violence. However there are significant differences by province. This has been attributed to poverty and high incidences of cultural and traditional practices, with 73% of women in Western Province report experiencing violence compared with 30% in Coast province. 40% of married women report having experienced marital violence and 16% have experienced sexual violence, according to the recently launched report on inequalities prepared by the Society for International Development: *"Pulling Apart: Facts and Figures on inequality in Kenya."* Nyanza Province has the highest levels of poverty and this contributes to high levels of gender-based violence in this part of the country. The Minister for Gender and Sports announced at the launching of the National Gender Commission in November 2004 that Kenya government hopes to launch an aggressive campaign to sensitise women on their rights to break the silence that surrounds violence in homes. The National Commission on Gender and Development established under Act of Parliament no 13 of 2003 will coordinate, implement and facilitate gender mainstreaming in national development and advise the government on all gender issues.

The incidence of domestic violence in Kenya presents some particular concerns given the high rate of HIV/AIDS infection in the country. Kenyan women bear a disproportionate burden in terms of infection levels, care and access to treatment. Gender dimensions of HIV and AIDS among Kenyan women demonstrate that unequal relations impact on women's ability to negotiate safe sex.<sup>71</sup> Cultural practises still in practise in Kenya such as female circumcision, widow inheritance not only violate women's rights but also prevent efforts to fight the spread of HIV/AIDS. There is growing evidence that a

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69 Kenya Police Annual Crime Statistic 2000-2004 (Unpublished report).

70 Kenya Demographic and Health Survey, Key Findings (2003) Kenya Bureau of Statistics and Ministry of Health and the National Council for Population and Development, Nairobi.

71 COVAW Advocacy document on HIV/AIDS Bill (2004), Coalition on Violence Against Women, Kenya.

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large share of new cases of HIV infection is due to gender-based violence in homes, schools and workplace and other social spheres. In a nationwide study of women aged 12-24 years, 25% said they lost their virginity because of force.<sup>72</sup> This was confirmed by a more recent study looking at the “*Experience of Sexual Coercion among Young people in Kenya*,” by Annabel S. Erulkar in 2004. The study notes that among sexually experienced respondents, 21% of females and 11% of males had experienced sex under coercive conditions. The study found that for young women, intimate partners-boyfriends and husbands were the most common perpetrators of sexual coercion, followed by acquaintances. Of the coerced young women who were married, 45% had been coerced by their husbands, 33% by someone else and 22% by both their husband and someone else. The study further notes that the risk of HIV/AIDS infection to many women comes from a regular partner, a risk heightened where there is unequal relationship between women and men, preventing open discussion about safe sex.

The challenge of ensuring adequate protection for women and protecting them from ill-treatment and human rights violations remains a challenge for the State and civil society organisations in Kenya.

## 2. Legal and institutional issues

### 2.1 Rape

The crime of rape illustrates some of the most significant inequalities which women face in the criminal justice system in Kenya. Section 139 of the Penal Code (Cap.63) defines rape as follows:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.”

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72 AIDS in Kenya (2001) (Unpublished report quoted in the Office of the President (2002) Mainstreaming Gender in the Kenya National HIV/AIDS strategic Plan 2000-2005, page 2.

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According to a local writer, Cyrus Ombati, rape, along with murder and robbery, although shown to be officially on the decline in the country as a whole, in Nairobi, trends show the exact opposite.<sup>73</sup> Kenya Police state that 13 rape cases were reported in September 2004 followed by 57 in the following month. This is a four-fold increase. In November 2004, the number had shot up to over 60.<sup>74</sup> While some critics believe that the increase is a reflection of the country's socio-economic situation, women's rights activists are pointing to poor policing strategies that neglect protecting women from violence. The Kenya Police recently set up a Spider squad to specially deal with rapists and carjackers. The squad has recorded impressive successes in the short time it has been put to work. The Spider squad was set up in November 2004 and it is based in Nairobi.

Specially trained police officers respond to gender violence cases at most Police stations however no independent police unit exists to investigate allegations of rape against police officers.

Difficulties encountered by women in accessing justice after rape incidents largely revolve around proving the offence. Corroboration is important though not mandatory in cases of rape as provided in the Evidence Act. As a matter of practice, the judicial attitude has been to subject rape victims' evidence to strict rules of evidence. The general rule is that it is risky to convict on the uncorroborated evidence of the victim. Therefore the judicial officers require strict collaboration of events. This leads to injustice, as it is a fact that rape offences are committed out of the public eye.

Moreover, the Medical Examination Report (P3) has its problems. On September 14, 2004, women's rights activists presented a memorandum to the Minister for Internal Security. Their demand was that the P3 form is not always available. Furthermore the onus on the victim to have the forms filled in by medical officers is cumbersome, retrogressive and ineffective and deters justice either inadvertently or in many cases deliberately. The human rights lobby is demanding that more police doctors and hospitals be gazetted to fill the P3 forms. This, they argue would encourage more women to seek justice.

The trial process in rape cases amounts to a travesty of justice since the victim is forced to undergo what has been referred to as another rape ordeal. The

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73 Cyrus Ombati, *Sting of a Spider* Daily Nation, December 10th 2004, page 4.

74 Country wide, 290 rape cases were reported to Police in September, compared with 258 in October.

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reporting process is not any better, and this has been attributed to insensitive law enforcement officers. The observations of Amnesty International in their report entitled *Kenya: RAPE – The Invisible Crime* is that “Rape is torture when the state has failed<sup>75</sup> in its responsibilities to protect, investigate and provide redress to women victims.” This report illustrates through a review of cases, the State needs to do a lot more to protect women from rape.

The law carries penalties of up to life imprisonment for rape sections dealing with incest, although actual sentences are usually no more than 10 years. Ms. Ann Gathumbi, coordinator of the COVAW Kenya concurs: “In most cases, there are no minimum sentences. The penal code for example only talks about a maximum life sentence for a rapist. It is therefore at the discretion of a judge or magistrate to hand down a minimum sentence. Consequently, some offenders get away with very light sentences”.<sup>76</sup>

The rate of prosecution and completed cases remains low because of cultural inhibitions against publicity discussing issues of sex, fear for retribution, slow and inefficient criminal justice system and unavailability of doctors who otherwise might provide the necessary evidence of conviction.

Under the current legal instruments and practice, married Kenyan women have no guarantee of protection from rape, because marriage is considered as blanket consent to intercourse. There is no law specifically prohibiting spousal rape. This is despite the availability of several Parliamentary Bills pending enactment into law. For example the Domestic Violence and Family Bill drafted in 2001 makes provision for protection from domestic violence. This progressive legislation seeks to address additional violations affecting women such as property rights and access to resources in case of breakdown of the marriage.

### 2.2 Incest

On the matter of incest, section 166 and 167 of Penal Code define incest and prescribes punishment as imprisonment for five years. The offence is defined as: “having carnal knowledge of a female person with knowledge that she is the accused person’s granddaughter, daughter, sister or mother. If the female

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75 Amnesty International (2002) Kenya: Rape the Invisible crime [www.amnesty.org](http://www.amnesty.org)

76 Zachary Ochieng, “Kenya – Relegated to second class citizens”, [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_812.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_812.html)

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person is under the age of thirteen years, the punishment is imprisonment for life.” The act provides that it is immaterial that there is consent of the female person.

Reported cases in the media indicate a steady rise in reported incest cases. However a large number of these cases do not get prosecuted and are settled out of court due to strong traditional pressure to protect the family name, lack of knowledge on basic rights, intimidation and lack of empowerment among victims and women to seek justice. The law enforcement agencies are also lax and inefficient in the collection of evidence and preparation of cases leading to successful prosecution.

### 2.3 Assault

Section 250 of the Penal Code provides that:

“Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in (the) Penal Code, is liable to imprisonment for one year”.

Section 251 provides for penalties for assault occasioning actual bodily harm for which the punishment is imprisonment for five years, with or without corporal punishment. Cases of wife battery are supposed to be prosecuted under these provisions. However law enforcement officers, principally the investigation, prosecution and judicial officers, treat domestic assaults and battery as “*private affairs*.” It has at times taken the intervention of the women’s rights organisation and the public to lobbying for the culprits to be brought to book.

Gender bias in the civil justice process is mostly visible in customary law matters and in areas of succession, child custody, marriage and matrimonial property. Dual legal practice is common in post colonial Africa, especially in ex-British colonies. The Constitution permits the use of customary law matters of personal law, and this where the duality comes in practice. Feminist activists and scholars point out that this practice leads to violations against women in personal law matters which are central to women’s personal empowerment and autonomy. Many women suffer torture and abuse of different forms silently without knowing that there is legal recourse available for them. Despite the presence of several women’s organisations offering legal services, there is little awareness about the legal provisions and procedures to report cases of violence. Moreover, even when women do report, the response



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of law enforcement agencies is at most discouraging and inept leading to a denial of justice.

There are several reasons for this situation. Kenya is a patriarchal society. Male control and interests are reflected and manifested in all the law enforcement agencies. Not only are there fewer women officers serving in these institutions, but most of the judicial and police officers have been socialized within these discriminatory cultures. Police officers have turned women away on several occasions when they try to report sexual and domestic violence committed against them. The policemen either ridicule the women and turn them away or ask for bribes in order to deal with their cases. The situation is even worse if the violator is a police officer. It means that the woman cannot get justice because the policeman's colleagues will not arrest him. Policemen have also been accused of violating women's rights while women are in their custody. There are several reported cases in the media.

A recent case was reported in Makueni District, Kilome Police Station. In November 2004 two women were arrested and held hostage by two police officers who tortured and raped them. The officers were interdicted but it is not clear if they have been charged with the offence.

A Senior Deputy Commissioner of Police, Mrs. Alice Kagunda, stated that "*Domestic violence and gender issues are yet to receive adequate attention by the police,*" and also noted that violence against women was still taken as a tradition in the society hence the failure to receive adequate police attention. She acknowledged that there have also been numerous complaints of human rights abuse against the public by the police.<sup>77</sup> The Federation of women lawyers, (FIDA Kenya) observes that between February-April 2004, 27.2% of sexual abuse cases were reported to Provincial Administrative Chief's, followed by 33.6% cases reported to family relatives and the Police respectively. Despite the important roles Chief play in the administration of justice, they often view such violence as a family affair and rarely support women's call for justice. Their lack of gender knowledge and subsequent insensitivity lead women back to their abusive family relations.

The highest court of the land, the Court of Appeal, the High court and other subordinate courts have passed rulings that are openly discriminatory of the women and reflect the subjective nature of male thought and interests. Some

77 *Daily Nation*, July 2004, FIDA Kenya and Kenya Police Launch of Gender Violence Training Manual to create awareness of Gender based violence among police officers.

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of the major constraints in the area of access to gender justice include poverty (hence limited access to court and lawyers' fees); delays (especially attributable to the backlog of cases in the court system); distance to courts and lack of courts.<sup>78</sup>

A key step in remedying the gaps and weaknesses in the law that currently makes it difficult to prosecute sexual violence and administer appropriate sentences is the passage of comprehensive legislation on sexual offences such as that contained in the Draft Sexual Offences Bill that will address the needs of survivors of sexual abuse. The Draft Sexual Offences Bill will partially address some of these needs as the issue of minimum sentences and social support services for victims of sexual violence compensation. More work is needed to strengthen the bill. The Draft Sexual Offences Bill consolidates and updates the various crimes that fall under the rubric of sexual violence and outlines a comprehensive approach to the problem. As Kathurima M'Inoti of the Kenya Law Reform Commission points out that current laws on sexual abuse date to the 1930's. Sexual offences are still classified as offences against morality, which creates the risk of de-emphasizing the seriousness of the crimes and their concomitant harmful effects on the survivor. This legislation was enacted prior to the growth and recognition of the human rights instruments, such as the Convention on the Elimination of all forms of Discrimination Against Women, committed to protecting and advancing the rights of women. The existing definition of rape should be revised to be non-gender specific and encompass the various kinds of violation that constitute rape.<sup>79</sup>

### **3. Institutional violence against women**

Institutional violence committed by agents of public administration and police were regularly reported in the daily media.

For example, The East African Standard on 25<sup>th</sup> August 2004 reported a case where an assistant chief (The Chiefs are part of the

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78 An interesting study by "Africa Rights by Lucy Hannan" reviewed this matter [www.africarights.co.uk](http://www.africarights.co.uk) and access to lawyers.

79 *Daily Nation*, Jane Onyango, December 10th 2004 *All under one Law*, page 7.

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Administrative Structure of the Executive arm of the State. They are based in sub-location and locations.) was charged with rape, at Murua village in Laikipia. The chief had carnal knowledge of Jennifer Ndingira whose husband had been arrested. Jennifer had gone to look for assistance from the chief regarding the arrest of her husband. The case is currently before the courts. Chiefs deal with a large variety of community-based disputes and cases. Most domestic violence cases in the rural areas are reported to them.

Police officers who are charged with the responsibility of policing society and providing protection have been reported in the media as violators of women's rights through acts of sexual abuse and other forms of violence and torture. Several cases reported in the media illustrate what women go through at the hands of the police.

A recent incident reported on Prime time News by the Kenya Television News Agency (KTN) in early January 2005 highlighted the plight of a 24-year-old Muslim woman who was raped by a police officer in a hotel. The woman had been arrested for not having her identification card. The police officer had asked her for a bribe of five thousand shillings before releasing her. However she did not have the money, so he took her to a hotel room and raped her after torturing her.

Two women in early November 2004 recounted their experience before two police officers that arrested them and subjected them to repeated physical violence and sexual abuse before raping one of the women.<sup>80</sup>

Police officers are also on record as down playing and trivialising cases of rape and other forms of violence that are reported to them.

One young Kenyan girl recounted her experience to the International Press Service during the just concluded sixteen days against Violence against women campaign 2004.

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80 Case occurred at Kilome Police station, Makweni District, in November 2004. The matter was highlighted in the press.

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*“I was raped 10 years ago by a person I knew very well. He was in the company of three men who all took part in raping me. The man laughed and threatened to kill me if I made any sound,”* the woman told IPS, showing off a disfigured finger that was smashed during her struggle to escape. *“I gathered strength the following day and went to the nearest police station to report. I had bruises all over my face. You cannot believe it but the officer at the counter joked that I had a good time doing it with all four men”*.<sup>81</sup>

In another case a woman wanted her husband, who is a policeman, arrested for assaulting her. His colleagues had refused to arrest him so she wrote to the Criminal Investigation Director seeking his intervention in the arrest and prosecution of her husband. This unnecessary delay and process to get justice highlights the failure and lack of support women get from the local police service.<sup>82</sup>

In another case of police brutality reported by a correspondent with the East African Standard dated 15<sup>th</sup> June 2004, relatives of a woman who died in Mtwapa police station claimed that two officers had attempted to rape her before torturing her. Akinyi’s parents alleged that the police officers went to the room and ordered other inmates to leave and were left behind with Akinyi. An autopsy performed on her indicates she had marks and injuries consistent with violence to her body, an indication that there may have been a struggle before she met her death.

Investigations and handling of allegations of rape and sexual abuse in police custody is not professionally done. As pointed out earlier, police officers have been reported as being involved in the torture and abuse of women. In some cases where the culprit is a police officer, no arrests are made. In fact the victim is usually threatened with death.<sup>83</sup>

81 This was a story picked from the International Press service website during the sixteen days of activism November 25<sup>th</sup>-December 10<sup>th</sup>, 2004. [www.ipsnews.net/africa/international](http://www.ipsnews.net/africa/international) news, November 24, 2005.

82 Daily Nation newspaper 9<sup>th</sup> April 2004, “*Wife asks CID Boss to arrest her spouse*”, by nation correspondent.

83 Daily Nation newspaper 9<sup>th</sup> April 2004, “*Wife asks CID Boss to arrest her spouse*”, by nation correspondent.

#### 4. Prisons and conditions of detention for women

There are 87 prisons in Kenya and according to the information the prison population is high. There are currently 8 Women's prisons in the country. The largest is in Nairobi. Women are kept separate from men.

Statistics released in December 2004 indicate that Kenyan Prisons hold as many as three times the number of inmates they are designed for.

The Prisons Act cap 80 of the Laws of Kenya empowers the Prisons authority to manage the affairs of Prisons. The Prisons authority use prison rules to set standards for the humane treatment of women prisoners. The rules outline the procedures and rules for ensuring women prisoners rights are respected and upheld. In women prisons both female and male staff members are presented.

NGOs have better access now than two years ago. The present leadership of the Prisons department has improved its links and networking with NGOs.

Conditions in the Kenya Women's prisons are known to be as brutal and dehumanizing as the men's prisons. According to a 2001 study conducted by Jane Mbugua, a researcher under Women Law and Development in East Africa (WILDAF Kenya) women prisoners are beaten and constantly raped by the male prison staff. Most of the victims become pregnant. Mbugua further argues that rape is an officially sanctioned form of physical and psychological torture that women are subjected to in Kenyan prisons. Therefore, it does not provoke an official response when a case is reported. There have been several cases of women getting babies while in remand which has been noted to occur when women have only been with male prisons officers.

In the Murder case Re Wagonda in 2002, one of the accused women was conceived and delivered a baby while found she was incarcerated for a long period.

In addition, women prisoners are not provided with basic necessities such as sanitary towels, access to writing materials and communication with family. To deny them these essential items further adds to suffering. Mbugua et al adds, "Expectant mothers are not exempted from the minimal diet and senseless brutality. They are forced to squat in the sun and endure savage beatings. During the body searches, sharp sticks are thrust into their vaginas and anuses to detect contraband".

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Although there have been reforms going on in the Kenyan prisons, much more needs to be done to improve the condition and to consider gender specific needs of women in the prisons. Women in Kenyan prisons suffer humiliation at the hands of the prison warders who in most cases are men and are insensitive to their special needs. Prison warders have also been accused of torturing women and raping them in prison.

Since the NARC administration took office, the government has prioritised human rights training for Law enforcement officers. The government created the Ministry of Justice and Constitutional Affairs in January 2003 to respond to the problem of access to justice by citizenry. This is articulated in the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC). The strategy identifies reforms in the Governance, Justice, Law and Order sector as one of the top priorities for action for the creation of wealth and employment. The Ministry of Justice and Constitutional Affairs is charged with the responsibility of undertaking radical legal and judicial reforms through the Governance Justice and Law and Order sector [GJLO's], aimed at creating an enabling policy and legal framework to facilitate access to justice by the poor and marginalized. Some of the projects under this broad programme include training of police officers, prisons officers and judiciary. In addition institutional structures such as the police cells and judicial offices will be remodeled and improved to ensure that women, children and other prisoners are well looked after and that their rights are not violated. No results have been registered at the time of writing the report.

The Kenya Police in particular has received assistance from civil society agencies to develop training manuals for Gender Sensitisation and women's rights training. The Federation of women lawyers FIDA Kenya has held Gender Sensitisation workshops for Police officers for the last ten years. A senior police officer Alice Kagunda was quoted in the media saying that the police force had embarked on training its officers to ensure they understand and uphold gender and human rights and promote the same at their workstations. This is now a standing course for all recruits and in service course.

The Kenya Human Rights Commission, a local non-governmental organisation has established links with the Kenya Prisons to assist not only with train-

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84 For more information see [www.khrc.org](http://www.khrc.org).

85 *Commissioner of Police announces the establishment of a Women only Police Station in Kilimani Nairobi*, Daily Nation August 2004.

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ing, but with programmes to address the problems of human rights observance by prison officers. This collaboration has been going on for the last ten years, and was a project looking at conditions in prisons.<sup>84</sup>

The Kenya Police recently announced the establishment of one Police station in Nairobi as a Gender Violence response station. This is a progressive development that has already seen an increase in reported numbers of cases.<sup>85</sup> It is currently under construction and will be ready for service in June 2005. In the meantime trained officers receive complaints and assist women.

Women's rights organizations accuse the government of dragging its feet when it comes to enacting effective legislation against abuse. Further, they blame the government for failure to accept full responsibility to end gender-based violence and allow it to occur with impunity. Even with the passing of legislation prohibiting and punishing violence against women, successful implementation of the same is yet to be done. The State has to step up its training of officers to understand the complexities of the issues surrounding violence against women.

## **5. Internal armed conflict and the situation of women**

Like most violence that occurs in the course of armed conflict, violence against women is not accidental. It is a weapon of war, a tool used to achieve military objectives such as ethnic cleansing, spreading political terror, breaking the resistance of a community, etc.

In conflict-ridden areas, murder, sexual violence, rape, unwanted pregnancies, vulnerability to sexually transmitted diseases, forced prostitution, reproductive tract infections, infection with HIV/AIDS, and psycho-social trauma are all elements of gender-based violence suffered by women at the hands of aggressors.

Many victims of gender-based violence during armed conflict are reluctant to talk about their suffering. Pressures from parties of the conflict, the government, the family or community often prevent women from reporting their

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86 Daily Nation report on 06th-20th January 2005.

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experiences. In a conflict situation violence against women is never addressed, and violators of women never get to pay for the crimes they commit.

Recent incidences reported in Northern Kenya, the north Rift and Central rift point to escalating incidents of internal conflict due to environmental and land concerns. During flight, women have been violated through rape and sexual abuse. Cases of women being abducted and kidnapped have been reported in Northern Kenya<sup>86</sup>. On 25<sup>th</sup> January, one of the Daily papers reported that women in the Pokot regions were requesting State action for rape cases committed against them by invaders.

Women bear the blunt of responsibility of managing their families while in displaced camps. They face numerous challenges in coping without basic necessities, while protecting their children and themselves from domestic violence and violence from external forces.



**PART III**

**STATE VIOLENCE AGAINST CHILDREN  
IN KENYA**



## 1. Introduction

In principle, the role of a government is to provide protection of children from torture and all other forms of violence. However, practice in Kenya shows that the absence of effective policy and institutional frameworks to facilitate the fulfilment of some of the provisions does hinder their full realization.

Despite having ratified the United Nations Convention on the Rights of the Child, the International Convention on Civil and Political Rights and its Optional Protocols and having gone a step further by passing the Children's Act of 2001, key gaps still exist in the Kenyan legislations and policies with respect to the actual provision of services to children towards safeguarding their rights and welfare.

Indeed, the reality is that torture and abuse of children's rights in general in Kenya occur in overt and covert forms. Overt forms include physical violence, sexual abuse, excessive labour and cruel, inhuman or degrading treatment or punishment especially whenever children are institutionalized. Covert forms include the failure to exercise due diligence to protect children from being violated by other actors. This especially relates to children in special circumstances (orphans, street children, etc.). It also includes discriminatory treatment accorded to children based on subjective factors such as social status that results in, for instance, arrest for status offences. Given the vulnerability of children, cases of torture against them are rarely appreciated or documented as such. Torture against children is prevalent in police stations, State-correctional institutions such as rehabilitation centres and public schools. Children are also victims of violence within family set-ups. Certain categories of children are more prone to violence than others. This includes children who come from poor families, orphans, and street children (who more often than not fall in the other categories as well). Street children are especially more vulnerable to abuse and many in State institutions have reported various forms of torture and violations of their rights including subjection to excessive labour that is not appropriate for the child's age, and severe forms of punishment.

In such cases, the challenge is whether the government acquiesces in the abuse through failure to exercise due diligence to protect such children.

## 2. Torture and other cruel, inhuman or degrading treatment or punishment towards children

### 2.1. Legal framework

#### 2.1.1. International law on children's rights

Kenya ratified the Convention on the Rights of the Child (hereinafter CRC) on 30 July 1990. In 2000, Kenya submitted its first Country Report on the implementation of the CRC to the Committee on the Rights of the Child which gave its concluding observations on November 7<sup>th</sup>, 2001.<sup>87</sup> Kenya has also signed on September 8<sup>th</sup>, 2000 the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (not yet ratified), and ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on 28<sup>th</sup> January 2002.<sup>88</sup>

Kenya has also ratified the African Charter on the Rights and Welfare of the Child and other international instruments that generally affect the rights of the child (see part I, section 2, page 10).

#### 2.1.2. National law

##### *a) The Constitution*

As already mentioned in the first part of this report, torture is outlawed by the Constitution. Chapter V, Section 74(1) of the Kenya Constitution protects

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87 State Party Report, Initial report of Kenya on the implementation of the CRC, CRC/C/3/Add.62; Concluding Observations and Comments of the Committee on the Rights of the Child: Kenya, CRC/C/15/Add.160.

88 Kenya made the following declaration during the ratification of the Optional Protocol of the CRC on the involvement of children in armed conflict: "The Government of the Republic of Kenya declares that the minimum age for the recruitment of persons into the armed forces is by law set at eighteen years. Recruitment is entirely and genuinely voluntary and is carried out with the full informed consent of the persons being recruited. There is no conscription in Kenya. The Government of the Republic of Kenya reserves the right at any time by means of a notification addressed to the Secretary-General of the United Nations, to add, amend or strengthen the present declaration. Such notifications shall take effect from the date of their receipt by the Secretary General of the United Nations."

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every person from torture and inhuman treatment. It states that: “No one shall be subjected to torture or to inhuman or degrading punishment or other treatment”.

The Draft Constitution adopted by the National Constitutional Conference is yet to be passed into law. Chapter Six of The Draft Bill of the Constitution specifically outlaws torture (section 45 (b)). The Draft Bill also specifically protects children from torture, cruel and inhuman treatment in schools and other institutions responsible for the care of children (Section 40(6) (g)). Section 74 outlaws forced confessions for purposes of evidence.

### *b) Statutes*

Acts not specific to children:

Some dispositions of the Penal Code, of the Police Act, of the Evidence Act and of the Prison’s Act criminalise torture or other forms of violence that could be committed by State agents under particular circumstances (while under police arrest and custody, in prisons, etc.). They aim to protect individuals against possible State violence (see part 1 of the report). They apply to all Kenyan citizens, including children.

Law focusing on children

#### (1) The Children Act

This is the main legislation that deals with issues concerning children. The Children Act (Chapter 586 of the Laws of Kenya) came into operation on 1<sup>st</sup> March 2002. It seeks amongst other goals, to give effect to the principles of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Children Act defines a child as any human being under the age of eighteen years. It repealed the Adoption Act (Cap 143 Laws of Kenya), The Children and Young Persons Act (Cap 141 Laws of Kenya) and the Guardianship of Infants Act (Cap 144 Laws of Kenya), which had different definitions of the child.

The Act has several comprehensive provisions that directly or indirectly relate to the protection of children against torture and other forms of violence and abuse. Part II of the Act codifies what has largely come to be referred to as the Children’s Bill of Rights. It has provisions for the rights and welfare of the child and provides safeguards thereto including designated duty bearers. The principles of the best interest of the child and non-discrimination are provided

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for in the Act. Sections that indirectly protect children against torture and other cruel, inhuman or degrading treatment or punishment include section 10 that protects the child from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. It also protects children from engaging in hostilities or armed conflict.

Section 13 protects children from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person. Section 14 protects children from 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 15 protects the child against sexual exploitation and use in prostitution. Section 16 protects children from the use of drugs and Section 18 (2) protects children from capital punishment or to life imprisonment. Comprehensive provisions are made for children in conflict with the law as provided for herein under. These include child-friendly courts and legal aid for children.

Moreover, the Act makes direct provisions that outlaw torture and other cruel, inhuman or degrading treatment or punishment against children. Section 18(1) of the Act outlaws torture and the deprivation of liberty of children. It states that: "...No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty...". It is however interesting to note that the language used is a clear departure from the Committee Against Torture language. The words "inhuman and/or degrading" are omitted. This means that even though there is an attempt to domesticate the international standards relating to torture, there is a deliberate departure from the international standard and a new less stringent standard is set by legislation.

It is clear that there are very positive and clear legislative provisions relating to all forms of violence that could be committed against children. Nonetheless, the greater challenge remains in implementing the legislation. Kenya is in a transitional state especially since the election of the new government. There is an inherited legacy of a culture of disrespect for the rule of law and human rights. Thus even though the law provides clearly and unequivocally against torture of children, the practice still differs significantly from the legislative provisions.

## (2) The Education Act

The Education Act, by Legal Notice No. 56 of 2001, was amended to outlaw provisions that regulated the administration of corporal punishment in schools. Nonetheless no express provision was made outlawing corporal punishment. One may argue that what the amendments did was merely to deregulate corporal punishment whereas in the past it was regulated.

### 2.2. The Practice

Police brutality is certainly the obvious form of violence by State agents towards children. The force used by the police in dealing with children is indeed often excessive.

Many children who go to police stations have complained of being physically violated through beatings and sometimes even rape. Police brutality is however not just limited to physical beatings and rape of children when they are at the police station. There are reported cases where children have died at the hands of trigger-happy policemen, the majority of such children being street children.

In the case of 4-year-old Ian Macharia Githinji (not himself a street child), 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-defense, eye-witness account indicated that the police shot carelessly in a crowd that was not violent and the majority of whom were children. The government has not done anything to prosecute the policemen who killed Ian.<sup>89</sup>

On the 6<sup>th</sup> of January 2004, the police shot a 13-year-old boy 6 times for stealing a cellular phone. According to eye-witness reports, he was made to sit and kneel before the police killed him.<sup>90</sup>

89 High Court, Criminal App. No 631/02.

90 Daily Nation, 7th January 2004.

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One month later, on or about 13<sup>th</sup> February 2004, the police beat up a student to death while preventing a riot in a Nakuru Secondary school.<sup>91</sup>

In the case of 17-year-old street boy Kamau, the police shot and wounded him on allegations of stealing a cellular phone. He lost sight in both eyes on account of the attack. However, instead of arresting the police and charging them with this heinous crime, the boy was arrested with 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 after a full trial. The policemen have not been charged and the government has failed to offer compensation to Kamau for the loss of his eyesight.<sup>92</sup>

A case that went on for more than a year is of a young girl who was sexually abused and had to go through the harrowing experience of going to court more than 12 times over a period of over a year. The accused was suspected of having HIV/AIDS and it would have been most prudent to give such a case a priority hearing to ensure the child is less traumatized. The accused eventually died of AIDS and the girl had to deal not only with the injustice of the abuse but also had to go through the trauma of waiting for justice for more than a year which justice unfortunately took a different twist<sup>93</sup>.

There exist other forms of violence and/or torture against children by State agents. These are mainly carried out in police custody, in the premises where children could be detained or are institutionalized; the details are provided herein below (sections 3 and 4).

### 2.3. Complaint procedures for child victims

#### 2.3.1. Description of the proceedings

A child who is a victim of torture or other cruel, inhuman or degrading treatment or punishment has the same rights as those that accrue to adults. They

91 Daily Nation, 14th February 2004.

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

93 CRADLE Case Trends Monitor.



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have a right under Penal Law to lodge a complaint of a criminal nature in law under the Penal Code and such sections include sections 250 and 251. They also have a right to file a civil suit for compensation. The Children's Act also provides for redress to the High Court for violations of any rights under Part II and torture is one of the rights included therein. More recently the Kenya National Commission of Human Rights was established. It can investigate claims of abuse of State power and torture and has far reaching powers including the ability to investigate prisons and rehabilitation centres. Unfortunately they do not have prosecutorial powers and hence they can only make recommendations to the government. Increasingly, there are many cases that are perpetrated by the Police against children and the challenge is to ensure independence especially at investigations. It would be prudent to have an independent office such as an office for an Ombudsman for children to deal with matters of violations especially by state officials. Even though the Children's Act provides a first step towards separating child victims from children in conflict with the law, a lot is yet to be done to actualise the provisions of the Act. The Act provides for legal aid for children when they are in the justice system but in reality, this is often not possible. The child rarely gets any legal, medical or psychological assistance from the government and the limited such help is by Non Governmental Organizations. However, the Children's Department does have child help numbers that are frequently advertised in the newspapers for children who are abused. The challenge though, is the capacity of the department to deal with such cases as they are understaffed and do not have any power for prosecution of offenders and often have to rely on a slow justice system to assist. Consequently most children who are abused rarely get any meaningful help from the official government channels. Some of the problems that child victims face include the following.

**2.3.2. Deficiencies***a) Poor prosecution of cases*

One of the greatest problems regards the prosecution of cases that is often done very shoddily. Adjournments for the most flimsy reasons are the order of the day. Witnesses are not bonded to attend court and many times the crucial witnesses end up not giving evidence in court. Investigation of cases involving children is also often done very poorly. In particular, in cases involving sexual abuse, it is a requirement that the child and the abuser be examined by a government doctor. This work is often done by one government doctor that

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rarely physically examines any child hence most of his reports often indicate no abuse even in cases where there was obviously abuse. This compromises cases and there is very little respite for children who have been violated.

### *b) Compromise of cases*

Many times the files disappear in court and often times in cases of defilement or sexual abuse, resurface with an acquittal. There is an urgent need to reform the filing system in courts and it would be prudent to have a separate registry for children's cases to limit incidence of compromise. The most alarming cases are cases of sexual abuse where it appears there is often a lot of compromises. In many cases witnesses are not bonded to attend court and many times files go missing. In one case of defilement in Makadara Law Courts, the prosecution failed persistently to call witnesses and eventually the file went missing. It only re-surfaced after an acquittal under section 210 of the Criminal Procedure Code. Most of the crucial witnesses had not been called. In that case, the alleged rapist instead threatened to sue the girl's family for defamation.

### *c) Failure to protect the child's dignity, worth and privacy*

The new Children Act seeks to protect children when giving evidence. Thus the court is required to hear cases relating to children in camera. However, this is not applied where a child is a witness in an adult case. This means not all children receive the same protection and many fear giving evidence in court. Also, the Kenyan court system does not take cognizance of children as a vulnerable lot that needs a lot of psycho-social support in court. Therefore a system of such support is not institutionalized. Other than the Nairobi Children's Court, in many courts the child has to face the offender and due to intimidation at times may fail to testify. There is a need to build structures that shield or protect children against witnesses. The courts should also employ other means of collecting evidence from children such as video taped or recorded evidence and the use of other methods such as anatomical dolls and close-circuit television.

### *d) Lack of psycho-social support*

Many lawyers, magistrates and other judicial officers are not trained to handle children in the justice system. Even though most magistrates are sensitive to children, many times there are misconceptions about child-psychology that lead to injustice to children.

In one case that was handled by The CRADLE, a girl who had been gang-raped twice appeared before court. She was made to face the abuser and was asked by the prosecutor and magistrate whether the abuser was her boyfriend and why it was only her being abused. The girl was only 14 which makes such questions irrelevant not only in psychology but also in law as such a child is deemed not to be capable of consenting to sexual abuse and especially twice by a gang.

In yet another case handled by The CRADLE, it was erroneously noted that a child could not have been abused since there was no evidence of struggle such as a torn cloth or bruises. This is a standard that is often erroneously applied to adults. It may be remotely justifiable for adults but it is impossible to imagine a four-year-old child having a torn dress as a result of resisting a rape attempt by a 30-year-old energetic young man.

### **3. Children in conflict with the law / Juvenile Justice system**

#### **3.1. The minimum age of criminal responsibility**

The age of criminal liability in Kenya is 8 years, save for cases of sexual abuse where a child is deemed incapable of committing a sexual offence if he is 12 years and below.

#### **3.2. Procedures**

##### **3.2.1. Description of the procedures**

In relation to child justice, there are varied procedures. There are procedures that are of an administrative nature and those of a judicial nature. The Children's Act has brought a positive advancement to cases of child justice. It establishes Children's Courts that are child-friendly and do not pay undue attention to technicalities.

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In regard to the child in conflict with the law, the principle of the best interest of the child is paramount. Section 4 (1) and (3) provides that all judicial and administrative institutions and all persons acting in the name of these institutions where they are exercising any powers conferred by the Children Act, shall treat the interest of the child as paramount. The CRC principle of respect for the child's opinion in matters affecting the child taking into account the child's evolving capacities is also codified under section (4).

The ultimate aim of the Children Act is the welfare of the child and hence any proceedings and any measures taken are corrective, rehabilitative and not punitive. The provisions seek to avoid stigmatization of children in conflict with the law and to preserve the child's worth and dignity. Thus the system in place is child friendly both in procedure, language used and goal. The main section that deals with the child in conflict with the law is Part XIII that should however be read alongside other provisions of the Act.

The Court has jurisdiction on all criminal matters regarding a child save for cases of murder and any offence where a child is charged jointly with an adult. Therefore if any other court trying an individual for a criminal offence other than murder determines within any stage of the proceedings that the person charged is a child within the meaning of the Children Act and that there are no co-accused who are adults, the court is mandated to remit the case to a Children's Court if there is one within the court's jurisdiction but has discretion to remit the case to a Children's Court if there is none within its jurisdiction. However, if the court deems it proper, based on the circumstances of the case to proceed with the case, the court has discretion to do so. It therefore appears that even though the wordings of this section are in mandatory terms in regard to remitting a case to a Children's Court where there is one, the court still has leeway to determine whether it should continue with the case. In cases where a court other than a Children's Court deals with the case of a child, the court is mandated to apply the provisions of the Children's Act as relates to a child offender.

Section 186 safeguards the rule of law in respect to a child offender. It provides that a child accused of having infringed the law:

“Shall be informed promptly and directly of the charges against him;  
Shall be provided with legal assistance by the government if he or she is unable to obtain one.”

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The component of such assistance would be to assist him or her with the preparation for his or her defense and for the presentation of the defense. This section should be read in line with section 77 which provides that the child may (which leaves it at the discretion of the magistrate) be granted representation if unrepresented. Section 18 (4) also provides that a child who is arrested and detained shall be accorded legal and other assistance by the government as well as contact with his family. These sections are very crucial as they determine whether a child is entitled as a right to legal aid. It is not clear from the readings of this section if this is what is meant. Given that many children do not understand the legal process, legal assistance should be mandatory otherwise the provisions of section 186 shall be purely cosmetic. A child may plead guilty to an offence merely because he or she does not understand the content of the offence or he or she may have been advised by other children as it is often the case, to plead guilty. This is why legal assistance can not be dispensed with.

The Act also provides for speedy resolution of matters, support services such as the services of an interpreter, observance of the rule of law, protection of privacy and special consideration for children with disabilities.

The Act also provides that no child shall be sentenced to death (Section 190 (2)), no child shall be ordered to imprisonment or placed in a detention camp and no child under the age of 10 shall be ordered by a Children's Court to be sent to a rehabilitation school. The Act also ensures protection of children in the justice system by providing amongst others, separation of children from adults while incarcerated and the provision of alternative to remand such as placements. Capital punishment is outlawed in respect to children and imprisonment is to be used as a measure of last resort. Corporal punishment is also outlawed as a form of punishment where a child is convicted.

### 3.2.2. Practice: deficiencies of the juvenile justice system

The legal provisions relating to children in the justice system are comprehensive and positive. Again the challenge is in implementing the same. A case that was handled by The CRADLE exemplifies this:

This case emanated from Busia Law Courts. In this case of R vs J.O (a minor) (Busia SRM 152/02), 15-year-old Joash,<sup>94</sup> was charged with

94 Not his real name.

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the offence of careless driving of a vehicle other than a motor vehicle contrary to Section 87 of the Traffic Act, Chapter 403 of the Laws of Kenya. It was alleged that on the 22<sup>nd</sup> of December 2001 at 9.00 am at Emaseno village along the Emaseno Korinda Road in Busia District of Western Kenya, being the rider of a bicycle, frame number not visible, he rode the bicycle in a careless manner and therefore caused an accident by ramming onto motor vehicle registration number KXX 783 Peugeot 505 saloon from the side causing damage to the said motor vehicle.

In this matter, the boy was remanded in custody with adults. The matter was heard in open court, not in a children's court, past the stipulated 3-month period for petty offences and without legal representation.

He was initially represented by lawyer Danvas Ongechi of Makhokha & Co. Advocates who brought an application under Sections 22 (1&2), 18 (3&4), 185 (1&5) of the Children's Act (Misc. Criminal Application No. 10 of 2002) for orders that the criminal matter in Busia that was coming up for hearing on the 26<sup>th</sup> of March 2002 pended until the hearing of the application in the High Court.

That the matter be transferred to a children's court was grounded on the fact that the rights of the child were not respected in the court that was hearing the matter due to the above-stipulated reasons. The court gave its ruling on the 2<sup>nd</sup> of April 2004 dismissing the application and ordering that the matter proceed as before but cautioning the lower court to observe the Children's Act. The court made no rulings on the other issues that had been raised in relation to the abuse of the rights of the child in the court proceedings.

The lawyer who had been offering free legal services was not able to continue offering voluntary services and withdrew his services. The CRADLE then took up the matter and filed an application for review of the ruling under Order XLIV Rules (1) & (2), Order L Rule (1) of the Civil Procedure rules; Section 3 A & 80 of the Civil Procedure Act; and Rules 1 and 5 of the General Rules and Regulations of the Children's Act. The application which was filed under certificate of urgency on the 22<sup>nd</sup> of August 2002 was premised on grounds that the order that had been given by the High Court on the 22<sup>nd</sup> of July 2002 had an error apparent on the face of the record since it did not specifically address the issues relating to the violation of children's rights in

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the lower court and also in regard to the provision of legal aid. The CRADLE argued that the Busia case should have been terminated since the child stood to suffer irreparably if the matter proceeded as had been ordered by the court.

The court gave an order for stay of proceedings in the lower court on the 23<sup>rd</sup> of August 2002. However, this did not deter the lower court from partly proceeding with the matter under the same unfriendly circumstances on the 28<sup>th</sup> of August 2002 despite the order having been served on the court on the 27<sup>th</sup> of August 2002. The application was heard on the 20<sup>th</sup> of September 2002 and the court refused to make a ruling on any of the substantive issues and instead made a ruling that the matter be sent to a magistrate in Bungoma Law Courts who was gazetted to hear children's matters. The matter was fixed for plea on the 14<sup>th</sup> of October 2002. The paradox is that from the first time the first application was filed under certificate of urgency challenging the procedures used in the court to the time the final ruling was made, it took exactly six months and yet the Children's Act stipulates that children's matters have to be finalized within 3 months. The applications were made so that there could be compliance with the provisions of the Children's Act and one such provision relates to the completion of cases within a 3-month period. The application itself to cure this defect took 6 months. The fact that the court was not friendly to the child was not dealt with by the Court. The matter was finally finalized after being in court for over 1 year and the child was acquitted. The court not only violated the rights of the child under the Children's Act but also under relevant international instruments on child rights.

In the case of Republic Vs SA (a minor), 15-year-old SA was charged with the murder of a child whom she allegedly pushed into a well. In this case, SA was detained together with adults, her parents/guardians were not informed of her arrest as stipulated in the Act, she was not accorded the assistance of a female police officer and she had stayed in custody for over 6 months by the time her matter was referred to The CRADLE. An application was made to the High Court seeking to have her released for the violations of the above-named provisions, Justice Rawal agreed to have her released on bail since she had been in custody for more than 6 months. This caused a ripple in the Justice system as there are other pieces of legislation that provide that a person charged with a capital offence shall not be released on bail. There is

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need for harmonization of laws to avoid confusion and to afford better protection of children. Nonetheless, SA has been in the court process for a period of over 1 year and an application is to be heard in the High Court on the 25<sup>th</sup> January 2005 seeking to have her case dismissed for violations of the Act.

From the above two cases, it is clear that even though there are clear legal provisions seeking to protect children in the justice system, they are not widely observed.

As indicated above, very comprehensive legislative provisions on children are provided for under the Children's Act. The challenge remains in actualising and implementing the provisions of the Act. The Act for instance makes clear provisions relating to the separation of children who are in conflict with the law from those in need of care and protection, but this is rarely done as there are inadequate facilities.

Even though a diversion system has been piloted primarily by non-governmental organizations to divert children from the justice system to avoid stigmatization, the same is yet to take proper effect. Currently it is only implemented in Nairobi but it is hoped that it will be replicated in other stations outside Nairobi.

Within the justice system, there are many inadequacies that compromise the rights of the child. On the whole, cases take very long to be finalized. In the majority of cases handled by The CRADLE, many cases that relate to child abuse take on average one year to finalize. This often compromises the case as child-witnesses forget very quickly. Cases where the child is in conflict with the law take relatively shorter but only if tried in a children's court. In most cases where children are charged with adults, i.e. not tried in a children's court, the cases can go on for more than a year. The delay in cases occasions injustices.

In one regrettable and tragic case from Nyeri, a young boy had to spend over three years in remand with his father and brothers in a case of murder. In this case, a young girl had been defiled and murdered and the villagers knew the culprit. He was arrested and handed over to the police. It is not clear under what circumstances he was released but the outraged villagers pounced on him baying for his blood. In the all too familiar case of mob-justice, the offender unfortunately became a victim of murder in the hands of the villagers. The family of the slain



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girl became the first suspect and were arrested and charged with the murder of the alleged rapist and murderer. The matter dragged on for years. The matter was first taken to court on or about the 3<sup>rd</sup> of March 1998. The substantive hearings were held for approximately 2 days. The matter however appeared regularly in court over this period when it was adjourned severally either because the lawyer or State Counsel was absent or because witnesses were not bonded. Eventually they were all acquitted on the 28<sup>th</sup> of March 2001. It is unfortunate that a child was involved in such a case because even though the court finally made an acquittal, the boy had not only been traumatized but became an adult behind bars spending the best part of his youth in custody.

### 3.3. Deprivation of liberty

#### 3.3.1. Police Custody

Most of the children arrested and placed in police custody are street children, many of whom are arrested for status offences. In a workshop that was organized in the year 2003 in Nairobi by The CRADLE in collaboration with Consortium for Street Children-UK and USK that involved former street children from several rehabilitation homes in Kenya, the children complained of several abuses against them. Several children also testified to having been beaten severely while in police custody. As seen previously (section 2.2.), police brutality is indeed the most common form of abuse against children.

One girl confessed to having been raped at the police station.

Another girl, currently in a program by USK, had scars from severe beatings by policemen in custody.

One boy said his hands were tied together and he was suspended in air while his knuckles were hit with rods.

In a case that was highlighted in the local media, an errant girl was taken to the police as “a child in need of care and protection”. The police on duty dragged her outside the station and raped her in the full view of some fellow policemen who were watching from their houses. The policeman was suspended but there is no information as to whether he was actually prosecuted for his actions.

In another case reported in the year 2003, a girl was allegedly raped by a policeman when she went to look for a relative that was staying at the station. The policeman was charged but a clan agreement was made and the girl taken to her rural home before the matter could be finalized.

### 3.3.2. Pre-trial detention

Many children who are in conflict with the law are often placed in poor remand conditions. There is need to expand centers that take care of such children as they have become overcrowded. In many cases, child offenders are huddled together with adult offenders, which is likely to affect these children negatively. Children are also placed together with adults especially when charged with serious offences.

For instance, a 7-year-old boy was in police cells with hardened criminals on accusation of rape of a 9-year-old girl. He was locked up at Riruta Satellite Police Station. He complained of being physically ill as well as being harassed by the adult suspects.<sup>95</sup> He was taken to court on the 5<sup>th</sup> of January but could not be charged with the offence of rape due to his age. He was remanded at Kabete Juvenile Remand Home after the parents could not raise the bond of Kshs. 20,000.00<sup>96</sup>.

The Act makes clear provisions relating to the separation of children who are in conflict with the law from those in need of care and protection. However, due to inadequate facilities children are often mixed in the institutions. For instance in Nairobi Remand Home, there are children in need of care and protection but there are also children in conflict with the law.

Some children in need of care and protection end up being placed in rehabilitation homes due to lack of alternatives to place them. There is need to expand facilities to accommodate the children as they are often subjected to abuse by older children.

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95 Daily Nation, 5th January 2004.

96 Daily Nation, 6th January 2004.

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### 3.3.3. Imprisonment

The Children's Act provides that a child should be detained as a measure of last resort. Even though the Children's Act makes clear separation of children by nature of case and by age, this is often not complied with due to lack of facilities. Many rehabilitation centres have children who should be in children's home but because of congestion in such homes, they are placed together with child offenders. Many of those facilities also do not have proper or adequate facilities and in some of the centres, children do not have enough beds and sleep on the floor.

Education is provided in most of the institutions, however continuity after a child leaves the institution becomes difficult as they are supposed to be supervised by children officers in their home districts but because of lack of capacity, this is rarely done. Often there are many cases of recidivism. Due to insufficient monitoring, some children sneak from the schools and commit other crimes.

In a case reported in the East African Standard, a boy escaped from a Juvenile Rehabilitation in Nyeri and strangled and killed a 3-year-old child.

In certain instances, when judicial officers have no alternatives for placement for children in need of care and protection, they are committed to rehabilitation centres for children in conflict with the law.

In one such centre, a 6-year-old boy had been committed for 3 years for stealing Kshs. 100. On inquiry it was revealed that the child had a single parent who was mentally challenged and hence the magistrate must have considered it more appropriate to commit the boy to the only available place which was a rehabilitation centre.

Many of the children detained complained of harsh forms of punishments against them such as groping on gravel with the knees and carrying water over extremely steep terrain. Some of the girls also said they were raped.

### 3.3.4. Death Penalty and Life Imprisonment without possibility of release

The death penalty is outlawed against children even when they commit capital offences. However, due to lack of effective legal representation, some children

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end up with the death penalty. Most children in the justice system do not have effective legal representation. Even though several NGOs now undertake voluntary work to avail legal advice and representation to children, many times and especially in the rural areas, many cases proceed without effective legal representation, which compromises the case.

In a case currently handled by The CRADLE, a boy, (name withheld) who was charged with robbery with violence and rape was convicted to death. This is against the provisions of the law. However because this boy did not have adequate legal representation, he was not able to raise the issue of his age at his hearing. (People charged with capital offences are often accorded legal aid under the Pauper Brief system if they can not afford a lawyer. However this system is not effectively managed often resulting in poor representation.) The matter proceeded to appeal and the case was dismissed but even at appeal he did not inform the court of his age because he did not understand the legal import of his age since as a child he can not be sentenced to death. Consequently he can now only be released through a Presidential Pardon. The CRADLE wrote to the Presidential Pardon Committee that rarely meets. Other than receiving a letter of acknowledgment, nothing has been done over a two-year period.

## **4. State Institutions**

### **4.1. Ill-treatment in Correctional Institutions**

State correctional facilities are also notorious for abusing children's rights.

In the workshop organized on Juvenile Justice and Street Children, a boy who was from a correctional center from Kakamega had a deformity occasioned by walking bare feet on dirty toilets (littered with human waste). Some of the girls also complained of having been sexually abused at these institutions.

The government has also acquiesced in the abuse of children in privately run institutions by failing to provide guidelines and also failing to supervise these institutions. This results in physical and psychological abuse of children.

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In October 2004, a children's home in Likoni, Coast Province, which was alleged to be operating illegally, was also noted to be starving the children in the institution. Ministry of Health Officials who visited the homes allegedly found the children starving.<sup>97</sup>

This is not an isolated case. There is no proper record of homes or institutions housing children and no proper monitoring of their work. They are often not accountable to anyone.

The CRADLE has handled at least 4 cases relating to sexual abuse in children's institutions. For instance, in the year 2002, The CRADLE handled a case relating to sexual abuse of children in a privately run institution "Spring Chicken". In this case, the government allowed a non-Kenyan national to operate a school in one of the urban slums of Nairobi without proper registration. Some of the parents complained of reported cases of sexual abuse of children by the foreigner, Hans Dieter. Instead of arresting him, the children who were potential witnesses were instead arrested and detained for hours by the police on trumped up charges. In order to subvert justice, some of the parents were constantly harassed, arrested, detained and charged with stealing chicken from the school proprietor. It was only after the intervention by The CRADLE that the matter was followed up by the police, albeit reluctantly (in one instance on the hearing date, the witnesses, including 10-year-old orphaned children were arrested and hence could not attend the trial.) Due to lack of police cooperation, even though the matter went to full trial, he was acquitted as no proper investigations were done. He was later arrested by a different unit of the police. He had a list of over 70 children against whose names he marked "virgin", "not virgin" prompting the police to believe that he had indeed sexually abused these girls who were in his institution but again due to the initial compromise of this case, he was acquitted a second time and has now proceeded to open another institution outside Nairobi with no rules, guidelines or supervision from the government.

However, the government has now taken initiative through the Department of Children Services and has developed draft guidelines on children institutions. The guidelines seek to stem abuse in both public and private institutions. The

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97 East African Standard, 20th October 2004.

same are yet to be finalized and gazetted. The greater challenge though remains in observance of these rules and not just in their drafting.

In relation to correctional institutions, the government has initiated extensive penal reforms which includes the provision of better facilities, conjugal rights for prisoners and the provision of education. In collaboration with civil society organizations, notable of which is the Prisons Paralegal Project, persons in remand are now accorded assistance to prepare for their matters in court or to prepare for appeal of their matters. However, even though the government has undertaken such a laudable initiative, attention has been heavily focused on adult and women prisons to the disadvantage of children's institutions. Not much has changed in children institutions where the physical facilities are still poor and human rights are not strictly observed.

## 4.2. Forms of violence against children in schools

### 4.2.1. Corporal Punishment

Prior to the Amendment of the Education Act in 2000, corporal punishment was one of the most common forms of brutality against children in State institutions and especially in public schools. The Education Act provided how it was to be regulated in schools. However, the Education Act was amended by deleting the sections that related to regulations on corporal punishment. In effect it means that it has been deregulated, although the intention is to outlaw the same. It is however only applicable in Educational institutions.

In relation to the use of corporal punishment as a form of penal punishment, the same was repealed by the Criminal Law Amendment Act of 2003. It is also outlawed under the Children's Act. Unfortunately despite the ban on corporal punishment, cases are still reported of children who have suffered injury from corporal punishment in schools and in correctional State facilities.

In one case reported to The CRADLE, a girl was caned to death by her teacher.

In the case of 11-year-old Grace Nyangarisa, who was a pupil at Muhoroni Primary, she was beaten by her teacher resulting in the loss of sight in one of her eyes. The teacher was only arrested after intervention by The CRADLE. Many teachers do not support the ban on

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corporal punishment and hence rallied their support for the teacher and testified that the injury to the girl was accidental and not as a consequence of corporal punishment. The teacher was acquitted. No compensation was awarded to the injured girl who was instead expelled from school for reporting the matter to the police.

In November 2004, over 100 students of Kanunga High School in Kiambu District marched for over 40 kilometers protesting the administration of corporal punishment against seven of the students by the school administration<sup>98</sup>. This problem has been acknowledged by Professor Karega Mutahi, the Permanent Secretary in the Ministry of Education in a newspaper report of 13<sup>th</sup> May 2004 (EA Standard). He noted that despite the ban on corporal punishment, it was still being meted out in schools.

Nonetheless, there is some positive action, albeit minimal, to totally stem the practice.

In the case of *Henry Nyota Karanja v Republic* [High Court Nakuru, 2004], Ag. Justice L. Kimaru gave an important ruling relating to corporal punishment. In this case, the accused, who was a teacher at Muruaki Primary School in Nyandarua District, often administered corporal punishment to his maths students. On 25<sup>th</sup> January 2001 he administered corporal punishment to his students who had not done well in a mathematics test. He caned their legs. On the 26<sup>th</sup> of January, he wanted to administer corporal punishment again to the same pupils but 11-year-old Wilfred Nganga who had suffered injuries on his leg from the previous day's canings requested to be caned on the hands. This infuriated the teacher shoved him to a table and continued to administer corporal punishment on his buttocks. He thereby occasioned injury to his testicles and Nganga had to be hospitalized for 10 days and a surgical procedure was undertaken to remove the testicle. The teacher was charged with grievous bodily harm contrary to section 234 of the Penal Code. He agreed that he had disciplined the students but denied causing harm. He was found guilty and jailed for two years or in the alternative he was ordered to pay a fine of Kshs. 80,000.00 (US \$ 1000). He appealed against the judgment and sentence noting that the judgment had subjected him to double jeopardy since he had lost his job and the sentence was excessive. Justice Kimaru in his ruling

98 East African Standard, 15th November, 2004.

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on the appeal noted that Mr. Karanja (the teacher) had set on a course of action whose ultimate result was the injury to Wilfred. He further noted that his method of teaching mathematics was sadistic as he appeared to derive joy from inflicting pain on his pupils in the name of 'disciplining them'. In molding the youth of the nation, the court stated, Mr. Karanja was not to indiscriminately administer corporal punishment and assault his pupils.

#### 4.2.2. Sexual Violence in schools

Ill-treatment in schools is not just limited to corporal punishment but to other forms of violence as well. Sexual violence is especially endemic in schools. Unfortunately, very little is done and often too late.

For instance, even though the action is often of a criminal nature, more often than not the action taken is of an administrative nature such as interdiction or suspension of the teacher. Furthermore, given a poor administrative follow-up, the abusive teacher is reinstated enabling him or her to continue violating other children.

In many circumstances, the school administration has acquiesced by providing enabling circumstances for the abuse. In most schools in rural areas, teachers are allowed to have school girls work in their houses or to work long hours unchaperoned. Many are sexually abused in the process. This is a practice that the government has not shown commitment to stemming out even though it abuses the children's rights to physical integrity and security and violates the rights of the child through inappropriate labour for teachers.

In instances where the matter is reported to court, there are often poor investigations and prosecutions resulting in less than 10% conviction rates. The bail terms and punishment given are often not commensurate with the gravity of the offence committed. In this sense the legal system does acquiesce in the abuse of children in schools. Other times the child ends up being victimized for pursuing the matter and some children are at times expelled from the same school.

The following reports are instructive:

It was reported in the East African Standard in May 2004 that a teacher was interdicted for sodomizing 36 boys in a Machakos Primary



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school.<sup>99</sup> However, it has to be pointed out that very rarely is any other legal action taken after an interdiction.

In February 2004, a teacher was suspended for sexually harassing his pupils in Eldoret.<sup>100</sup>

In November 2004, three teachers in Trans Mara District were arrested on allegations of defiling two primary school pupils aged 10 and 11 years old. The girls were lured into the teachers' houses and defiled.<sup>101</sup>

In October 2004, a teacher who defiled and made pregnant his pupil at Tumaini Primary School in Garissa District went missing after a warrant of his arrest was issued.<sup>102</sup>

In October 2004, a primary school teacher was alleged to have raped a standard 8 pupil in the staff room. Apparently no action had been taken against him and the local Catholic Justice and Peace Commission was demanding for his arrest.<sup>103</sup>

A teacher suspected of molesting girls during the last three years in a Kiambu Primary School was forgiven by the school's committee since he was a good teacher. The teacher was alleged to have fondled the breasts of standard six and eight girls for 3 years.<sup>104</sup>

In November 2004, a teacher at Nanga Primary School in Gwassi Division of Suba District was charged with defiling a standard 8 girl whom he pretended to be coaching mathematics after official school hours (at 5.30)<sup>105</sup>. Fortunately he was charged with the offence. Nonetheless as indicated above, this may not relate to a conviction.

In November 2004, a nursery school teacher was charged before a Nakuru court with defiling a 6-year-old girl. The suspect is said to have defiled the girl in his office in Lomoloo Sisal Estate. He denied

99 East African Standard, 27th May 2004.

100 Daily Nation, 27th February 2004.

101 East African Standard, 30th November 2004.

102 East African Standard, 26th October 2004.

103 East African Standard, 21st November 2004.

104 East African Standard, 6th August 2004.

105 East African Standard, 17th November 2004.

the offence in court and was released on a bond of Kshs. 2,000 (US \$ 25) with a surety of the same amount.

A 27-year-old teacher went into hiding for 3 weeks after defiling a 13-year-old form one student at Nyaimera Secondary School in Gucha District. The teacher was eventually arrested.<sup>106</sup>

Sexual violations against children in schools are of alarming proportions, yet the government has not taken commensurate measures to deal with it. The efforts taken are often sporadic, erratic and reactive. There is no comprehensive legislation on sexual violations. Even though the Honorable the Attorney General effected some amendments to the Penal Code through the Criminal Law Amendment Act on certain matters relating to sexual violence, there is need for a comprehensive legislation on sexual violence and a specialized institution within the Public Prosecutions to deal with the scourge especially due to the prevalence.

## **5. Lack of due diligence in cases of widespread violence against children / other specific issues**

### **5.1. Acquiescence in private torture**

Many times the government acquiesces in torture by non-State actors by failing to take action against perpetrators or by failing to put programmes that would prevent such abuse. There are several reports where parents or guardians in whose care a child has been placed have committed atrocious acts against the child and yet no action has been taken against such an individual.

For instance, a father chopped off his 5-year-old son's genitals in Butere as a punishment for being late. The father was not charged with the offence.<sup>107</sup>

The government usually comes in only when grievous harm or death is occasioned. No regulatory mechanisms exist for children in work situations and

106 East African Standard, 10th August 2004.

107 East African Standard, 23rd May 2004.

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many end up being tortured and violated. In one case a 16-year-old girl employed as a house-help escaped to freedom after two years of torture in Nairobi.<sup>108</sup> Many cases of parents violating their children abound. In most of those cases, lenient sentences are often given.

The following are examples of the type of violations children face in the home:

A 56-year-old man stabbed his 12-year-old daughter to death. The incident took place at their home in Ziwa Village in Uasin Gishu. The man was arrested and charged<sup>109</sup>.

An infant was slashed to death by a man who denied having fathered it. The incident took place in Nyakinyua Farm in Solai area of Nakuru. The matter was heard in Nakuru High Court on the 2<sup>nd</sup> of November 2004<sup>110</sup>.

A father stripped off his son's clothes and beat him to death as the mother watched. The 17-year-old boy was killed over disagreement on school fees. The father was charged and the matter is being heard at Nakuru High Court.<sup>111</sup>

A 1-year-old child was hacked to death by his uncle in a family land dispute in Meru North District. The toddler was crawling around his father's house when he was cut with a panga three times. The uncle was arrested.<sup>112</sup>

A boy aged 3 years was strangled to death by a 17-year-old boy who had broken out of a Juvenile Remand Home in Nyeri. The 17-year-old boy was later rearrested.<sup>113</sup>

A 17-month-old baby together with the mother were scalded by the drunken father on the 30<sup>th</sup> of October 2004 at 9 pm. The father scalded them with hot water after a quarrel of Kshs. 10 (a dime). The child sustained 29% burns. The incident occurred at Athiru Gaiti Location

108 East African Standard, 9th June 2004.

109 East African Standard, 30th November 2004.

110 East African Standard, 3rd November 2004.

111 East African Standard, 27th October 2004.

112 East African Standard, 5th August, 2004.

113 East African Standard, 6th July 2004.

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of Igembe South East Division, Meru. No indication was given as to whether the father was arrested and charged.<sup>114</sup>

A High School teacher was arrested in Isiolo for torturing her 12-year-old domestic servant. At the point of arrest, the girl's body had marks of old and fresh wounds.<sup>115</sup>

In cases of domestic house-helpers, the Employment Act makes provision for supervision of children in employment but this is never done. The Children's Act also makes provision for the regulation of employment for children over 16 years. This presumably implies that children below 16 years should not be in employment. Nonetheless many people employ and mistreat children below this age. No rules or guidelines have been made as indicated in the Children's Act. However, the Children's Act is only 2 years old and it is hoped that the rules will be made in the near future. This should however be prioritized to stop the cases of abuse against children in domestic labour.

In yet another case, the head-teacher of Kapenguria Boys High School was charged with attempting to defile an 11-year-old girl. The girl was the daughter of his first cousin. The girl was a standard 5 pupil at Cornerstone Primary School in Eldoret. The teacher had taken his pregnant wife to deliver and was living at the girl's home. He went with her parents to see his wife in hospital but sneaked back home to defile the girl. He was caught in the act, arrested and charged. The teacher was released on a bond of Kshs. 30,000 (US \$ 440).

## 5.2. Sexual exploitation

The Children's Act in Section 15 provides that:

“A child shall be protected from sex exploitation and use in prostitution, inducement, coercion to engage in any sexual activity and exposure to obscene materials.”

The Children's Act in recognition of a child's vulnerability as a major contributory factor to prostitution and other forms of child exploitation in Section 114 defines a child in need of care and protection to include one who has been sexually abused or is likely to be exposed to sexual abuse and exploitation, including prostitution.

114 East African Standard, 31st November 2004.

115 Daily Nation, 13th May 2004.

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Sections 147 and 148 of the Penal Code outlaw the procurement of girls and women for immoral purposes. This offence is classified as a misdemeanor and a penalty of corporal punishment is prescribed in addition to any other sentence the court may award.

The high level of poverty and the high number of children being orphaned due to the HIV and AIDS pandemic, have left a lot of children without protection and therefore vulnerable at the mercy of relatives who abuse them.

Poverty, breakdown of traditional structures and influence of the media are major contributing factors to sexual exploitation. Children who drop out of school as a result of lack of fees and are unable to get basic needs are often vulnerable to sexual exploitation.

Section 4(1) of the Children's Act, 2001 places on the family and the government the responsibility to ensure the survival and development of the child. However, some of the guardians charged with the responsibility of taking care of these children have more often than not sexually exploited them.

“A certain girl, whose parents were too poor, was taken by a relative to the city so that she could get good education. The relative did not accomplish this but instead she forcefully introduced the girl to prostitution. The girl could not get back to her parents because it was very far. The life of this girl is in jeopardy. She could be infected with the HIV and AIDS virus or other sexually transmitted diseases”.<sup>116</sup>

### 5.3. Child Labour / Slavery

The Employment Act Cap 226 Laws of Kenya defines a child in Section 2 as an individual male or female who has not attained the age of sixteen years. The Act makes it a crime for anyone to employ a child whether gainfully or otherwise in an industrial undertaking. Children may however be employed in family business, including agriculture. Specific provision is made to prohibit employment of a child in any open cast workings which are entered by means of a shaft or lift and therefore in a quarry or mine.

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116 Data Collection on the Status of Children in Kenya for Incorporation in Compilation of Sitan: By Kenya Alliance for Advancement of Children, page 38.

The Act also empowers enforcement officers to withdraw a child from employment if that employment is by an undesirable person (i.e. an employer whose behaviour is known to be unbecoming and unacceptable in society) or the employment is dangerous and immoral, or if the employment is likely to be injurious to the health of the child. It also requires an employer of children to maintain a register indicating the date of entry and exit from employment and to ensure regular medical examination of the child.

Some cases involving children have necessitated court intervention either to withdraw a child from hazardous labour or to seek legal redress for children whose rights have been violated while working.

Poverty has been seen as the major factor contributing to child labour. The children are usually expected to work so as to supplement the little family income. The children do not have access to basic needs hence seek employment to be able to purchase the same. Some of the people who employ children cannot afford to pay the adult workers therefore opt to employ children, as their remuneration will not be as high.

The HIV/AIDS pandemic has increased the number of child headed families forcing the children to look for employment to cater for their siblings. The breakdown of cultural values and practices has led to situations of child labour. In cases where the children have been left under the care of guardians, the guardians usually abuse them either by exposing the children to harmful and hazardous work or forcing the children to run away from the homes and seek employment to cater for themselves.

The high levels of illiteracy and lack of clear goals on education on the part of the parents is also a leading factor in child labour.

Lack of government support systems force many children to turn to the streets either to beg, work as house help or farmhands.

#### **5.4. Child trafficking**

The Constitution clearly indicates that any trade or attempted trade in children for whatever purposes, be it for sale, prostitution, pornography or any other forms of labour is unconstitutional, illegal and certainly raises serious criminal liability.

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Of specific importance is Section 174 of the Children's Act which restricts advertisements for adoption of children. This is a particularly crucial measure that should be applied to block the channel of illicit adoptions, which are already becoming a lucrative conduit for traffic in and the sale of children. The section provides that it shall be unlawful for any advertisement to be published indicating that the parent or guardian of a child desires to cause the child to be adopted, or that a person desires to adopt a child, or that any person (not being an adoption society) is willing to make arrangements for the adoption of a child. Any person who causes to be published or knowingly publishes an advertisement in contravention of this section is liable on conviction to a fine not exceeding ten thousand shillings.

Section 174 of the Penal Code deals with the concomitant offence of child stealing, and provides that any person who forcibly or fraudulently takes or entices away or detains a child under the age of fourteen years with the intent to deprive any parent, guardian or any person who has the lawful care or charge of the child, or receives or harbors the child, knowing it to have been so taken or enticed away, is guilty of a felony and is liable to imprisonment for seven years.

Sections 254-266 of the Penal Code outlaw the offences of kidnapping, abduction, concealment and slave trade, which are key to facilitating trafficking of children for sale and other purposes.

Section 12(1) of the Children's Act directly addresses the offence of trafficking and sale of children by unequivocally providing that:

"A child shall be entitled to protection from physical and psychological abuse, neglect and any form of exploitation *including sale, trafficking or abduction by any person*".

The Act in Section 18 prescribes the penalty of imprisonment for a term of up to twelve months or a fine not exceeding fifty thousand shillings or both such fine and imprisonment for commission or omission of the stated offences.

Despite the existence of the legal framework in place to curb cases of trafficking, poverty, unemployment, and gender inequality enable child trafficking to thrive in Kenya. The Kenyan legal framework especially the Children Act has failed to cover the large range of ways in which trafficking can occur and does not include all persons that actually may be involved in trafficking especially as regards transnational trafficking.

### 5.5. Religious related violence

Children's rights are often violated in the name of religion. Several religious groupings undertake activities that amount to torture of children. Even though these religious groupings and their activities are outlawed, no serious efforts are taken to curb these practices by the government.

In Misc. App. 855/1977 at the High Court in Nairobi, The CRADLE brought an application on 18<sup>th</sup> January 2002 under certificate of urgency seeking the revocation of the order granting guardianship to the grandmother of 4 orphaned children and appointing the aunt the guardian. One of the reasons was that the grandmother was a member of a religious sect that had forcefully circumcised one of the children. Even though female genital mutilation is outlawed against anyone below 18 years, it is still practiced and not much is done to stop the perpetrators.

In another incident, a 13-year-old girl was murdered and her headless body found near her home.<sup>117</sup> The killers are suspected to be members of the Mungiki Sect who are notorious for violating girls and women's rights through forced circumcision and other forms of torture including murder for persons who do not subscribe to their beliefs. The girl's murder was suspected to be linked to a ritual killing. The victim was a standard six pupil at Kikapu Primary School on Gichobo Farm in Njoro. The girl had been sent to buy milk in the evening by a neighbor but never returned.<sup>118</sup> Even though the 78-year-old man who was suspected to be the leader of the sect in Njoro was arrested, the government has in the past shown absolute leniency to members of the Mungiki who even at one time undertook an orgy of violence in one of the informal settlements of Nairobi and hacked several people to death. The self confessed national leader, Ndwiga went into hiding for several months and when he resurfaced, he was let go on a small fine. On several occasions they have stripped women naked for wearing mini-skirts. The government has therefore shown a very sympathetic stance towards the Mungiki sect.

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117 East African Standard, 15th September 2004.

118 East African Standard, 12th September 2004.



## Questions proposed to be raised to the Kenyan Delegation

### Reporting process

Why the government has not been reporting as frequently as it ought to?

Why it did not publicize the reporting process?

Will it publicize the concluding observations from the Committee and act on them? A firm commitment hereto is necessary.

### Optional protocols to the ICCPR

When the government will accede to the First Optional Protocol to the Covenant (giving the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol) and to the Second Optional Protocol to the Covenant (on the abolition of the death penalty with regard to States who have accepted the Protocol).

### Secret police units

The Committee should question the government on existence, formation and chain of command of secret police units, like the flying squad, alfa romeo and rhino squad. Police officers in these units dress in civilian clothes. The units are reported to be the most torturous.

### Torture in the military department

There are fears that there may be incidences of torture in the military. The Committee should question the government on this. The military is a secret

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department with self-regulation through court martials, so information on the issues was not easy to come by.

**Measures to eradicate torture**

How does the government propose to deal with emerging torture trends?

How does the government propose to deal with past torture cases especially those of grand scale like the clashes? How does the government propose to deal with persons adversely mentioned in Akiwumi Led Commission of Inquiry into tribal clashes? Why has it not dealt with those individuals two years after the NARC government came into power?

**Measures to decongest prisons**

Why the government is not implementing measures to decongest prisons like, granting of bail for allailable offences, use of Community Service Orders as a form of punishment, prison courts to hear and dispense with matters within prisons, use of police bonds and bonds to keep peace for very minor offences. What other measures does the government propose to put in place to decongest prisons?

**Measures to improve the justice system**

How does the government propose to make justice accessible? Is there any legal aid scheme in the near future? A public defenders office is provided for in the Draft Constitution.

**Remedies**

The Committee should raise an issue with the government on investigation and punishment of law enforcement officers who perpetrate torturous acts.

The Committee should also raise the issue of the requirement for consent from the attorney general's chambers to prosecute law enforcement officers alleged to have been torture perpetrators.

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The Committee should raise an issue with the handling of compensation cases by the attorney general's chambers as the government representative, due to its failure to settle the matters even where the perpetrators are charged in court.

When does the government propose to form the truth justice and reconciliation commission?

### Measures to disseminate human rights

The quality of human rights education given to law enforcement officers and the numbers so far trained. How are the law enforcement officers trained on changes in law with human rights implications? Does the training extend to prison wardens, KWS rangers, Anti-Stock Theft police unit and Anti-Narcotics police unit?

### Access to information

Kenya is yet to enact a Freedom of Information Act. In the meantime, due to the Official Secrets Act, obtaining information from government officers and law enforcement officials is not easy. The Committee should question the government on this and ask it to make access to information easy for the citizens. Access to information is a right in the Draft Constitution<sup>119</sup>. Information should be disseminated to the citizens thus ending the culture of secrecy.

### Draft Constitution

When will the Draft Constitution be passed into law? What is the government doing to enable its passing into law?

The Draft Constitution is hijacked by the political wrangles in what have been identified as contentious issues. The Bill Of Rights save for the cost part has not been identified as a contentious issue. What is the government doing to protect the human rights gains in the Draft Constitution?

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119 Article 51 of the Draft Constitution 2004.

In protecting human rights gains in the Draft Constitution, can the government consider incorporating the bill of rights in the Draft Constitution in the current Constitution? This entails amending the current Constitution to contain a more comprehensive bill of rights.

### **Suppression of terrorism Bill**

How does the government propose to deal with issues around the Suppression of Terrorism Bill? Will it proceed to pass the same though it threatens to erode the gains made in civil and political rights?

## Recommendations of the coalition

### General Recommendations

The coalition of NGOs recommends that:

1. The State authorities should ensure the implementation of the recommendations already adopted by international and regional human rights treaty bodies.

### Draft Constitution

2. The Draft Constitution 2004 should be passed and enacted into law. Alternatively, the State authorities should consider replacing the bill of rights in the current Constitution with the progressive one in the Draft Constitution via a constitutional amendment<sup>120</sup>. This would ensure and protect human rights gains in the Draft Constitution from being hijacked and taken over by political interests.<sup>121</sup> The proposal is premised on the fact that the progressive bill of rights in the Draft Constitution is not contentious between the polarized groups, seeking to share power in the Constitution.

### Suppression of Terrorism Bill

3. The State authorities should not pass the Suppression of Terrorism Bill, 2003 without the necessary amendments since as demonstrated it has provisions that derogate from constitutionally guaranteed core rights.

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120 Prof. Githu Muigai, a leading Constitutional lawyer and a commissioner at the Constitution of Kenya Review Commission, made this minimum reforms proposal in his presentation at a constitutional review workshop organized by the Association of Professional Societies of East Africa on 22nd October 2004. The paper was titled "Overview and critique of the so-called contentious issues."

121 As it is, the political class is so polarized on the issue of the Draft Constitution, the parliament too is split almost by half, making it doubtful whether it will pass the Draft Constitution as law mandates it. The recommended path of a referendum does not guarantee the passing of the Draft Constitution. There is a risk that it could receive a no vote.

### Kenya National Commission on Human Rights (KNCHR)

4. The KNCHR should receive its funds directly from the Treasury so that the illusion of subordination by the Ministry of Justice and Constitutional Affairs is removed. Once its budgetary allocation is voted on by parliament, the same should be disbursed to the KNCHR directly and not through the Ministry of Justice and Constitutional Affairs. The position will improve on the passing of the Draft Constitution 2004 as it will become a constitutional commission able to draw its monies from the consolidated fund.
5. Further, the government should facilitate KNCHR's setting up of a fund from which to pay compensation for human rights abuses. The parliament should include in the KNCHR establishing statute<sup>122</sup> payment for compensation and making orders for compensation.

### Death penalty

6. In view of the de facto moratorium, the government should ratify the protocol abolishing the death penalty.
7. The government should consider doing away with capital punishment for the offences of robbery with violence and attempted robbery with violence. This is so noting that crime increase in Kenya is related to poverty and unemployment problems that the government itself ought to be solving.
8. In the meantime, to the extent that the offences of robbery with violence and attempted robbery with violence attract the death penalty, the trial process should be similar to that of murder. The safeguards that are attached to a murder trial should be extended to all the offences that attract the death penalty. These include being exclusively tried at the high court and not in the subordinate courts and provision of counsel to defend the accused person at the cost of the State.

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122 The Kenya National Commission on Human Rights Act, 2002.

### **Political persecution and assassinations**

9. NARC government should put an end to State sponsored political persecution and assassinations. There should be no dispersal of demonstrators and of those exercising their freedoms of association, assembly and expression. The State should not make inconspicuous moves at muzzling the freedom of the press. The government should promise never to deal with dissidents and political opponents the way the former regimes did.

### **Unlawful use of force by law enforcement officers**

10. When lawful use of force is unavoidable, police must exercise restraint in such use and act in proportion to the seriousness of the offence to minimise damage and injury and respect and preserve human life.
11. Unlawful use of force by law enforcement officers should be punished. Suspects should be as far as practically possible arrested and made to face trial. Spot executions should cease forthwith.
12. In order to prevent illegal shootings, the law enforcement personnel should be given clear instructions in accordance with relevant international standards. The use of a firearm at a crime scene should be treated as a unique situation. Any situation that results in death involving a member of a security force must warrant an immediate and thorough investigation. Relatives and close friends of the injured should be notified.

### **Torture**

13. The State authorities should enact a comprehensive torture legislation, complying with the definition provided by the CAT (Article 1). The legislation should prescribe adequate sanction and compensation.
14. Effective mechanisms must be set up to rein in impunity for abuses and for ensuring that victims of torture and ill-treatment receive fair redress and compensation. The public must be fully informed on decisions to this effect and be able to see what sanctions are imposed against officers who break the law.

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15. The government should be consistent and firm in its actions to punish torture perpetrators so that it can act as deterrence against any such future incidences. Any officer accused of torture should be suspended and any officer convicted of torture should lose their jobs and benefits. This should be publicized to act as deterrence to all other officers.
16. The government should make open to scrutiny the incidences of torture that are acknowledged to be spiraling within the military. This is bolstered by the view that comments and audit of such violations do not prejudice State security and the military's clandestine manner of running its affairs. There should be laid down a workable procedure by the government for the attainment of this vital need. It would enable the assessment of the government's commitment to the relevance of the CAT within the military department and avert the atrocities inherent therein.
17. Anticipatory bail will protect the suspect from violation of his or her rights and guard against torture inflicted by police during investigations.

**Detention**

18. There is a direct relation between over-crowding in prisons and backlog of cases in courts. For those already convicted, the option of Community Service Orders should be more utilized as a form of alternative punishment. The government should undertake public education on the measures proposed of bail and Community Service Orders so that the populace does not interpret this to mean that the offenders have escaped free of punishment as this leads to increased incidences of mob justice and lynching.
19. Prison courts that were mooted by the judiciary should be strengthened and operationalized in all prisons especially those where there are large numbers of remandees. All measures put in place by the government to help improve the situation should be implemented and made effective, these include prison courts, Community Service Orders, etc.
20. There have been commendable efforts to make the prisons more humane led by the Vice-President Hon Moody Awori, but a lot still needs to be done. They should be backed by some form of legislation, either reform of the Prisons Act or subsidiary legislation in the form of rules and regulations.



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21. There are prisons in Eldoret and Homa Bay that are not congested. Prisoners should when possible be transferred from the most populated prisons to the less populated ones.
22. Courts should give less stringent bail terms and sometimes even free bonds for petty offences. The police should also give bail to suspects as they conduct investigations to avoid congesting remand homes.
23. For comprehensive recommendations on prisons, we support those included in the Meru report.<sup>123</sup>
24. The government should take measures to curb the transmission of HIV/AIDS in prisons.

**Defense rights**

25. The courts should insist that suspects are brought before them within the prescribed time. For any suspect brought outside that time, the prosecution should be made to explain the delay. Courts should always question long delays in custody and should particularly be more concerned where the accused person who has been in custody for long enters a plea of guilty.
26. The judiciary should grant *habeas corpus* orders.
27. Robbery with violence and attempted robbery with violence suspects should also be afforded counsel at the State's expense.

**Investigation and punishment**

28. As concerns investigations and punishment of all officers alleged to have perpetrated torturous acts, the findings should be publicized. Where such cases are reported the police should issue a statement substantiating the complaint soonest possible.

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123 See appendixes.

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29. The duty of charging and prosecuting criminal cases should be handled by the attorney general's office and not by the police. The police should only handle investigations. This should apply to all offences but most immediately to offences that attract the death penalty.
30. The magistrates and judges should also note the injuries, wounds or scars on the bodies of accused persons who appear before them, question how they occurred, and establish whether the accused persons were tortured in prison. This would extend to questioning an accused person who cannot stand or sit well in court.
31. As far as the complaints are concerned, the judiciary should meet out punitive deterrent sentences to perpetrators of torture. In the civil cases, the judiciary should award punitive and exemplary damages to torture victims against the government.

**Complaints and remedies**

32. A body independent of the police force should be set up to handle complaints, investigations and compensation. P3 forms necessary to record torture injuries for proof in court should be obtainable from such a body. In the meantime aid forms should be available at police stations and offices of the Kenya National Commission on Human Rights. Complaints should also be reported to the Attorney General's office.
33. The government should enhance and improve its complaints handling mechanisms. The police department should acknowledge and reply to letters written by civil society organizations regarding various torture victims. The police commissioner, his deputies or the police spokesman should answer to any complaints and allegations of torture brought forward against officers. The same goes for the provincial administration.

**Truth Commission**

34. The government should act on the report of Akiwumi Commission of Inquiry and those adversely named in the report as having had a role to play in the clashes. No one so far has been brought to court. Taking into account the recent resurgence of tribal animosities leading to death,

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injuries and loss of property in Mandera, Likia and Mai Mahiu. The government would set a powerful precedent, by addressing the Akiwumi report on past tribal clashes.

35. The government should form a Truth Commission to address historical violations of rights like the Wagalla massacre to allow for forgiveness and reconciliation.

**Dissemination of Human Rights**

36. The government should raise public awareness and undertake a comprehensive human rights training of all law enforcement officers including chiefs, prison wardens, senior and junior officers.
37. The government should forward the manuals of police curriculum, now including a course on human rights, to the civil society for it to see and investigate the sufficiency of the course. Further the government should give the number and distribution of police officers so far trained in human rights.
38. The government should disseminate towards the civil society the recommendations adopted by the Human Rights Committee at the end of the reporting process.

**Access to information**

39. Information recording and retrieval systems in government should be made effective and efficient. Statistics should be properly kept. Information that does not touch on national security should be accessible to the citizenry.
40. Progressive changes in law should be publicized to the civil society and the law enforcement officers.

## Recommendations with regard to women

The coalition of NGOs recommends that:

1. The government should enact into law as a matter of urgency the Domestic Violence and Family Bill and the Draft Sexual Offences Bill. In addition, the government should expedite the enactment of a new Constitution that will provide a comprehensive bill of rights that provides a comprehensive framework for protecting women from violence and ill-treatment. At the regional level, the Kenya government should ratify the Protocol of Women's rights under the Charter of the African Union.
2. The government should call upon the relevant authorities to ensure accountability for women's rights violations committed by Public Administration officers and Police officers. This will be addressed through implementation of internal reforms as stipulated in the on-going Kenya Police reforms.
3. The Prosecution services should be strengthened to address gender-based violence with a view of ensuring that all reported cases are well investigated and prosecuted. Gender-based training for Police officers should become mandatory and necessary in order to effect attitude change. The Kenya government should invest more resources in public security and establish specialised units for addressing gender-based violence. This will give confidence to victims to report cases and expect to be protected and will allow the Kilimani Police station addressing gender-based crimes to become a dynamic centre of excellence that can be replicated nationwide.
4. The government should call agencies charged with the responsibility of producing gender-segregated data, such as the Central Bureau of Statistics to provide gender specific data on crime and Human Rights violations. This will guide appropriate policy reforms.
5. The government should ensure compliance with its obligations under International Law and its commitments under the various United Nations conventions and instruments.

## Recommendations with regard to children

The coalition of NGOs recommends that:

1. The government should ensure a better respect of child rights in all parts of the society.
2. The government should participate in the UN Study on Violence Against Children, particularly by answering the questionnaire to governments before the end of March 2005.
3. The government should be aware that violence against children and impunity remain matters of great concern. Kenya should bring all offenders to justice, apply appropriate punishments and exercise a more efficient control over State officials, particularly over its police forces. There must be no tolerance or acquiescence by the administration, especially in the educational system. So far Kenya has not put into practice the 2001 recommendations of the CRC in that respect.
4. An Office of children's ombudsman should be established.
5. All procedures concerning children, including measures of institutionalization, should follow the principle of the best interest of the child and should provide for child participation.

## Prevention

6. The government should be aware of the need for clear mechanisms to avoid torture and violations of children's rights. There are currently no comprehensive prevention programs. Kenya should develop a nationwide information campaign to promote child rights in general and the prohibition of ill-treatment in particular.
7. Keeping in mind that despite the Committee on the Rights of the Child urged Kenya to provide for sufficient training to persons dealing with children, the government has not undertaken the necessary steps to train social and welfare workers, lawyers, magistrates, teachers, police forces, etc. with regard to child rights and child psychology. Kenya should create the instruments for the training of all workers in relation with children.

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8. The government should explicitly prohibit corporal punishment in schools.
9. The government should work in cooperation with the civil society and development partners in training and awareness creation.
10. The government should prevent the application of the death penalty to children through a nationwide information campaign for persons working in the legal system, particularly in rural areas.

**Legislation**

11. The government should amend the Children's Act in order to prohibit torture as well as other cruel, inhuman or degrading treatment or punishment, with specific aggravated sanctions when the victim is a child, domesticating the CAT and CRC.
12. In particular, the government should abandon the concept of "lawful torture" immediately and bring the torture definition of the Children Act into line with international standards.
13. The government should prohibit corporal punishment explicitly, precisely and in general. Comprehensive compulsory rules and guidelines to hinder all forms of cruel, inhuman or degrading treatment or punishment in institutions must be drafted, widely distributed and their implementation supervised, especially in private institutions.

**Juvenile Justice**

14. The government should comply with the recommendations of the CRC regarding a higher age of criminal liability, which indeed is much too low and should be raised to minimum 14 years.
15. There is need for a specific legislation for children in conflict with the law that incorporates diversion and restorative justice. It could be classified Child Justice Act and should clearly provide guidelines and safeguards not included in the Children's Act such as what constitutes a child-friendly court, when diversion is permitted and nature of restitution.

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16. It is necessary that other courts for children are built in the country and that the general ambience of the other courts is changed to make the courts truly child-friendly; whenever any court handles a child-related matter, the court should act as a children's court.
17. In spite of the CRC's recommendations, Kenya still has not put into place child sensitive hearings, procedural rules and complaint mechanisms.
18. The government should ensure that psycho-social support is always provided for children in conflict with the law.
19. The government should always provide legal aid for children in conflict with the law. In this respect, the government should establish a national legal aid scheme with a special focus on children and other vulnerable groups.
20. Children in conflict with the law must at last be separated from children in need of special care and protection, in procedure and internment.
21. Detention facilities for children have to be improved and rendered child-friendly according to the CRC's standards.
22. As the CRC already stated in 2001, Kenya should at last establish a system for the reintegration and rehabilitation of child victims.

**Child trafficking, Child sexual exploitation**

23. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography should be ratified as the CRC already recommended it in 2001.
24. The government should develop the legal framework against child trafficking which lacks efficiency and needs to be improved in order to cover all possible situations and persons.
25. A Sexual Offences Law should be enacted, including specific provisions against those who initiate prostitution and pornography of minors or take advantage of it as well as against sexual abuse in schools, children's homes and care institutions. A special Sexual Offences Unit should be established in the office of the Director of Public Prosecutions -the CRC's recommendation to introduce an effective reporting system for child abuse has unfortunately not been implemented by Kenya.

### Child labour

The government and the administration should better protect children in work situations, above all an explicit minimum age for admission to employment -as requested by the CRC in 2001. In particular there is still a need to develop a clear regulation for private household domestics and agricultural workers.

### Other issues

The government should strengthen its technical cooperation with UNICEF, UNAIDS, UNDP and WHO e.g. in order to act more thoroughly against socio-economic root causes of child's rights violations. Despite the CRC's recommendations in 2001, Kenya does not yet show the necessary efforts and abandons some categories of children to their fate, e.g. HIV/AIDS victims, poor children, street children, victims of child trafficking, child labour and sexual abuse as well as children in the need of alternative care.

The government should establish programmes to help and protect street children (in this area the State has not given any effect to the CRC's detailed recommendations of 2001).

There should be firm State action against sects and their harmful practices or offences by means of education and the justice system.



## Annexes

### 1. Analysis of the “Suppression of terrorism bill”, 2003

The government of Kenya published the Suppression of Terrorism Bill in 2003 with the aim of implementing its State party international obligations on terrorism imposed by various international conventions aiming at combating terrorism. The Bill was presented before parliament amidst protests from some Members of Parliament, Civil Society and Religious groups. Parliament overwhelmingly voted the Bill out. The main objection to the Bill was that it negated the fundamental rights and freedoms of Kenyans.

#### Definition of terrorism

A basic constitutional rule is that criminal offences must be defined in clear, precise and unambiguous terms. Where the definition is vague and imprecise, it is possible to criminalize legitimate forms of exercising fundamental rights and freedoms. Imprecise definitions also make it impossible to ascertain before hand what constitutes the offence and opens windows for mischievous and partisan interpretations.

In the Suppression of Terrorism Bill, 2003, terrorism has been defined in Section 3 as the use or threat of action where the action used or threatened:

- Involves serious violence against a person
- Involves serious damage to property
- Endangers the life of any person other than the person committing the action
- Creates a serious risk to the health or safety of the public or a section of the public
- Is designed seriously to interfere with or seriously disrupt an electronic system
- The use or threat is designed to influence the government or to intimidate the public or a section of the public
- The use or threat is made for the purpose of advancing a political, religious or ideological cause

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- Provided that the use or threat of action, which involves the use of firearms or explosives; chemical, biological, radiological or nuclear; or weapons of mass destruction in any form shall be deemed to constitute terrorism whether or not paragraph (b) is satisfied.

The drafting technique used in the above definition can be described as listing of various levels of alternative, and in some instances, cumulative conditions that use the operator 'or' at the end of the condition. Interpretation of the offence allows only one of the enumerated conditions to be sufficient to trigger the fearsome legal consequences in the form of existence of terrorist activity thereby satisfying the legal ingredients for the commission of the offence of terrorism. The term "weapons of mass destruction" has not been defined in the Bill or elsewhere in the law, such as in the Explosives Act<sup>124</sup>. It is a generic term that may be misused since the investigating officers and the prosecutors have the discretion to decide what constitutes a weapon of mass destruction.

The definition uses an extraordinarily wide choice of possible criteria and circumstances. Law enforcement agencies can choose which one might be best suited. This method may inescapably classify virtually every kind of even mildly unlawful conduct as terrorist conduct. The result of this kind of legislation is the sanctioning of arbitrary rule of law enforcement agents who decide what crime to charge suspects with that is whether to classify the criminal act as terrorism or ordinary crime.

The definition part of the Bill does not define what constitutes an action for the purposes of defining terrorism. The definition of terrorism in the Bill encompasses ordinary criminal acts such as assault, damage to property, trespass, and offences under the Public Health Act<sup>125</sup>. An act or action under the Bill constitutes an omission.

An undefined threat constitutes the offence of terrorism. Under section 3(1)(c) of the Bill, the use of threat or action to advance an ideological, political or religious beliefs or cause amounts to terrorism. The Bill does not indicate what constitutes the correct ideology or belief. Again, the Executive has the discretion to decide what is the correct ideology or religion for the populace.

The offence of terrorism is committed despite the degree of damage caused by the terrorist act and the number of people injured or killed. This will intro-

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124 Chapter 115 of the laws of Kenya.

125 Chapter 211 of the Laws of Kenya.

duce in the penal statutes the problem created by the definition of robbery with violence where the court has to convict and impose a sentence once certain elements of the offence are proved without having regard to the effects of the suspect's actions.

### Freedom of association and assembly

Section 5 provides that any person who directs the activities of an organization involved in the commission of acts of terrorism *at any level* shall be guilty of an offence. This means that a person can be charged with the offence of terrorism for associating with members of a purported terrorist group even if he did not indeed know that such persons were engaged in terrorism activities. Section 6 makes it an offence to possess articles related to commission, preparation or instigation of acts of terrorism.

The minister is granted the power to declare an organization as a terrorist organization. A clear procedure of appeal or conducting of a hearing before the decision is made or soon thereafter is not provided for. There is no set out criteria in the Bill for determining whether an organization is a terrorist organization. The procedure for obtaining judicial review or appealing against the minister's decision is not provided in the Bill. Though one may apply through the usual civil process, in some instances the intervention by the court may come late in the day if the decision that an organization is terrorist is accompanied by other measures like deportation of the officials.

The procedure for declaring an organization a terrorist organization should include a requirement that the minister tables a draft notice in parliament for debate unless he makes a declaration that such tabling and debate is unnecessary for reasons to be recorded.

The Bill prohibits being a member of a terrorist organization<sup>126</sup>, inviting support and addressing meetings of such an organization<sup>127</sup>, wearing or carrying items that arouse suspicion of membership of such an organization<sup>128</sup> and transmission of information likely to be used by terrorists and possession of document or record containing such information<sup>129</sup>.

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126 Section 10 of the Suppression of Terrorism Bill, 2003.

127 Section 11 of the above note.

128 Section 12 as above.

129 Section 7 as above.

### **Right to protection against arbitrary search and entry and from unlawful interference with privacy, home and correspondence**

The constitutional provision<sup>130</sup> prohibiting searches and seizures seeks to ensure a balance between the individual rights and legitimate government law enforcement authority to satisfy protection of human freedom while accommodating legitimate law enforcement concerns.

Investigatory measures must respect the offender's privacy. The Bill permits police officers to search premises, persons, vehicles, aircraft or vessel and seize remove anything, which he considers to be evidence of commission of an offence under the Act. Persons found in such premises can be detained pending the completion of the search (sections 25&26).

Searches and interception of correspondence must be done within the confines of established law and under judicial control. Criminal investigations must be carried out under judicial control and the attempt in the Bill to exclude judicial supervision of investigators "in cases of urgency" may lead to instances where the rights of suspects are violated. Measures taken in times of emergency must conform to principles of legality, proportionality and necessity and must be strictly limited to the temporary needs of the situation. They must contain safeguards against arbitrary treatment and abuse.

### **Right to personal liberty**

Lengthy detention on grounds of national security requires justification in terms of reasonableness and proportionality, availability of judicial review and an opportunity to consult confidentially with an advocate of the suspect's choice during the period of detention.

Accused persons must be held in official places of detention and a record kept of their identities. Lawyers and family must have access to such records. The right to apply for *habeas corpus* and communicate with lawyers must be guarded at all times. The suspects must at all times have the right to a judicial remedy to contest the legality of any deprivation of liberty and the right to take proceedings before a court to decide without delay on the lawfulness of detention.

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130 Section 76 of the Constitution of Kenya.

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Kenyan police have been known to hold suspects for long periods, for example in the Paradise Hotel-Mombasa bombing case. And the Bill further allows officers to detain suspects for up to 36 hours without the right to consult an advocate or their relatives (section 30).

The Bill<sup>131</sup> also allows police officers above the rank of an inspector to arrest and detain any person reasonably suspected of having committed or of being about to commit an offence under the Act where in a case of urgency, communication with a judge to obtain a warrant would cause a delay that may be prejudicial to maintenance of public safety and public order. This does not necessarily derogate from section 72 of the Constitution that guarantees personal liberty but the same is open to abuse. Police officers may arbitrarily arrest suspected terrorists, as the said section is not open for review by a court of law as to the circumstances of the arrest. No mention of bail is made.

**Right to access a legal counsel of the offender's choice**

Consultation with a lawyer should be allowed without delay, interception or censorship, in full confidentiality, and not within hearing of law enforcement officers. The accused must have the right to appoint a legal counsel of his or her choice.

However, the Bill allows investigators to prohibit consultation with a lawyer by the accused if that is likely to lead to destruction of evidence, will lead to alerting of other suspects or will hinder the search, seizure or tracking of terrorist property (section 30). If the right to consult with an advocate is to be deprived even for a short period then the police must ensure that investigations are done within time and suspects are arraigned in court immediately.

**Extradition**

Extradition procedures must comply with international law, especially the right to an effective remedy by way of reference of the dispute to an independent and competent tribunal. The Constitution of Kenya provides for immunity from expulsion from Kenya's territory for citizens except on grounds of interests of defence, public safety or public order (section 81(1) and (3)(a)).

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131 Section 26 (I) (e).

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The Bill allows persons suspected to be involved in terrorist activities to be excluded from the Kenyan territory on orders of the minister (section 31). There is no provision for the procedure to be followed in appealing from or challenging such an order in a court of law or for the procedure in case the suspects are citizens of Kenya. A person who is subject to an exclusion order should have the right to have the order judicially reviewed in the High Court pending its implementation and citizens of Kenya should not be subjects of extradition proceedings under the Bill as they can be charged, tried and sentenced in Kenya under the new law or existing penal statutes.

Concerning requests for mutual assistance, the Attorney General should be obligated to present to parliament once a year a list of all such requests and other pertinent information on what steps were taken regarding the requests. It should be the duty of the Attorney General to exercise due diligence concerning citizens of Kenya arrested in other countries on charges of terrorism.

### **Immunity from Civil or Criminal Proceedings**

The Bill<sup>132</sup> provides that a member of the police force, customs officer or other officer who uses such force as maybe necessary for any purpose in accordance with this Act shall not be liable in any criminal or civil proceedings for having, by the use of force, caused injury or death to any person or damage to or loss of any property.

This is another of the contentious provisions of the Suppression of Terrorism Bill as it purports to give immunity to police officers against criminal or civil proceedings arising out of use of force.

### **Conclusion**

Since all the acts constituting terrorism are offences in their own right, it is questionable whether importation of the word terrorism as a concept of law is useful or desirable other than in whittling down the gains made in enforcing and protecting fundamental rights and freedoms. The Bill infringes on basic civil liberties and democratic rights. The measures suggested are dispropor-

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132 Section 40 of the Suppression of Terrorism Bill, 2003.

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tionate and unrelated to the perceived threat of terrorism. Having noted how capricious Kenyan police force is with discretion, the terrorism Bill just creates more avenues for violation of rights, particularly torture of suspected terrorists.

The unqualified respect for the full scope of fundamental human rights and freedoms, which have not been legitimately suspended under an emergency, must form a fundamental part of any anti-terrorist strategies.

The lack of consensus at the international level on a definition of terrorism means that each act or situation must be evaluated on its own facts and in its particular context to determine in what manner contemporary international law may regulate responding conduct of States.

Kenya should streamline its procedures for and adopt international standards in dealing with public emergencies by incorporating international guidelines for derogating from its human rights obligations.

The use of laws treating public emergencies within the prescribed legal limits and proper enforcement of existing penal provisions in Kenyan statutes would obviate the need to enact legislation that aims at repressing gains made in promoting human rights and civil liberties.

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**HUMAN RIGHTS COMMITTEE**

**KENYA**

**LIST OF ISSUES**

**PREPARED IN THE ABSENCE  
OF THE SECOND PERIODIC REPORT  
OF THE STATE PARTY DUE ON 11 APRIL 1986**

### **Constitutional and domestic legal framework within which the Covenant is implemented (art. 2 of the Covenant)**

1. What is the status of the Covenant in the constitutional and domestic legal framework? Can the Covenant be directly invoked before the courts? Have there been instances where this has occurred, and if so, with what result?
2. How does the Constitution protect the rights enshrined in the Covenant? What measures has the State party taken to bring its national laws into line with its obligations under the Covenant?
3. Does the State party intend to accede to the Optional Protocol?

### **Provision of effective remedies; impunity (art. 2)**

4. Does the State party have in place a system for providing effective legal remedies, including compensation, to victims of human rights violations?

### **Gender equality, discrimination (arts. 3 and 26)**

5. What restrictions, if any, apply to the right of women to equality in marriage, authority within the family, divorce and inheritance? What measures has the State party taken to remove any such restrictions?
6. Foreign men married to Kenyan women do not automatically acquire Kenyan citizenship, and Kenyan women who marry foreigners lose their Kenyan citizenship if they take up their husband's nationality. How is this treatment considered compatible with articles 3 and 26 of the Covenant?
7. Please explain the position of women in the economic and social life of the country, in particular the position of women in employment, higher education, the private and public sectors and in Government. What percentage of women hold senior positions in the private and public sectors respectively, and how is this assessed and monitored? Few women have been elected to the Kenyan Parliament. What measures has the State party adopted to encourage participation of women in the political system?

**Derogation from rights (arts. 4 and 5)**

8. What provision is made in the Constitution for derogation from Covenant rights? Is such derogation subject to parliamentary approval? Have any such provisions been invoked by the State party, and if so, when and to what extent?

**Right to life (art. 6); prohibition of torture (art. 7)**

9. The death penalty applies to the crime of “armed robbery with violence”: how is this considered compatible with the requirement that the death penalty be applied only to the most serious of crimes (art. 6 (2))? How many offences carry the death penalty? Is the sentence of death mandatory in certain instances? How many death sentences have been handed down in the last five years, and what is the average length of time a prisoner spends on death row?
10. There have been numerous reports of suspects having been shot by police. Have these cases been investigated promptly by the State party, and what have been the results of investigations? What legal provisions govern the use of force by the security services? Do the police receive training directed at avoiding excessive force?
11. Please comment on allegations that the practice of police officers extracting confessions from suspects under torture is widespread. What mechanisms exist to protect the physical integrity of detainees? What mechanisms exist for detainees to complain about torture or other mistreatment? Have there been any prosecutions of police officers accused of mistreating detainees?
12. According to information before the Committee, there have been numerous cases of deaths in police custody. Have such cases been investigated and with what results?
13. Please provide information about the State party’s laws which give effect to the prohibition of torture contained in article 7 of the Covenant. What measures have been taken to give effect to the recommendations of the report of the Special Rapporteur on the question of torture of the Commission on Human Rights?

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14. Do exceptions exist to the general prohibition on abortion?
15. The Committee is aware of allegations that the practice of female genital mutilation (FGM) remains common, despite the legislative prohibition of FGM in the State party's legislation. Have any convictions resulted from this prohibition? What legal and educational measures is the State party taking to combat the practice of FGM?
16. Please comment on reports that violence against women is widespread, particularly violence within the family and sexual violence. What legal, social and other measures are in place to protect women from domestic violence, and to what extent do the victims of domestic violence have access to women's refuges and effective legal redress?
17. What steps have been taken to reduce overcrowding in the State party's prisons?

**Security of the person, freedom from arbitrary arrest (art. 9)**

18. Please provide detailed information about the laws, regulations and practice governing arrest and detention before trial.

**Right to a fair trial (art. 14)**

19. Please provide detailed information on the structure of the judiciary and the procedure for the nomination of judges. Is the Judicial Service Commission (JSC) independent from the Government? Do judges have security of tenure?
20. Please comment on allegations of widespread instances of judicial corruption. Have there been any formal investigations into judicial corruption and with what results? What measures have been adopted or are envisaged to combat judicial corruption?
21. Does a legal aid system exist, and if so, for what criminal charges is legal aid available?
22. The Kenyan Constitution makes provision for "Kadhis courts" whose jurisdiction extends to the determination of Muslim law in certain matters. Please provide information on the operation of these courts.

**STATE VIOLENCE IN KENYA****Freedom from interference with privacy, family and the home (art. 17)**

23. Please provide information on the forcible eviction of residents of informal settlements, particularly in the Kibera region of Nairobi. What measures have been adopted to provide for the resettlement and compensation of persons who have been or will be evicted from informal settlements?

**Right to hold opinions and freedom of expression (art. 19)**

24. Please comment on reports that the system of issuing and regulating broadcasting permits and frequencies is manipulated for political purposes, to the detriment of the political opposition.

25. Publishers are required both to purchase a bond before printing any publication, and to deposit copies with a registrar within two weeks of publication. The bond fee was increased by 100 per cent in 2002. Please comment on the purpose and operation of these regulations, and on how they are considered consistent with the State party's obligations under article 19.

**Right to freedom of assembly and association (arts. 21 and 22)**

26. What restrictions are placed on the right to freedom of assembly and freedom of association?

**Protection of the family (arts. 23 and 24)**

27. What measures has the State party taken to enforce the provisions of the Child Act, which prohibit children of school-going age from taking up employment? Please comment on allegations that the incidence of child labour is increasing, particularly with regard to the recruitment of boys into the coffee and tea plantation industries in the Central Province.

28. What is the minimum age of marriage? Are forced marriages prohibited by law? What is the status of polygamous marriage under the State party's laws?

## **Dissemination of the Covenant and the Optional Protocol**

29. Are all non-governmental organizations that engage in human rights monitoring in the State party's territory able to disseminate freely information about the provisions of the Covenant?
30. Has the State party taken any measures to educate public officials, law enforcement and judicial officers, the legal profession and the general public about the provisions of the Covenant?

**HUMAN RIGHTS COMMITTEE  
EIGHTY-THIRD SESSION  
14 MARCH - 1 APRIL 2005**

**CONSIDERATION OF REPORTS SUBMITTED  
BY STATES PARTIES  
UNDER ARTICLE 40 OF THE CONVENANT**

**CONCLUDING OBSERVATIONS OF THE  
HUMAN RIGHTS COMMITTEE:**

**KENYA**

**STATE VIOLENCE IN KENYA**

1. The Human Rights Committee considered the second periodic report of Kenya (CCPR/C/KEN/2004/2) at its 2255th and 2256th meetings (CCPR/C/SR.2255 and 2256), on 14 and 15 March 2005. It adopted the following concluding observations at its 2271st meeting (see CCPR/C/SR.2271) held on 24 March 2005.

**A. Introduction**

2. The Committee welcomes the second periodic report of Kenya. It regrets, however, that the report was submitted more than 18 years late and does not contain sufficient information on the effectiveness of measures taken to implement the Covenant, nor on practical measures designed to implement Covenant guarantees. The Committee commends the delegation's efforts to provide answers to its questions, both in writing and orally, as well as the commitment that the next periodic report of the State party will be submitted on time. It welcomes the reopening of a long-interrupted dialogue with the State party.

**B. Positive aspects**

3. The Committee welcomes the fact that the State party's new draft constitution includes a proposed Bill of Rights that is inspired by international human rights standards and seeks to remedy present deficiencies in the protection of fundamental rights, including gender disparities. It hopes that a Bill of Rights in full conformity with the Covenant will be adopted soon.
4. The Committee welcomes the establishment of the independent Kenya Human Rights Commission in 2003 and expresses the hope that the Commission will be endowed with sufficient resources to enable it effectively to discharge all of its mandated activities and to operate in accordance with the Paris Principles.
5. The Committee appreciates the State party's circumspection in legislating on the pending Suppression of Terrorism Bill, a draft of which was made available for comments to civil society stakeholders, and its intention to balance security concerns with human rights concerns in the adoption of



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this bill. In this context, the State party is invited to take into account pertinent considerations set out in the Committee's general comment No. 29 on derogations during states of emergency and general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant.

6. The Committee welcomes the information that Kenya has now prohibited all forms of corporal punishment of children, and notes that implementation of the prohibition should be accompanied by public information and education campaigns.
7. The Committee welcomes the Criminal Law (Amendment) Act 2003, which prohibits courts from accepting confessions unless they are made in court.

**C. Principal subjects of concern and recommendations**

8. The Committee notes that the Covenant has not been incorporated into domestic law and that the provisions of international human rights instruments, in particular the Covenant, are not in practice invoked in courts of law. It stresses that implementation of Covenant guarantees and the possibility of invoking the Covenant before domestic courts do not depend on the State party being a party to the first Optional Protocol to the Covenant.

The Committee invites the State party to take appropriate measures to allow Covenant rights to be invoked in the domestic courts.

9. The Committee notes with concern that because of, *inter alia*, widespread corruption, the access of citizens to domestic courts and to judicial remedies is limited in practice. The frequent failure to enforce court orders and judgements is an additional cause of concern (article 2 of the Covenant).

The State party should ensure that all individuals subject to its jurisdiction have equal access to judicial and other remedies.

10. The Committee notes with concern that systemic discrimination against women persists in Kenya, both in law and practice. This includes a low level of representation of women in Parliament and in public office, despite recent progress in this area; inequalities in claiming property rights;

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the discriminatory practice of “wife inheritance”; and inequalities in the law of succession or inheritance. In addition, the continued application of some customary laws, including the permissibility of polygamous marriages, undermines the scope of the non discrimination provisions in the Constitution and other legislative texts (articles 2, 3, 23, 24 and 26 of the Covenant).

The State party should take urgent measures to address the absence of constitutional protection against discrimination in relation to women and gender disparities, and intensify its efforts to ensure their protection, whether through the National Commission on Gender and Development or otherwise. The draft bill that would eliminate inequality of spouses with regard to marriage, divorce, devolution of property and other rights should be adopted without delay. The State party should prohibit polygamous marriages.

11. The Committee is disturbed by the fact, acknowledged by the delegation, that domestic violence against women remains a recurrent practice in Kenya and that women do not benefit from adequate legal protection against acts of sexual violence - another widespread phenomenon (articles 7 and 10 of the Covenant).

The State party should adopt effective and concrete measures to combat these phenomena. It should sensitize society as a whole to this matter, ensure that the perpetrators of such violence are prosecuted and provide assistance and protection to victims. The draft Family Protection (Domestic Violence) Bill should be enacted as soon as possible.

12. The Committee remains concerned that, despite the recent legal ban on female genital mutilation (FGM) of children (section 14 of the Children Act (2001)), the practice of FGM persists, particularly in rural areas of the country, and that there is no legal prohibition of FGM for adults (articles 3 and 7 of the Covenant).

The State party should increase its efforts to combat the practice of FGM, including through prohibition of FGM for adults, and, in particular, step up the awareness campaign launched by the Ministry of Gender, Sports, Culture and Social Services.

13. While welcoming the fact that no one sentenced to capital punishment has been executed in Kenya since 1988, the Committee notes with

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concern that there is a large but unspecified number of individuals under sentence of death, and that the death penalty applies to crimes not having fatal or similarly grave consequences, such as robbery with violence or attempted robbery with violence, which do not qualify as “most serious crimes” within the meaning of article 6, paragraph 2, of the Covenant.

The State party should consider abolishing the death penalty *de jure* and acceding to the Second Optional Protocol to the Covenant. The State party should remove the death penalty from the books for crimes that do not meet the requirements of article 6, paragraph 2. It should ensure that the death sentences of all those on death row whose final appeals have been exhausted are commuted.

14. The Committee expresses concern about the high maternal mortality rate prevalent in the country, caused, *inter alia*, by a high number of unsafe or illegal abortions (article 6 of the Covenant).

The State party should adopt measures to improve access to family planning services for all women. It should review its abortion laws, with a view to bringing them into conformity with the Covenant.

15. While it notes with appreciation the recent awareness campaigns and the activities of the National AIDS Control Council, the Committee remains concerned about the extremely high rate of deaths resulting from AIDS, and the unequal access to appropriate treatment for those infected with HIV (article 6 of the Covenant).

The State party should take measures to ensure that all those infected with HIV have equal access to treatment.

16. The Committee is concerned about reports of extrajudicial killings perpetrated by police units (“flying squads”) or other law enforcement personnel. While noting the delegation’s intention to address this issue, it deplores the fact that few instances of unlawful killings by law enforcement officials have been investigated or prosecuted, and that *de facto* impunity for such acts continues to be widespread (articles 2, 6 and 7 of the Covenant).

The State party should promptly investigate reports of unlawful killings by police or law enforcement officers and prosecute those found responsible. The State party should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against the police.

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17. The Committee notes with concern the differential between the time in which those accused of having committed an offence must be brought before a judge (24 hours) and the time limit that applies to a person accused of a capital offence (14 days); the latter is incompatible with article 9 (3) of the Covenant. It is further concerned that most suspects do not have access to a lawyer during the initial stages of detention.

The State party should ensure that those accused of the capital offence of murder fully benefit from the guarantees of article 9 (3) of the Covenant. It should further guarantee the right of persons in police custody to have access to a lawyer during the initial hours of detention.

18. The Committee is concerned at reports that police custody is frequently resorted to abusively, and that torture is frequently practiced in such custody. It is especially concerned at the information about the extremely high number of deaths in custody provided by the delegation. While noting the delegation's explanations in this respect, it remains disturbed by reports that law enforcement officials responsible for acts of torture are seldom prosecuted, and that forms for the filing of complaints (so-called "P3 forms") can only be obtained from the police themselves. While welcoming the power given to the Kenya Human Rights Commission of unrestricted access to places of detention, it is concerned that such access is sometimes wrongfully denied by the police (articles 2, 6, 7 and 9 of the Covenant).

The State party should take more effective measures to prevent abuses of police custody, torture and ill-treatment, and should strengthen the training provided to law enforcement personnel in this area. It should ensure that allegations of torture and similar ill-treatment, as well as of deaths in custody, are promptly and thoroughly investigated by an independent body so that perpetrators are brought to justice, and that complaint forms are available from a public body other than the police. In particular, High Court judgments in such cases should be enforced without delay. The Committee recommends that the State party provide it with detailed information on complaints filed in connection with such acts and on the disciplinary and criminal sanctions imposed during the past five years. The State party should enforce the law requiring that access to places of detention be given to the Kenya Human Rights Commission.

19. While taking note of efforts made by the State party to improve conditions of detention and to ease prison overcrowding through passage of the

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Community Service Orders Act, the Committee continues to be concerned at the situation in prisons, particularly in the areas of sanitation and access to health care and adequate food. It is concerned at the extreme overcrowding of prisons, which was acknowledged by the delegation and which, combined with sanitation and health-care deficiencies, may result in life-threatening conditions of detention (articles 7 and 10 of the Covenant).

The State party must guarantee the right of detainees to be treated humanely and with respect for their dignity, in particular their right to live in hygienic facilities and to have access to health care and adequate food. The State party's next periodic report should include detailed information on measures taken to address the problem of prison overcrowding.

20. The Committee remains concerned about reports of serious dysfunctions in the administration of justice, owing primarily to the lack of human and material resources as well as the slow pace of proceedings. While the Committee appreciates recent Government measures such as the adoption of the Anti-Corruption and Economic Crimes Bill and its implementation, and the establishment of the Kenya Anti-Corruption Commission, which led to the resignation or the suspension of many High Court and Court of Appeal judges, it notes that allegations of judicial corruption persist, a situation that seriously undermines the independence and impartiality of the judiciary (articles 2 and 14 of the Covenant).

The State party should give priority to its efforts to combat corruption in the judiciary and to address the need to provide increased resources to the administration of justice.

21. The Committee is concerned that only individuals facing a capital murder charge currently benefit from a legal assistance scheme, and that those charged with other capital or non-capital offences, however serious, do not benefit from legal aid (article 14, paragraph 3 (d), of the Covenant).

The State party should facilitate the access of individuals to legal assistance in all criminal proceedings where the interests of justice so require. The envisaged expansion of the legal aid scheme should be pursued actively.

22. While noting the delegation's explanations on the issue, the Committee remains concerned about reports of the forcible eviction of thousands of inhabitants from so-called informal settlements, both in Nairobi and other

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parts of the country, without prior consultation with the populations concerned and/or without adequate prior notification. This practice arbitrarily interferes with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant.

The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.

23. The Committee notes with concern that large public political meetings are subject to a prior notification requirement of at least three days under section 5 of the Public Order Act, and that public demonstrations have not been authorized for reasons that appear to have nothing to do with the justifications listed in article 21 of the Covenant. Additional matters of concern are that no remedy appears to be available for the denial of an authorization, and that unauthorized meetings are at times broken up with violence (article 21, paragraph 2, of the Covenant).

The State party should guarantee the right of peaceful assembly and impose only those restrictions that are necessary in a democratic society.

24. The Committee is concerned about the extremely low age of criminal responsibility, namely 8 years (paragraph 190 of the report), which cannot be considered compatible with article 24 of the Covenant.

The State party is urged to raise the minimum age of criminal responsibility.

25. The Committee is concerned about allegations of trafficking of children and instances of child prostitution, as well as the State party's failure to prosecute and punish trafficking offences that have come to the authorities' knowledge and to afford adequate protection to victims (articles 8 and 24 of the Covenant).

The State party should adopt specific anti-trafficking legislation, including for the protection of the human rights of victims, and actively investigate and prosecute trafficking offences. It should implement policy across Government for the eradication of trafficking and for the provision of support to victims of trafficking.

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26. While noting the efforts undertaken by the State party to address the issue of child labour, the Committee expresses its concern at the prevalence of the phenomenon in Kenya, especially in the commercial agricultural sector (articles 8 and 24 of the Covenant).

The State party should intensify its efforts to combat and reduce the incidence of child labour.

27. The Committee notes with concern that section 162 of the Penal Code continues to criminalize homosexuality (articles 17 and 26 of the Covenant).

The State party is urged to repeal section 162 of the Penal Code.

28. The Committee sets 1 April 2008 as the date for the submission of Kenya's third periodic report. It requests that the State party's second periodic report and the present concluding observations be published and widely disseminated in Kenya, and that the third periodic report be circulated for the attention of the non-governmental organizations operating in the country.

29. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 10, 16, 18 and 20 above. The Committee requests the State party to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole.

