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Kenya

The impact of “anti-terrorism” operations on human rights

“Our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy. Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension.”

Kofi Annan, Secretary General of the United Nations (UN), statement delivered at the special meeting of the UN Security Council’s Counter-Terrorism Committee.¹

1. Introduction

The ongoing crackdown on “terrorism” in Kenya has extensive impact on the general human rights situation in the *country*. Amnesty International (AI) recognises the duty of states under international human rights law to protect their populations from violent criminal acts. However, such measures should be implemented within a framework of protection for all human rights. Human rights standards constitute the bare minimum of standards necessary to protect the safety and integrity of individuals from abuse of power. Measures to prevent “terrorism” can only be effective if they also guarantee and protect human rights. Security and human rights go hand in hand – and are not alternative options.

Amnesty International is concerned that the Kenyan authorities have failed to act in compliance with international human rights law and standards and Kenyan law in the investigations following the bombing of a hotel in Kikambala, near the port city of Mombasa in November 2002 and other “terrorist” acts on civilians.²

This failure to respect the rule of law and to comply with international human rights standards is evident in numerous reports of incommunicado detention, detention without charge, torture, cruel, inhuman or degrading treatment or punishment and harassment of family members and relatives of those suspected of “terrorism”.

Amnesty International has followed law-enforcement activities in the context of the on-going crackdown on “terrorism” since December 2002³. All the individual cases documented in this report occurred in the context of counter-“terrorism” activities. The

¹ UN Doc S/AC/40/SR.57, para 10, 6 March 2003.

² Amnesty International condemned the Kikambala hotel bombing: See *Kenya/Israel: Amnesty International condemns targeting of civilians*, (AI Index 32/021/2002, 28 November 2002).

³ Amnesty International interviews in Mombasa on 26 December 2002.

findings in this report are based mainly on research carried out by the organisation during May and June 2004 in Kenya. Developments since then have also been reflected. Amnesty International delegates travelled to Nairobi, Mombasa and Lamu during that period, meeting with former detainees, families of detainees, human rights activists, journalists, lawyers, religious leaders and members of faith-based organisations. Amnesty International also met with government and law-enforcement officials and representatives of certain diplomatic missions in Kenya.

Amnesty International delegates were given access to the seven accused standing trial for murder and conspiracy to “*commit a felony*” cases following the Kikambala hotel bombing.⁴ Delegates were able to obtain first-hand information about their conditions at the Kamiti Maximum Security Prison and to speak with prison officials.⁵ The focus of Amnesty International’s inquiries was on their treatment during arrest and detention and on the conditions in which they were held. Amnesty International did not inquire into the merits of their cases since this was a matter to be determined by the trial court.

The level of secrecy surrounding “terrorism”- related investigations has made fact finding and analysis difficult. Amnesty International found that anti-“terrorism” measures generated fear among certain communities, especially on the Kenya coast, in view of the arbitrary arrests and detention, among other issues. Because of the possibility of harassment, some former detainees were reluctant to talk about their experience at the hands of security officials. In several cases, interviewees asked that their names and other identifying details be withheld as they feared for their own safety or the safety of relatives. In other cases, lawyers advised against making their clients’ names public.

In this report Amnesty International makes a number of recommendations calling on the Kenyan authorities to ensure respect for the rule of law and the protection of human rights.

1.1 Background

Before moving to Amnesty International’s concerns, this report looks briefly at the background which underpins Kenya’s anti-“terrorism” operations. Since 1998 there has been two major attacks in Kenya, in which large numbers of civilians have been killed and injured.⁶

⁴ At the time Amnesty International met with the seven accused, the trials were on-going. Four faced 15 counts of murder in the High Court relating to the deaths in the Kikambala hotel bombing, while three others faced four counts of “*conspiracy to commit a felony*”, namely taking part in the 1998 bombing of the US Embassy; conspiracy to bomb the present US embassy premises; conspiracy to shoot down a plane in November 2002, and conspiracy to bomb the Kikambala hotel.

⁵ This visit marked a welcome step in the new policy of openness adopted since 2003 by the Prisons Department and the Ministry of Home Affairs in Kenya. Amnesty International appreciates the assistance it received from the Department’s staff in facilitating this visit.

⁶ This report does not aim to address the circumstances that give rise to, support and perpetuate acts of “terrorism” in Kenya.

On 7 August 1998, the United States of America (US) embassy in the heart of Nairobi’s business district was bombed, killing 213 people (201 Kenyan and 12 US nationals) and wounding 4,600 others. The US embassy in Tanzania was bombed on the same morning: 10 people died and 71 were wounded in Dar es Salaam.

Following these bombings, the US government ordered the temporary closure of seven diplomatic missions within Africa, fearing further attacks. The attacks were attributed to the “terrorist” network of Osama ben Laden. There were also unsubstantiated claims of responsibility for the bombings by another Islamist group, protesting against US influence in the region.⁷

In May 2001, four men were convicted in connection with the US embassies bombings. They are Khalfan Khamis Mohamed, a Tanzanian national, Mohamed Rashid Daoud al Owhali, a Saudi Arabian national, Wadih el Hage, a US citizen of Lebanese origin accused of conspiracy, but not direct involvement in the bombings, and Mohamed Sadeek Odeh, a Jordanian national, accused of helping to plan the bombing in Kenya.

On 28 November 2002, two suicide bombers drove a car bomb into a hotel in Kikambala, near Mombasa, popular with Israeli tourists. 15 people died, 12 Kenyans and three Israelis, and 80 were wounded. On the same day, an attempted missile attack on an Israeli airliner failed. The missile narrowly missed the plane as it took off from Mombasa’s Moi International Airport, carrying over 200 passengers.⁸

In March 2003 the British Foreign Office warned of “terrorist” threat in East Africa, stating that there was a “*particular threat against Western interests in the Kenyan capital, Nairobi.*”⁹ The US had similar concerns and continued to warn US citizens not to undertake any non-essential travel to Kenya.

A number of international flights to and from Kenya, mainly from the United Kingdom, were suspended in mid-May until June 2003 in response to the perceived risks of missile attacks similar to the one in November 2002 in Mombasa.¹⁰ The risk of attacks was linked to the possible presence in Kenya of a suspected “terrorist” linked to the 1998 US embassy bombings and the failed attempt to shoot down the Israeli plane in Mombasa in November 2002.¹¹

In June 2003 the US embassy in Kenya closed for five days following reported specific threats of imminent “terrorist” attacks, including flying a plane and driving a truck

⁷ Pettiford, L & Harding, D, *Terrorism The New World War*, Arcturus Publishing Ltd., 2003, p. 134

⁸ Al Qaeda claimed responsibility for the attacks on 2 and 8 December 2002.

⁹ The Independent Newspaper (London), “*Foreign Office warns tourists of ‘terrorist threat’ in East Africa*”, 14 March 2003.

¹⁰ The suspension of UK flights to Nairobi was lifted on 26 June 2003, while flights to Mombasa resumed on 4 September 2003. The UK reportedly set eight terms to improve security before lifting the ban. See Daily Nation, “*UK reportedly sets security terms before lifting flight ban*”, 18 June 2003.

¹¹ See The Guardian (London), “*Kenya flights grounded over al-Qaeda attack fears*”, 16 May 2003.

full of explosives into the US embassy buildings in Gigiri, a suburb of Nairobi.¹² Three people were later charged with “conspiracy to bomb the US embassy buildings”.

On 1 August 2003, a 22-year old man whom the police approached for questioning in connection with possession of explosives following a tip-off detonated a hand-grenade outside Mombasa’s main police station, killing himself, a police officer and a passer-by. Following the grenade detonation, police seized an arms cache from a flat in Tudor Estate, Mombasa. There were concerns expressed in various quarters that following the 1998 US embassy bombings, Al-Qaeda cells located in Kenya had not been dismantled.

Since the beginning of 2003, in response to the perceived risk of further attacks, the Kenyan authorities have taken the following measures:

- established a specialized Anti-Terrorism Unit within the Kenya Police Force;
- established the National Counter-Terrorism centre in Nairobi in January 2004, under the responsibility of the National Security and Intelligence Service aimed at providing “timely” and “factual” intelligence in the fight against terrorism;¹³
- imposed a flight ban between Kenya and Somalia on 19 June 2003. The ban was lifted on 8 July 2003;¹⁴
- strengthened security measures at points of entry into Kenya, including airports;
- strengthened security measures at public places and hotels;
- engaged in cooperation to fight “terrorism” in the region, under the auspices of the Inter-Governmental Authority on Development (IGAD);¹⁵
- published the *Suppression of Terrorism Bill* in April 2003.¹⁶

¹² See AFP, “US embassy in Nairobi target of truck, plane attack in June”, 27 October 2003.

¹³ See East African Standard, “Anti-terrorism centre launched in Nairobi”, 28 January 2004.

¹⁴ The US has reportedly been concerned about the “continued situation of Somalia as a failed state because terrorists are entering [Kenya] and getting refuge there, and using the country as a springboard for their attacks”, US State Department official quoted in Daily Nation (Nairobi), “Kenya to reportedly receive “largest share” of 100m-dollar US anti-terror fund”, 8 August 2003.

¹⁵ BBC News Online, “East Africa’s anti-terror plan”, 27 June 2003.

¹⁶ The *Suppression of Terrorism Bill* was withdrawn following public outcry that it infringed human rights and targeted Muslims as a group. The Attorney General’s Office announced in September 2004 that a new version of the Bill, taking into account comments received from various parties, will be presented to Parliament in 2005. Amnesty International has voiced its concerns regarding the draft legislation’s incompatibility with international human rights standards. See *Kenya: Memorandum to the Kenyan Government on the Suppression of Terrorism Bill 2003* (AI Index: AFR 32/003/2004, September 2004).

Twelve international conventions related to “terrorism” have been adopted within the UN context. Kenya is a party to all. The UN Security Council has adopted a number of resolutions concerning “terrorism”. Most were passed in the context of condemning specific acts, including the events on 11 September 2001 in the US,¹⁷ the bomb attack in Kikambala and the attempted missile attack on the airliner departing Mombasa.¹⁸

Two UN Security Council resolutions also established a collective framework for action. In *Resolution 1296* (1999) the UN Security Council called upon all States to cooperate with one another to prevent and suppress “terrorist” acts, to protect their nationals and other persons against such attacks, and to bring to justice perpetrators of such acts.¹⁹ Full implementation of *Resolution 1373* (2001) requires changes in laws, regulations and practices or for those who so require, the adoption of new laws.²⁰

The reactivation of the work of the *Ad Hoc* Committee for the elaboration of a comprehensive convention on terrorism should also be flagged.²¹ On 10 June 2002, the *International Convention for the Suppression of Financing of Terrorism* came into force. On 20 January 2003, the UN Security Council followed upon *Resolution 1373* and subsequent resolutions on countering “terrorism”, with a declaration that makes specific reference to human rights obligations in the context of the fight against “terrorism”.²²

The African Summit on Terrorism adopted the *Declaration Against Terrorism* in October 2001 and in December 2002 the Organisation of African Unity (OAU) Convention on the *Prevention and Combating of Terrorism* came into force.²³ Though its definition of “terrorism” is broad, the Convention provides that “*nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples’ Rights*”.²⁴

From 20-24 September 2004, the Legal and Constitutional Affairs Division of the Commonwealth organized a “Workshop on Capacity Building to Combat Terrorism” in Nairobi in order to train prosecutors and law enforcement officials from Africa.

¹⁷ See UN Security Council *Resolution 1368*, adopted at its meeting on 12 September 2001.

¹⁸ See UN Security Council *Resolution 1450*, adopted on 13 December 2002.

¹⁹ United Nations Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the protection of human rights while countering terrorism*.

²⁰ On 28 September 2001, the UN Security Council unanimously adopted *Resolution 1373* under Chapter VII of the *Charter of the United Nations*.

²¹ UN General Assembly *Resolution 51/210*, 17 December 1996, established the *Ad Hoc* Committee

²² The declaration was adopted as an attachment to UN Security Council *Resolution 1456* (2003) on 20 January 2003. Article 6 stipulates that “*States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law*”.

²³ Kenya ratified the OAU Convention on the *Prevention and Combating of Terrorism* on 28 November 2001.

²⁴ See Article 22 of the OAU *Convention*.

It is against this backdrop, which adds an international dimension to Kenya's fight against "terrorism", that this report sets out Amnesty International's concerns and recommendations with regards to measures taken by the Kenyan government in the context of counter-"terrorism".

2. Rights violated

As part of the response to "terrorism" in Kenya, extensive arrests were carried out throughout most of 2003 and 2004 in coastal towns, as well as in Nairobi. The aim of these operations was to locate those suspected of involvement in the 2002 bombing or alleged Al-Qaeda operatives.²⁵ Arrests continued, though to a lesser extent, throughout 2004 and to date. Suspects were detained without charge, in many cases incommunicado and in undisclosed locations. They were often denied access to lawyers and some have stated that they were tortured or ill-treated. Family members of suspects were also detained and harassed. Witnesses were also held.

Amnesty International found a disturbing level of secrecy surrounding the arrests and detention. The organization recognizes that governments need to investigate potential "terrorist" links and that this may require certain information to be withheld while investigations are in progress. However, the treatment of all suspects must fully comply with international human rights standards, including those related to the rights not be subjected to arbitrary detention, not to held incommunicado, to challenge the lawfulness of detention, to humane conditions of detention and to freedom from torture and ill-treatment.

International standards provide that all persons who are arrested or detained must be informed immediately of the reasons for the arrest or detention and notified of their rights, including the right of prompt access to and assistance of a lawyer and the right to have their family informed of their detention and where they are held.

These rights are set out in detail in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the *Body of Principles*), adopted by consensus by the UN General Assembly in 1988 and in different resolutions and other documents of the African Commission on Human and Peoples' Rights²⁶. They are important safeguards against arbitrary detention and other abuses such as torture and ill-treatment.

2.1 Arrests

Amnesty International does not know the exact number of people who have been arrested and/or detained in the context of the security measures taken to counter "terrorism". No official statistics regarding arrests were provided by the authorities when Amnesty

²⁵ Interview with the Police Provincial Officer, Mombasa, 18 May 2004

²⁶ See Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (*Body of Principles*), annexed to the United Nations General Assembly *Resolution 43/173* of 9 December 1998. See in particular principles 10 - 19.

International requested for these. Officials stated that as there was no specific crime of "terrorism" under Kenyan law, it was difficult to obtain disaggregated data.

Major operations by the Anti-Terrorism Unit and the General Service Unit of the Kenya Police Force were undertaken in Nairobi's Eastleigh area, home to thousands of Ethiopian and Somali refugees.²⁷ In May, 150 people were reportedly detained.²⁸ In a sweep in June 2003, over 100 people, mostly young men, were arrested and interrogated. Such operations reportedly continued throughout the year. Very little information was made available in the public domain regarding these operations.²⁹

Arrests in Mombasa and other coastal towns were also frequent. The Muslim Lawyers' Trust made available a list of 34 people arrested and detained in Mombasa and Lamu up to the middle of 2003 in the context of investigations into the November 2002 Kikambala hotel bombing.³⁰ These were cases which were brought to the Muslim Lawyer's Trust's attention and represented a small fraction of the hundreds who were arrested and then released after nothing was found to link them to "terrorism". Hundreds of arrests were also affected following the security incident involving a hand grenade detonation in Mombasa on 1 August 2003.³¹

Numerous respondents who spoke with Amnesty International expressed concern about what they termed as discriminatory effects of certain law enforcement measures in the aftermath of the Kikambala hotel bombing and the hand-grenade detonation.³² It was the view in some communities that people were suspected, stopped, searched, arrested and held in custody solely because of their ethnic, racial or religious origins.³³ Dozens of people were reported to have been arrested on their way to or from the mosque after Friday prayers.³⁴

²⁷ The General Service Unit was established in 1948 for deployment in troubled areas and in emergency situations. It still performs the same functions.

²⁸ See AFP, "More than 150 foreigners detained in Kenya amid terrorism fears", 26 May 2003, "... more than 150 people, mostly from the Horn of Africa, are in custody. ... Links to terrorism is the first thing those arrested are probed for," the official ... told AFP.

²⁹ See Mburu Mwangi, Daily Nation (Nairobi), "Kenya Bans Somali Flights in Major Terror Crackdown", 23 June 2003.

³⁰ The Muslim Lawyers Trust is a non-governmental organisation (NGO) whose objective is "to promote human rights and the creation of a society based on justice and equality, [provision of] legal aid and promotion of the rights of Muslim advocates".

³¹ See AFP, "Kenyan Police detain 1,200 as part of an 'anti-terror operation' 1 August 2003, in Mombasa. ... "Kenyan police have detained about 1,200 people in an ongoing anti-immigration swoop as part of wider efforts to identify terror suspects believed to be in the country, police said Monday".

³² This included interviews with religious leaders, representatives from faith-based organizations, human rights activists, lawyers, journalists and former detainees.

³³ See AFP, "Kenyan Police detain 1,200 as part of an 'anti-terror operation' in Mombasa. ..." Local leaders, meanwhile, criticise the police for allegedly singling out Muslims, ethnic Somalis and Arabs".

³⁴ See Daily Nation (Nairobi), "Murungaru [Minister for National Security] bans police swoops at mosques", 10 November 2003.

Though the Kenyan authorities have made statements in denial, concerns about discriminatory practices still persisted during law enforcement activities.³⁵

Amnesty International recognizes that security forces may be acting on intelligence and other information from different sources when questioning suspects or making arrests. However, police need to have specific reasons for arresting people on suspicion and the suspicion must not be based on religious or social identity.

The women arrested and detained in connection with “terrorism” investigations were family members who were subjected to such measures by security officials reportedly to force the “real” suspects to hand themselves in. Arresting and detaining relatives to put pressure on the real suspects to hand themselves in amounts to arbitrary detention or even hostage-taking.

2.2 Circumstances of arrest

An arrest is defined in the *Body of Principles* as the “act of apprehending a person for the alleged commission of an offence or by the action of an authority.” It is therefore a formal act that puts an end to personal freedom.

Under international law, no person may be deprived of his or her liberty except on grounds and in accordance with procedures established by law.³⁶ Such procedures must conform not only with domestic law, but also to international standards. International law also prohibits arbitrary arrests and detention.³⁷ The Human Rights Committee, charged with the monitoring and implementation of the International Covenant on Civil and Political Rights (ICCPR), has explained that the term “arbitrary” in Article 9(1) of the Covenant includes not only that which is against the law but also elements of inappropriateness, injustice and lack of accountability.³⁸ Detention is also arbitrary if it constitutes an abuse of power.³⁹

The law in Kenya is clear regarding the circumstances in which an arrest should be conducted and the safeguards available to those under arrest.⁴⁰ If the police have reasonable grounds to suspect that someone has committed a “cognisable offence” that person may be arrested without a warrant.⁴¹ Notwithstanding other exceptions that do not apply here, the police require an arrest warrant signed by a magistrate for any other arrest. Under Kenyan law, when a police officer is arresting without a warrant he should inform the person of the

³⁵ See Kenya KTN TV, “Government not targeting Muslims in the fight against terror”, 3 August 2004.

³⁶ See Article 9(1), of the International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature, ratification and accession by UN General Assembly *Resolution 2200 A (XXI)* of 16 December 1966.

³⁷ *Ibidem*, ICCPR.

³⁸ See *Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p.12.

³⁹ See Inter-American Commission, Report No. 13/96, Case 11.430. Mexico, 15 October 1996.

⁴⁰ See The Criminal Procedure Code, Part III, Laws of Kenya, Chapter 75.

⁴¹ See Section 29 of Criminal Procedure Code.

grounds of his arrest, unless the grounds of arrest are obvious, that is, the offender is caught in the act.

The *Constitution of Kenya* provides that a person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.⁴²

According to information provided by lawyers whose clients have been arrested and detained, a large number of the arrests conducted in the context of counter-“terrorism” investigations could be termed as unlawful and arbitrary. The circumstances of arrests included heavily armed operations and deceit and intimidation.

One of the features of the detentions in the aftermath of the Kikambala hotel attack is arbitrary detentions of relatives of suspects. On 9 December 2002 the police requested a fifty-two year old woman, A.B., whose son, C.B., they were looking for, to accompany them to the police station as the “... boss wanted to speak to her”.⁴³ According to her, she was not informed she was under arrest and the officers gave no reasons for the arrest. She said that the police asked her to telephone another of her sons, D.B., in order to ask him to come to the police station. D.B., an elder brother of C.B., later said that on his arrival, he was told he was also under arrest and again no reasons were given. According to A.B. and D.B., the only questions put to both of them related to the whereabouts of C.B., the younger son of the family. A.B. and D.B. were both released nine days later after the family filed applications for writs of habeas corpus successfully challenging the lawfulness of their detention. The mother has not been charged with any offence.

However, ten months later, on 18 October 2003, a group of people dressed in civilian clothes, entered the house of the elder son, D.B., at lunchtime, arrested him and took him away. They did not introduce themselves and once again, they did not give any reasons for his re-arrest.⁴⁴

The police also arrested and detained E.B., the wife of the younger brother on 15 December 2002⁴⁵. At that time, she was nursing their infant child. Police officers ordered her to pack some clothes for her child and they then took both away to the police station. The young woman’s mother, R.T., was also arrested and detained on the same occasion. Both E.B. and R.T. stated that no reasons were given for their arrest and it became clear that the police were, in effect, looking for E.B.’s husband, that is C.B.⁴⁶ While R.T. was released after about four days, E.B. remained in custody until the end of December 2002. Neither E.B., nor R.T. has been charged with any offence.

The above case is typical of many others in that most of the people Amnesty International interviewed indicated that they were given no reasons for arrest and detention.

⁴² See Section 72(2) of the Constitution of Kenya, Revised Edition, 2000.

⁴³ Amnesty International interview on 17 May 2004.

⁴⁴ Amnesty International interview on 24 May 2004.

⁴⁵ Amnesty International initially interviewed E.B. when she was in detention on 26 December 2002 and then again on 17 May 2004.

⁴⁶ Amnesty International interviews on 17 and 22 May 2004.

Another case to illustrate this pattern is that of F.G. On 26 February 2003, police arrested H.G., F.G.'s father, in Siyu Village on Pate Island, took him to Lamu and then flew him to Mombasa, on suspicion of having contacts with an alleged "terrorist" involved in the 1998 US Embassy and the 2002 hotel bombings. F.G. informed Amnesty International that initially he was not under arrest; however, police also locked him up in a cell on reaching Mombasa as he accompanied his father. F.G. further said that on the following day he was interrogated on the whereabouts of the "alleged terrorist" who had lived in Siyu Village for a period. Both father and son were then flown to Nairobi the following day. F.G. said that he underwent lengthy and intimidating interrogation for over ten days. The father, H.G. was released on 4 March, 2003 while F.G. was released on 7 March 2003. F.G. stated that, on returning to his home town in the company of his father after their release, the bus in which they were travelling was stopped and police officers then told both of them that they were rearrested, without giving any reasons for the re-arrest.⁴⁷ F.G. was charged with murder and H.G. with conspiracy to murder.

Another suspect, J.K., was arrested as he waited to cross by ferry while he was in the company of his wife and five year old son, on Friday 1 April 2003 at about 9pm at Likoni, Mombasa. His wife informed Amnesty International that she repeatedly asked the police to give reasons why they were arresting J.K. and taking him to the nearby police post, but no reply was forthcoming.⁴⁸ A private car then arrived with about six people, reportedly police officers in plain clothes, who tried to pull the suspect inside the car. In view of the commotion which the incident caused, a crowd had gathered at the police post, J.K. accompanied the police officers to avoid use of force and a stand-off. J.K.'s lawyer, summoned by the wife, came to the police station located in one of the suburbs of Mombasa. When he asked about the reason for his client's arrest, one police officer replied: "*whether you like it or not we have to go with him*". He was later taken to Nairobi and charged with murder.

L.M., father in law of J.K., was arrested on 19 May 2003 and released on bond after four days. L.M. was asked to report to the police station every week. During the third week after his release, when he reported to the police station as per the conditions for his release on bond, he was driven to the airport in Mombasa, and then flown to Nairobi. No reasons were provided for his re-arrest. He was taken to court in Nairobi, first charged with murder and on 7 August, 2003, the murder charge was withdrawn and he was charged with "conspiracy to murder".

N.P. informed Amnesty International that he was stopped on 1 August 2003 in Mombasa while shopping and asked to accompany police officers to the police station. When N.P. asked whether he was being arrested and whether police officers had an arrest warrant, he was told that it would be a "*short, five minutes matter*", after which he would be allowed

⁴⁷ Amnesty International interviews on 24 May 2004. See also Daily Nation (Nairobi), "*Suspect linked to two bomb incidents*", 19 March 2003 "... A senior police officer in Lamu said he had not been briefed about the arrests by the special team of detectives from Mombasa".

⁴⁸ See the wife's interview in sub-section 3.2 of the report.

to go on with his chores. At the police station on realizing that he was under arrest, N.P. again asked for the reasons of his arrest and detention. He reportedly received the following answer: “*We don’t know. The order came from our seniors. You will be told later.*” He was kept incommunicado for 48 days before being charged with murder in the Kikambala bombing.

Armed operations were also mounted to arrest suspects. Police officers came to the place of work of another suspect, R.S., and asked him to accompany them. R.S. stated that when he refused, he was pushed in a car and driven away. Another suspect was pushed in a car by armed people, hooded, and driven away at high speed to an unknown location and then on to Nairobi.⁴⁹ In another case, a heavily armed operation was mounted to arrest a suspect, T.V., at an orphanage in Garissa Town.⁵⁰

None of those Amnesty International spoke with were ever shown arrest warrants, even when they asked. They all stated that at the time of their arrests, they were not given the reasons for the arrests. Furthermore, many of those Amnesty International interviewed were, at the most, potential witnesses or people who might have been in touch at some point with persons suspected of committing the 1998 US embassy or the Kikambala hotel bombings

2.3 Search of premises

From testimonies gathered by Amnesty International, premises of the detainees were searched and documents, bank records, photographs and other items were seized. Despite requirements in Kenyan law, those Amnesty International interviewed stated that no search warrants were shown and, except in two cases, receipts for the items taken were not handed over. In many instances, such searches were not conducted in the houses of suspects or places where alleged crimes could have been committed, but in the homes of potential witnesses.

Article 17(1) of the ICCPR provides that “*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, ...*”. Paragraph 2 of the same Article further provides that “*Everyone has the right to the protection of the law against such interference ...*”

The law relating to search warrants is laid down in the *Criminal Procedure Code* of Kenya. A search warrant needs to specify “*the thing*” which is being searched for.⁵¹ According to Section 119 of the *Criminal Procedure Code*, a search warrant “*may be executed on any day ... between the hours of sunrise and sunset, but the court may by the warrant authorize the police officer or other person to whom it is addressed to execute it at any hour.*”

The *Police Act* of Kenya makes provision for the power to search without a warrant in circumstances where the investigating officer “*has reasonable grounds to believe that some thing necessary for the purposes of the such investigations is likely to be found in any place*”

⁴⁹ See sub-section 4 of this report.

⁵⁰ See sub-section 3.3 of this report.

⁵¹ See Section 118 of *Criminal Procedure Code*.

*and that the delay occasioned by obtaining a search warrant ... will substantially prejudice the investigation”.*⁵²

However, the law does not allow police officers to go on “evidence fishing expeditions” in people’s homes. Furthermore, Section 70(c) of the Constitution of Kenya provides for the protection of the privacy of the home and other property of every person and Section 76 provides for protection against arbitrary search or entry.

Unlawful searches appear to have been a standard practice, contrary to the law, from the interviews Amnesty International conducted.

*“Police officers intimidate detained persons and their families. They enter houses with force to carry out searches. No search warrant is produced. This makes the search illegal and subsequently, any seizure made is illegal. Furthermore, searches and seizures are sometimes not made in the presence of suspects or their lawyers, which could mean that evidence could be planted quite easily in order to frame possible suspects.”*⁵³

N.P., a suspect, stated to Amnesty International:

“It was about eleven o’clock at night on the day I was arrested. I was still in police custody. They came to take me from the police cell and one of them said that they wanted to know where I lived. About twenty police officers gathered outside my father-in-law’s house, where I also lived. Some of them were armed with guns. I asked whether they had a search warrant and the reply was negative.

I knocked at the door and once it was opened, they all rushed in, harassing my family members. Everyone was so frightened, thinking they were armed robbers. I had to shout that they were police officers, as they were all in plain clothes. My wife was expecting our baby and was then in an advanced stage of pregnancy. She became very agitated and I was worried for her. My father-in-law also demanded a search warrant. None was produced for his inspection. The whole family was restricted to the veranda while the house was searched.

⁵² See Section 20 of Police Act, Chapter 84, Laws of Kenya.

⁵³ Amnesty International interview with a lawyer, Mombasa, 18 May 2004.

They searched everywhere for about two hours. They took my mobile phone, all my documents, including my educational certificates and photos. One of them told my father-in-law that they were just doing some investigations and if they needed anything else, they would come back later.”

3. Detention and access to the outside world

Dozens of suspects have been detained for long periods, in one case up to almost one and a half months, at undisclosed locations, not informed of the reasons for their detention, effectively held incommunicado in the initial stages after arrest as relatives and lawyers searched for their whereabouts. They were forced to undergo lengthy interrogations without advising them of their rights or allowing them access to a lawyer.

Amnesty International is concerned that those detained have suffered violation of their human rights set out under Kenyan and international law. These include the right to humane treatment, as well as rights essential to protect from arbitrary detentions, such as the right of anyone deprived of their liberty to be informed of the reasons for the detention; to be able to challenge the lawfulness of the detention and to have prompt access to and assistance from a lawyer. These rights are important as they are essential protections against torture and ill-treatment. Frequent transfers of detainees to different places of detention, sometimes away from their home provinces, were also noted.

3.1 Incommunicado Detention

Amnesty International was informed by relatives of detainees that for days after the arrests they were unable to establish where their detained relatives were being held. Amnesty International delegates also met with former detainees, who spoke of their anguish while in incommunicado detention. Frequent transfers of detainees to different places of detention also served to perpetuate secrecy surrounding detention.

International standards require that no one is detained without their being able to communicate with the outside world, specifically lawyers, doctors and family members. The practice of detaining people incommunicado, that is without such access, increases the risk of torture and ill-treatment and “disappearances”.

International standards provide that restrictions and delays in granting detainees access to the outside world are permitted in very exceptional circumstances and even then, only for very short periods of time. Principle 19 of the *Body of Principles* provides that “*A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject only to reasonable conditions and restrictions as specified by law or lawful regulations*”.

In the view of the UN Commission on Human Rights, “*prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture.*”⁵⁴

The UN Special Rapporteur on torture has called for a total ban on incommunicado detention, stating that:

*“Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. Information regarding the time and place of arrest as well as the identity of the law enforcement officials having carried out the arrest should be scrupulously recorded; similar information should also be recorded regarding the actual detention, the state of health upon arrival at the detention centre, as well as the time the next of kin and lawyer were contacted and visited the detainee. Legal provisions should ensure that detainees are given access to legal counsel within 24 hours of detention.”*⁵⁵

N.P. stated to Amnesty International:

“Nobody knew where I was and it was a terrible experience. I was afraid. I repeatedly asked for a lawyer while being lengthily interrogated by Kenyan and foreign investigators. I was kept incommunicado for 48 days. I know I had the right to be assisted by a lawyer but my request was consistently denied and I could not contact my family or the outside world. My family was looking for me in Mombasa while I was in Nairobi.”

3.2 Access to family and frequent transfer of detainees

Anyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, their family and friends. The information must include the fact of their arrest or detention and the place where they are kept in custody. If the person is transferred to another place of custody, their family or friends must again be informed.

Principle 16(1) of the *Body of Principles* provides that: “*Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or the transfer and of the place where he is kept in custody.*”

⁵⁴ Commission on Human Rights *Resolution: 2004/41*, para. 8

⁵⁵ See E/CN.4/2003/68, para. 26.

People in pre-trial detention are to be given all reasonable facilities to communicate with family and friends and to receive visits from them. These rights are subject to restriction and supervision only as "are necessary in the interests of the administration of justice and of the security and good order of the institution."⁵⁶

In several cases families have reported difficulties in finding out if and where the police were detaining their relatives. Family members have not only had problems locating where their relatives were detained, but have also been denied access to them. Relatives have had, in certain circumstances, to file applications for writs of habeas corpus to have access to members of their families who were detained. Several detainees report having been effectively cut off from the outside world for periods ranging from three days to over six weeks while their families tried to locate them.

The wife of a detainee stated:

"My husband was arrested while we waited together with our five-year old son to cross at the ferry. He was first taken to Bamburi Police Station and we followed them there. At around 1am we were told that 'the arrested person' has been released and left through the back door. He went home to get his Identity Card. This was a lie. They just wanted to get rid of us. We went home and on the next morning, we were told that my husband was fine and he had been taken to Nairobi at around 10am by car.

I informed family and friends in Nairobi and our lawyer in Mombasa talked to one in Nairobi. The police in Nairobi would not tell anybody, whether family, friends or the lawyer, where my husband was. They all looked for him for a week without locating him. It was only after we filed a habeas corpus application that we were able to locate him."⁵⁷

The wife of another detainee, N.P., stated that police officers did not inform her where her husband had been taken to. That was in August 2003. She learned that he was in police custody late at night on the day he was arrested. The following day she sought help from a relative and together they went to at least three police stations in search of her husband in Mombasa. All their efforts were in vain. It was only after about three weeks, when she was herself questioned about her husband, that she learnt that he was in police custody in Nairobi.

Frequent and often secret transfers of detainees to different places of detention have hampered detainees' ability to receive the assistance of legal counsel and access to their families. Families were not informed of where their detained relatives had been transferred to,

⁵⁶ See Principle 19 of *the Body of Principles*.

⁵⁷ Testimony recorded in Mombasa, 18 May 2004. Case of J.K. in sub-section 2.2 of this report.

as required by international standards, with the result that they were left without knowing where their family members were.

Amnesty International learnt about several cases of detainees being moved repeatedly from one place of detention to another in Mombasa and even to Kilifi and Lamu on the coast. Other detainees were arrested in their home provinces and taken to the capital city, Nairobi, without the knowledge of family and lawyer.

The mother of a detainee stated to Amnesty International:

*"They arrested him from his place of work at around 3pm. They brought him to my house. I was away and they broke in, searched everywhere. We went looking for him for a week without knowing where they were keeping him. Nobody told us where he was and how he was doing. We went to all police stations in Mombasa, searching for him. It was only later that an officer from the Anti-Terrorist Unit informed us that my son had been taken to Nairobi by air."*⁵⁸

Three of the detainees AI interviewed in Nairobi were moved from one place of detention to another. In one case, the detainee stated that he was moved to three different police stations within a period of fourteen days while family members and his lawyer searched for him. Family members have reported making the trip from Mombasa to Nairobi, hopeful that they would see their relatives, only to find that they had been moved to other detention centres which were not revealed or where they were denied access.

One detainee stated:

*"I remember I had been moved from one police station to another. I heard my family came to visit me one day. My mother, my wife and children and my sister came to visit me at the police station, all the way from Mombasa. I was not allowed to see them."*⁵⁹

While the authorities may justify the transfers for investigation or security purposes, transfers without notification to relatives and lawyers where their relatives or clients were are in breach of international standards.

3.3 Right to legal counsel

Amnesty International is concerned that detainees were not informed of their right to counsel during their initial period in custody when Kenyan police officers interviewed them,

⁵⁸ Amnesty International interview, Mombasa, 17 May 2004.

⁵⁹ Amnesty International interview, Nairobi, 24 May 2004.

sometimes reportedly in the presence of foreign interrogators. Amnesty International has also learned of cases where detainees’ requests to contact a lawyer were denied during initial and subsequent questioning.

Every arrested or detained person, whether or not on a criminal charge, has the right to the assistance of legal counsel. A person’s right to the assistance of legal counsel in pre-trial proceedings is not expressly set out in the ICCPR. However, the Human Rights Committee (HRC) has stressed that “*all persons arrested must have immediate access to counsel*”.⁶⁰

Principle 17(1) of the *Body of Principles* provides that “*A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it*”.

Principle 1 of the *Basic Principles on the Role of Lawyers* provides that “*All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.*”⁶¹ Principle 7 states that access to a lawyer must be granted “*promptly*”. Principle 8 states that “*... all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.*”

The right to counsel is guaranteed in Section 77(2) (d) of the *Constitution of Kenya*.⁶² Offences which are specified in law as subject to the death penalty, the indigent accused can be assisted by counsel through legal aid.⁶³ At pre-trial level, at the onset of interrogations and detention, those who can afford the services of counsel can be assisted. The State does not provide representation through legal aid at the commencement of investigations.

Lawyers experienced difficulty in trying to establish where their clients were being held. Amnesty International spoke to several lawyers in Mombasa and in Nairobi who said they had to conduct lengthy searches and enquiries in order to find out where and why their clients were being held and to have access to them.

The lawyer of D.B., who was originally questioned regarding the whereabouts of his brother C.B., and later on re-arrested as a suspect, spent over three days trying to find out where his client was detained. According to the lawyer, his client was removed from

⁶⁰ *Concluding Observations of the Human Rights Committee: Georgia*, UN Doc.CCPR/C/79/Add.74, 9 April 1997, para.28.

⁶¹ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - 7 September 1990.

⁶² Section 77(2) (d) of the *Constitution of Kenya*, “*Every person who is charged with a criminal offence ... shall be permitted to defend himself before the court in person or by a legal representative of his own choice*”, Revised Edition 2000.

⁶³ The death penalty is still being imposed in Kenya, though there has been no executions since 1986. Kenya is therefore considered as “*abolitionist in practice*”. The death penalty is retained for crimes such as murder, robbery with violence and attempted robbery with violence. In the *Suppression of Terrorism Bill* 2003, no death penalty was imposed for offences listed in this Bill.

Mombasa to Nairobi without anyone being informed. Different arrangements had to be made for legal representation in Nairobi. There, D.B. was moved to three different police stations, thus effectively denying him of his right to legal counsel, while his lawyer searched for him.⁶⁴

On 28 June 2003, a contingent of security officials from the Anti-Terrorism Unit, regular police and administration police, raided the grounds of the Garissa Muslim Children's Home, North Eastern Province, in a heavily armed operation mounted at dawn. They arrested T.V., a 24-year old Kenyan who had been living at the home since his return from Pakistan in 2002. T.V. was interrogated for eight hours on that day. He was suspected of being involved in the Kikambala hotel bombing and providing support to activities against the state. He was then taken to Nairobi and detained at the Gigiri police station. For three days, he was held incommunicado and interrogated by officers of the Anti-Terrorism Unit of the Kenya Police.

His lawyer was able to obtain access to him only after three days. The lawyer attended the last interrogation session in the presence of foreign agents. The suspect was held in custody for nine days. The lawyer asked that he be either released immediately or formally charged before a competent court of law, should there be any evidence to link him to any recognizably criminal offence. It was only after his lawyer lodged a habeas corpus application that T.V. was released. T.V. was not charged with any offence.⁶⁵

Another suspect, J.K., was led out through the back door at a main police station and driven to another less accessible police station while his lawyer was made to wait at the front of the police station.⁶⁶

3.4 Interpretation and translation

Principle 14 of the UN *Body of Principles* states that anyone who has been arrested, charged or detained, who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand what their rights are and how to exercise them, why they have been arrested or detained, and any charges against them. They are also entitled to receive a written record of the reason for arrest; the time of arrest and transfer to a place of detention; the date and time that they will be brought before a judge or other authority; who arrested or detained them, and where they are being held. They are also entitled to have an interpreter to help them with the legal proceedings after arrest, free of charge if necessary.

The confusion several detainees experienced during the initial stages of detention and interrogation could have been made worse because of language difficulties. Several interviewees reported that they could not understand why they were being kept in custody, why they were interrogated or even the charges being put to them. Amnesty International is also concerned that the alleged violations of pre-trial rights of detainees may have been

⁶⁴ Amnesty International interview with D.B.'s lawyer on 7 June 2004.

⁶⁵ Amnesty International interview with T.V.'s lawyer on 14 May, 2004.

⁶⁶ Amnesty International interview with J.K.'s lawyer on 25 May 2004.

exacerbated by the fact that interrogations were often conducted in a language the detainees could not fully understand.

For example, a fifty-two year old woman from Mombasa, whose native language was Swahili, was interviewed in English by foreign investigators, notwithstanding the fact that she could not speak or understand fully the language. One of the Kenyan police officers involved in the interrogation provided some interpretation. She also claimed that she was interviewed in Arabic by another set of foreign investigators, a language she spoke, though not fluently. There was no interpretation on this occasion.

4. Torture and other cruel, inhuman or degrading treatment or punishment

Article 1 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment defines torture as follows: “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

Torture and other cruel, inhuman or degrading treatment and punishment are prohibited under Kenyan and international law.⁶⁷ The prohibition of torture and ill-treatment is expressed inter alia in Article 7 of the ICCPR, in Article 2 of the *Convention Against Torture* and in Article 5 of the African Charter on Human and Peoples’ Rights, all treaties that Kenya has ratified. Other relevant standards prohibiting torture and other ill-treatment include those set out under the *UN Standard Minimum Rules for the Treatment of Prisoners* and the *Body of Principles*.⁶⁸

Torture still occurs in Kenya, despite its prohibition under the *Constitution of Kenya* and despite the enactment of the *Criminal Law Amendment Act* in July 2003, amending the *Penal Code*, the *Criminal Procedure Code* and the *Evidence Act* to prohibit the use of confession statements or admissions of guilt as evidence in criminal proceedings, if made under duress.⁶⁹

⁶⁷ “...other cruel, inhuman or degrading treatment or punishment” is referred to as “ill-treatment” in this report.

⁶⁸ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955.

⁶⁹ Section 74(1) Constitution of Kenya: “No person shall be subject to torture or to inhuman or degrading punishment or other treatment”.

⁷⁰ These changes brought Kenyan law into line with Article 15 of the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (*Convention Against Torture*) which

Several detainees have told Amnesty International they were subjected to torture or other ill-treatment during questioning. Three of the interviewees said they were physically abused while in detention. One of them stated that an electric device had been used.⁷¹

Mohammed Ahmed Surur is a 30-year old charcoal dealer in Mombasa. He is married and has two children. Amnesty International first met him shortly after his abduction and release in June 2003. Delegates also met him for a follow-up of his case during the May-June 2004 research mission.

Mohamed Surur told Amnesty International that he was abducted on Friday 30 May 2003 as he was returning home from the mosque. He was grabbed, handcuffed and pushed into the rear seat of a car. A black hood was placed on his head while he was further restrained. Mohammed Surur was then driven to a place unknown to him. His hood was taken off while he was led into a house where the handcuffs were removed and his fingerprints forcibly taken.

He was handcuffed again before being locked in a tiny room. Then the handcuffs were removed and he was asked to relieve himself as a long journey awaited him. In the toilet he used his mobile phone to talk to his wife. When his abductors realized this they beat him and took away his telephone. After about two hours his abductors led him out, covering his head with the black hood. He was forced into a vehicle that drove at high speed for about five to six hours.

When the vehicle stopped, he was ushered up some stairs and into a board room where he found eight men, who according to him, were foreigners. They were dressed in civilian clothes. They were seated at the table, on which a desktop computer was placed. No explanation was given to Mohamed Surur as to who these people were or where he was. Two of his abductors from Mombasa were also present.

He was placed in a seat between two of the foreigners, one of whom spoke broken Kiswahili. This man told Mohammed Surur that he knew he was a member of Al-Qaeda and his fingerprints were found all over the bombed hotel in Kikambala. Surur rejected the allegations but the person insisted. Surur then challenged them to take him to court if they had such evidence. At this point he was ordered to sign some papers before being taken to court which he refused. He was then beaten. The man on his left side grabbed him by his neck and banged his head on the table. Mohamed Surur was told that three of his "accomplices" were

obliges state parties to "ensure that any statement which is established to have been made as the result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". Other international standards, notably Article 12 of the *UN Declaration* also exclude statements made as a result of other cruel, inhuman or degrading treatment or punishment.

⁷¹ A reference to a headpiece close to what the interviewee was referring to was made recently. See *The New York Times*, "Detainee says he was tortured while in U.S. custody", 13 February 2005, "... The physical abuse, he said, ranged from a kick ... to electric shocks administered through a wired helmet that he said interrogators told him could detect whether he was lying".

being held and they had implicated him. He challenged them to produce these accomplices so that they could accuse him in his presence. The handcuffs were removed and his fingerprints were forcibly taken again and close-up photographs taken of his face from different angles.

He was brought to a small room where he remained until 12pm, Saturday 31 May. He was taken into the board room again, where he saw the same men. One of them removed some documents from an envelope and asked him to sign the printed papers but he refused. Somebody left the room and returned with a metallic chair that had cables protruding from beneath. His handcuffs were removed and he was asked to sit on the chair. The chair had been placed next to the computer and connections made thereon. His hands, legs and upper torso were held in place, using belts and metallic brackets attached to the seat. A round metallic headpiece with cables attached was placed on his head and white stickers pasted all over his head, with wires connected to the computer.

At this point, one of the men placed some papers before him and wanted to know whether he was willing to sign them so that they could remove him from the chair. He declined. The foreigner at the computer tapped on the keyboard. Surur felt a strong current running all over his body into the head thereby causing him extreme pain. They attempted to make him sign the papers again but he refused. The device was activated again. He lost consciousness.

When he recovered he found himself in the small room. He was taken back into the board room which was used as interrogation room and asked to sign the papers once more. Again he declined. He was placed on the same chair, at which point one of the men said that he thought that Surur was not involved in the events they were investigating. One of his abductors from Mombasa allegedly insisted he was involved in the Kikambala hotel bombing and that was why he was arrested. The foreigner argued that the chair could cause serious harm if it were reactivated. Surur was taken back to the small room.

On Monday 2 June 2003 at 9am he was brought back to the board room, where he was informed that his abductors would scrutinize his fingerprints to determine whether he had been involved in bomb attacks before, referring to the 1998 American embassy bombings and the Kikambala bombing. They threatened him that should they find his fingerprints anywhere, they would know where to come and get him. The hood was placed on his head again and his mobile phone was handed back to him. He was forced into a car and driven for about 15 minutes on a smooth road. The vehicle suddenly slowed down, the hood and handcuffs were removed and he was then pushed out of the car onto the road.

The treatment he was subjected to through the use of an electric device amounted to a violation of his right not to be tortured. At the time of speaking to Amnesty International delegates, Mohammed Surur was still on medical treatment since his three-day abduction, as he had not fully recovered from the trauma. He continued to suffer from insomnia, lack of concentration, severe headaches and his eyesight was affected. He complained of persistent apprehension and anxiety.

On his return to Mombasa from Nairobi following his abduction, he received an anonymous telephone call threatening him with death should he make enquiries or investigations into what happened to him. He first reported his abduction to the Provincial

Police Headquarters in Mombasa on 5 June 2003. He has also reported the threat to his life to the police and went back on 23 March 2004. He had received no information from the police on any investigation regarding his case when Amnesty International met with him.

The police denied any knowledge of the abduction. The case was raised at the National Assembly on 15 October 2003 and a thorough investigation promised. Amnesty International is not aware of any further information regarding these investigations promised by the Kenyan authorities.

Two other interviewees said they were beaten with sticks during interrogation. Two of them were family members related to a prime "terrorism" suspect, C.D., the police were looking for. One of them, a woman, stated:

*"During interrogation, they told me that if I did not speak the truth, they would beat me up. All they wanted to know was where my husband was and I did not know. At a certain moment, they actually started beating me with wooden sticks on my legs, my knees and the sole of my feet. A woman police officer carried out the beating. The next day I could not walk and had fever. I asked to be brought to the hospital, but they refused to take me."*⁷²

The second detainee stated the following:

*"While I was in the police cell, I was beaten up by the police with a baton on my knees, legs and arms. I am not aware of the name of the police officer who beat me but I used to see him around. After my release I felt a lot of pain but I did not go to the hospital. I did not fill-out a P-3 form because the police threatened me and said that I should not ask for one."*⁷³

Among other incidents of torture or ill-treatment reported to Amnesty International are the following:

- Two detainees suffered repeated verbal abuse during the period in custody at the hands of Kenyan and foreign interrogators. Foreign interrogators reportedly told a female detainee that they could keep her in detention for as long as they wanted; that they would arrest her whole family and they could blow all of them up, even her

⁷² Amnesty International interview on 17 May 2004.

⁷³ Police Form 3 is a document that a government medical doctor completes in order to record the particulars of assault and bodily harm to a person. It is issued by the police and tendered in court.

grand-children. This caused great fear and distress to the point where she fell ill. Another suspect said that though he had not been physically tortured, he was put under tremendous mental and psychological stress when the foreign officers allegedly threatened they could harm his family, his mother, wife and children.

- Detainees reported being pushed around and manhandled. One reported being grabbed by his clothes and shaken during interrogation, as well as shouted at with the interrogator’s face close to his.
- Handcuffs were used, even during interrogation. In August 2003 one of the suspects was interrogated with handcuffs on, while kneeling on the floor. When he asked why he had to remain handcuffed he was told that certificates showing that he had qualified in martial arts were found among his belongings, and therefore he had to be restrained.
- A suspect reported that he was denied sleep for two nights and told about the various methods which would be used to torture him if he did not speak.

The UN Committee against Torture has stated that the application of so called “*moderate physical pressure*” as a mode of interrogation clearly breaches the *Convention against Torture*.⁷⁴ It has stated that even if a suspect is believed to have information about imminent attacks against the state, the following methods of interrogation may not be used as they violate the prohibition on torture and ill-treatment: restraining in very painful conditions; hooding; playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee.⁷⁵

Principle 21 of the *Body of Principles* states: “*No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity or decision or his judgement.*”

Rejecting torture and ill-treatment does not mean foregoing effective interrogation of suspects. Skilful, professional interrogations can obtain critical information without reliance on such means. It is therefore imperative that the authorities embark on the appropriate training schemes that would equip the Police in Kenya with the necessary skills to carry out their duties effectively without having recourse to illegal acts of torture or ill-treatment. Such training should include integrating respect for human rights in daily policing.

The authorities should also strongly indicate that perpetrators of such acts would be brought to justice. As the Kenya Police has pointed out in its strategic plan:

⁷⁴ The UN Committee against Torture is the body of independent experts which monitors states’ compliance with their obligation under the *Convention against Torture*.

⁷⁵ See UN Doc.CAT/C/SR.297, reporting on Israel’s compliance with the Convention Against Torture. The Committee recommended that interrogations by Israeli security officers applying these methods “cease immediately”.

“The chief enemy of accountability is impunity – a state of affairs in which police officers can engage in misconduct, crime and violations of human rights and be confident that they will not be disciplined or held to account for their actions...Impunity exists in the absence of effective mechanisms for investigating and punishing police misconduct.”⁷⁶

The Kenyan authorities should speed up the establishment of the Independent Police Complaints Authority, identified as one of the mechanisms to promote accountability within the police.⁷⁷

4.1 Violations of detainees’ rights by foreign security agents during interrogation

Almost all of those arrested and detained whom Amnesty International met maintained that they were interviewed by foreign agents, some of whom introduced themselves as belonging to specific foreign security agencies, while others did not.⁷⁸ On several occasions the foreign agents reportedly interviewed detainees alone, without the presence of Kenyan police officers, and in the absence of a lawyer. Detainees claim to have been regularly intimidated by the foreign investigators.⁷⁹

Kenyan officials Amnesty International met would not comment on the type of cooperation which existed between Kenya and foreign countries in the context of counter-“terrorism” activities.⁸⁰ Officials at the US Embassy in Nairobi rejected the claim that US security agents were involved in the interrogation of suspects.⁸¹

Senior management of the Kenya Police Force admitted that foreign agents from two countries requested the assistance of the Kenyan Police Force during their own investigations. They denied, however, that those agents acted or could have acted on their own and in

⁷⁶ *The Kenya Police Service Strategic Plan 2004 – 2008*, p.12.

⁷⁷ *Ibidem*, p.13.

⁷⁸ Amnesty International interviews on 26 December 2002, 8 - 12 July 2003 and May - June 2004.

⁷⁹ See KTN TV, “Sixth suspect charged with bombing of tourist hotel”, 18 September 2003, “...Defence lawyers complained to [Judge] that foreigners, especially Israeli agents, were being allowed to interrogate the suspects while in custody”. See also East African Standard (Nairobi), “Ninth suspect in Paradise Hotel bombing case charged”, 22 November 2003, “[Defence lawyer] said his client had been interrogated by both Kenya police and FBI agents without his knowledge”.⁷⁹

⁸⁰ The Nation (Nairobi), “Foreign Security Teams Flown In”, 1 June 2003, “British and American security experts are in the country to help beef up security following recent threats of “terrorism”, Tourism and Information Minister ... has disclosed.” See also Associated Press, “Two Kenyans held in connection with Mombasa attacks”, 1 December 2003.

⁸¹ Meeting at the US Embassy in Nairobi on 26 May 2004. Amnesty International also requested to meet with the Israeli diplomatic mission in Nairobi, but the meeting did not take place.

violation of detainees’ rights. In addition, experts in “counter-terrorism” from a third country were helping the Kenyan police in specialized training.⁸²

Neither Government representatives nor senior police officers would explain the basis of this cooperation and assistance and the safeguards put in place to ensure the respect of the human rights of those who came in contact with foreign investigators.

One detainee said:

“I was taken to Nairobi by air from Mombasa. I was brought somewhere and locked in a small cell, where there was a wooden structure to sleep. They gave me two blankets. I was interrogated for five days by Kenyan officers in a bigger room. They wanted to know my background, whether I travelled to other countries and what I knew about the Kikambala bombing. At night I would be taken back to the cell. Nobody knew where I was.

On the sixth day, foreigners joined the Kenyan interrogators. They were from three different countries. Two of them told me where they were from and one did not, but I know. One of the foreigners told me that I was arrested for “terrorist” activities in Kenya. They started showing me pictures of people, asking me whether I knew them. I refused to speak and I said I needed a lawyer. The foreigner told me no member of my family or lawyer would come to the place where I was and that it was in my interest to answer their questions. Another threatened me that if I did not speak, they would take me to Guantánamo Bay.⁸³

I refused to talk and told them I had the right to remain silent but they became more threatening and demanding. Then, one of them told me they would not take me back to the small cell to rest. I could just sleep where I was. That night, I remained seated on a tall stool. At one point, I told one of the Kenyan officers I wanted to sleep. Somebody brought two blankets and I tried to rest on the floor.

⁸² The Nation (Nairobi), “Foreign security team flows in”, 1 June, 2003, “... British and American security experts are in the country to help beef up security following recent threats of terrorism”.

⁸³ Since early 2002, hundreds of detainees of many nationalities have been detained by the US authorities without charge or trial at a prison camp at the Guantánamo Bay US naval base in Cuba, where US administration has authorised the use of detention conditions and interrogation techniques which violate international standards. Authorized interrogation techniques have included stress positions, isolation, hooding, sensory deprivation, and the use of dogs. Among the abuses reported are the cruel and prolonged use of shackling, the use of loud music and strobe lights and the use of dogs to intimidate detainees. See for example, Amnesty International, *USA: Guantánamo detentions enter fourth year as torture allegations mount*, (AI Index: AMR 51/003/2005, 7 January 2005 and Amnesty International, *USA: Guantánamo – an icon of lawlessness*, (AI Index: AMR 51/002/2005), 6 January 2005).

On the next day, the foreigners came again. They were accompanied by two Kenyan officers. They continued interrogating me. They did not beat me but they threatened me. They did not allow me to sleep for two days. One of the foreigners told me he would bring my mother and my wife there. He told me one of my brothers had died of shock when they went to interrogate him. I learnt later that this was false but I was distressed at the time. I had no lawyer, no contact with my family or with the outside world.”

The Kenyan authorities have responsibility, under Kenya’s laws and treaty obligations, to ensure that during investigations, suspects are not subjected to torture, cruel, inhuman or degrading treatment or punishment and their rights, including the right to legal counsel and the right to be assisted by an interpreter, are fully respected. Kenyan authorities should ensure that any foreign agent to whom access to a suspect or detainee may be granted should scrupulously abide to Kenyan law and international standards. All complaints relating to torture and ill-treatment by suspects should be instantly investigated, publicly denounced and redress provided.

In addition, Kenyan authorities have a duty not to send detainees to another country to be interrogated if there were substantial grounds for believing that the person would be at risk of torture and ill-treatment, as well as other violations of their human rights.

5. Challenging Detention

5.1 The right to be brought promptly before a judge or other judicial officer

International standards provide that all arrested or detained persons should be brought promptly before a judge or judicial authority so that their rights can be protected.

In order to safeguard the right to liberty and freedom from arbitrary arrest or detention, and in order to prevent violation of fundamental human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority.⁸⁴

Article 9(1) of the ICCPR provides that “*Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.*” Although no specific time limits are expressly contained under international standards, seven-day detention before someone is initially brought before a court exceeds what has been considered acceptable in cases reviewed by the Human Rights Committee. Members of the Human

⁸⁴ Principle 4 of the *Body of Principles*.

Rights Committee have questioned whether detention of 48 hours without being brought before a judge is not unreasonably long⁸⁵.

Article 9(3) of the ICCPR applies to people arrested or detained on a criminal charge: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...”

Principle 11(1) of the *Body of Principles* states: “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority”. This applies to all detainees, whether or not they are held on a criminal charge.

The purposes of the review before a judge or other judicial authority, include the assessment of whether sufficient legal reasons exists for the arrest, whether detention before trial is necessary, to safeguard the well-being of the detainee, and to prevent violations of the detainee’s human rights.

The *Constitution of Kenya* provides that a person who is arrested or detained 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 within 24 hours of his arrest or from the commencement of his detention, or within 14 days of his arrest or detention if the offence is punishable by death.⁸⁶

One suspect stated to Amnesty International:

*“Suspected of involvement in the Kikambala Hotel bombing, I was arrested on 1 April, 2003 and taken to one police station in Mombasa and then moved to another one. On the next morning they drove me to Nairobi, where they took me to a police station in one of the outer suburbs. I was not taken to court and on 8 April I went on a hunger strike, demanding to be taken to court. On 9 April I was charged with ‘harbouring a person unlawfully present in Kenya’. This charge was later dropped and substituted with murder”.*⁸⁷

5.2 The right to challenge the lawfulness of detention

Everyone deprived of their liberty has the right to challenge the lawfulness of their detention before a court, and to have the detention reviewed on a regular basis. This right is different from the right to be brought before a judge because it is initiated by the detainee or on the

⁸⁵ Report of the Human Rights Committee, Vol 1 (A/45/40), 1990, para 333, Federal Republic of Germany.

⁸⁶ Section 72(3) (b) of the *Constitution of Kenya*, Revised Edition 2000.

⁸⁷ Amnesty International interview on 24 May 2004. See the case of J.K under sub-section 2.2 of this report.

detainee's behalf, rather than by the authorities. This right safeguards the right to liberty and provides protection against arbitrary detention and other human rights violations.

Article 9(4) of the ICCPR provides that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

Amnesty International is concerned that the lack of information and secrecy that surrounded detentions could have prevented detainees from being able to effectively challenge the lawfulness of their detention and to be released if that detention were determined to be unlawful, this being another important right under international law.

The various transfers to which detainees were subjected also hampered them in their right to challenge the lawfulness of their detention and to be released if that detention was determined to be unlawful.

Several lawyers and former detainees Amnesty International delegates spoke with gave information to the effect that they challenged detention before courts by filing habeas corpus applications before the High Court under Section 389 of the Criminal Procedure Code.⁸⁸ The following case is particularly indicative of the difficulties encountered in challenging detention.

The case of D.B:

D. B. was first arrested on 9 December, 2002, as the police were looking for his younger brother, C.B.⁸⁹ The family filed a habeas corpus application in the High Court in Mombasa on 11 December 2002. He was released on bond by the court as there were no charges against him. One condition attached to his release was that he should report to the police every Monday of the week, which he did until 13 March 2003, when the court released him unconditionally.

On 18 October 2003, the police in Mombasa again arrested him and he was detained for three days. On the night of 21 October 2003, he was flown to Nairobi and detained at one police station until 27 October 2003.

On 24 October 2003 the High Court at Mombassa ordered that he be produced in court or be released immediately.⁹⁰ The order for his release was served on the Office of the

⁸⁸ *Habeas Corpus* is the legal procedure by which the courts can enquire into any unlawful restriction on the liberty of an individual and, if necessary, order the person in question to be set free.

⁸⁹ See under sub-heading 2.1 of this report.

⁹⁰ Order in Miscellaneous Criminal Application No. 108 of 2002 in the High Court of Kenya at Mombasa, *ex-parte* [XXX] (Applicants) v/s (1) The Mossad, (2) Federal Bureau of Investigations, (3) The Commissioner of Police (through) 4. The Honourable Attorney General. (Respondents).

Attorney General and the Commissioner of Police. He was reportedly formally released and instantly rearrested. On one occasion he was told he was released and was requested to report to Police Headquarters first to collect his passport, Identity Card and other personal documents. On his way there, one of the officers who was in the car transporting them received a telephone call and he was afterwards informed that he had been rearrested. This was confirmed on his arrival at the Police Headquarters.

On or about 27 October 2003, he was taken to another police station where he was detained for three days until 30 October. On the evening of 30 October 2003, he was transferred to another police station on the outskirts of Nairobi. He was moved in the evening of 31 October 2003 to an undisclosed police station. He was not taken to court until 21 November 2003. He was charged with murder in the Kikambala hotel bombing.

5.3 The right to trial within a reasonable time or to release from detention

Anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. Article 9(3) of the ICCPR provides that *"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but releases may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement"*. Principle 38 of the *Body of Principles* is another standard relating to this issue.⁹¹

If a person in detention is not brought to trial within a reasonable time, he/she has the right to be released from detention pending trial. The law in Kenya provides that when a person is in police custody, he/she can, at the discretion of the court, be released on bail, pending the trial of his case, except in cases punishable by the death penalty. The right to bail is found in Section 72(5) of the Constitution of Kenya.⁹² Sections 122-133 of the Criminal Procedure Code deal with provisions attaching to bail.

Bail has been denied to the three standing trial in the "conspiracy to commit a felony" case before the Chief Magistrate's Court in Nairobi. Those standing trial were accused of four counts of conspiracy, namely taking part in the 1998 bombing of the US Embassy, conspiracy to bomb the present US embassy premises, conspiracy to shoot down a plane in November 2002 and conspiracy to bomb the Kikambala hotel. The case started with the minor charge of "harbouring a person illegally in Kenya", which is an offence for which bail may be granted, pending trial. However, bail was denied and the charge changed to the four above counts, still offences for which accused may be released on bail pending trial. The trial was on-going

⁹¹ "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."

⁹² Section 72(5) Constitution of Kenya: "If a person arrested or detained ... is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

and further delays were noted, to the extent that the Magistrate said that those standing trial could be freed unless the prosecution presented the required evidence.⁹³

6. Other conditions while in detention at police stations

Article 10 of the ICCPR states that "*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*" The same requirements are also stipulated in the *Body of Principles*.⁹⁴

People held in custody by law enforcement officials have the right to be examined by a doctor and, when necessary, to receive medical treatment. Principle 24 of the *Body of Principles* states that "*A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.*"

Amnesty International is concerned that several of those detained in the Kikambala Hotel bombing and other investigations were held in degrading conditions, contrary to international law and standards for humane treatment. Complaints include unsanitary conditions in police cells, failure to provide medical care when needed, as well as erratic provision of food. Detainees alleged that they were made to sleep on the floor, without any bedding, in filthy conditions. Though the conditions apply generally, the effects on individuals arrested in the context of "terrorism" investigations were exacerbated because they were also in incommunicado detention.

A young woman told Amnesty International:

"I was left outside in the compound with my baby at a police station in Mombasa. It rained a few times and there is not much space to take shelter. I was allowed to use a table in an office to sleep at night. It is only when my baby girl, whom I was nursing, became ill that they allowed my family to go with her so that she could get treatment".⁹⁵

⁹³ Daily Nation (Nairobi), "*Terror suspects may be freed, They could be given bail unless bomb expert testifies, warns magistrate*", 4 March 2005.

⁹⁴ Principle 1: "*All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person*".

⁹⁵ Amnesty International interview on 17 May 2004.

When Amnesty International raised this situation with the police authorities the response was that separate lock-up facilities for male, female and even juvenile detainees were not available in all police stations. Nonetheless, keeping the detainee in the above conditions violated her right to humane treatment.

Another woman stated:

*“The police was moving me from Mombasa to Lamu and it was at night. They held me for a night in the police station in another town in a mosquito-infested cell which I shared with rats. There were no beddings and I slept on the filthy floor”.*⁹⁶

A number of those detained on suspicion of “terrorist” acts, who were flown from the coastal provinces did not have the appropriate clothing for Nairobi, where the weather is colder, thus causing them to fall ill.

At least two reported that they asked to be taken to the hospital while in detention but were denied access to medical treatment. One feared he had pneumonia. Another said he could not walk after being beaten by police officers. A detainee suffering from stomach ulcers and high-blood pressure reported falling ill during interrogation. She said that no medical treatment was allowed for at least four days. Food and water were reportedly provided in an erratic manner while detainees were cut off from the outside world and relatives and friends could not bring food for them.

6.1 Conditions of detention at Kamiti Maximum Security Prison

Prison conditions leading to cruel, inhuman or degrading treatment and even death, which have for long been a concern of Amnesty International in Kenya, are in violation of international standards.⁹⁷ Though improvements were noted over the past two years regarding access to prisoners, other concerns, such as overcrowding and its attendant problems, still persist.⁹⁸

For example, on 24 May 2004, when Amnesty International visited Kamiti Maximum Security Prison, there were 3,385 prisoners, although it has a holding capacity of 1,500.⁹⁹

⁹⁶ Amnesty International interview on 17 May 2004.

⁹⁷ See Amnesty International, *Kenya: Prisons: Deaths due to cruel, inhuman and degrading conditions*, AI Index: AFR 32/010/2000, 7 December 2000.

⁹⁸ See Amnesty International, *Kenya: The Government should fully investigate recent deaths in custody in Meru district* (AI Index: AFR 32/006/2004, 30 September 2004).

⁹⁹ Amnesty International had an opportunity to get first-hand information when it was permitted to visit the seven detainees standing trial in the two cases in connection with the Kikambala bombing, that is the murder case and the “conspiracy to commit a felony” case.

This is where the seven detainees standing trial for the bombing of the Kikambala hotel and the conspiracy case were detained.

It is imperative to accelerate the implementation of the programme of reforms announced by the Prisons Department in 2002-2003, which targets the whole prison and detention system, starting from detention conditions to improvements in the working conditions of warders.¹⁰⁰ Reforms at all levels should aim at improving conditions of confinement such that "*all prisoners shall be treated with the respect due to their inherent dignity and value as human beings*".¹⁰¹

The seven detainees told Amnesty International that it was not always possible to get treated for their medical needs promptly and adequately. In addition, some of them said that they were suffering from specific medical conditions such as stomach ulcers and that they require a special diet, which was not made available to them.¹⁰²

Amnesty International has not been in a position to assess these claims in detail but noted that international standards clearly specify that medical care and treatment shall be provided whenever necessary, free of charge.¹⁰³ In addition, prisoners should be provided at "*the usual hours with food of nutritional value adequate for health and strength...*" and prisoners should have access to drinking water whenever they need it.¹⁰⁴

The prison authorities at Kamiti informed Amnesty International that one medical practitioner has been seconded for duty to Kamiti, Langata and Industrial Area Prisons and prisoners were taken to hospital on his recommendation. There was a ward to house prisoners who may need medical treatment at Kamiti Prison, under the responsibility of trained medical staff, as well as in-house laboratory and X-ray facilities. They also asserted that all prisoners at Kamiti have access to medical treatment when required.

Amnesty International also received complaints regarding the general unsanitary conditions prevailing at the prison. Toilets were in poor condition; overcrowding and low level of sanitation caused prisoners to be affected by pests such as body lice. Malaria is a problem due to the prevalence of mosquitoes. It was also mentioned that bedding materials were inadequate and in short supply.

¹⁰⁰ Amnesty International Interview with the Senior Assistant Commissioner of Prisons on 14 May 2004.

¹⁰¹ *Basic Principles for the Treatment of Prisoners*.

¹⁰² See also Daily Nation (Nairobi), "*Sixth Mombasa terror suspect charged*", 19 September 2003, "... On his part [Defence lawyer] alleged that the suspects were denied the rights of visit by relatives, discriminated against and not given special diet prescribed by a doctor".

¹⁰³ Rules 22(1) and (2) of the UN Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First UN Congress on the Prevention of Crime and Treatment of Offenders, Geneva, 1955 and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) on 31 July 1957 and 2076 (LXII) of 13 May 1977.

¹⁰⁴ *Ibidem*, Rule 20(1).

All the prisoners Amnesty International met complained about the transportation to and from the court on the days they had to appear in court for their trial. They were transported in a congested vehicle, with about 80 to 100 people packed in it, this being about three times the capacity of truck. There was little ventilation in such conditions. The journey was undertaken at high speed, while the prisoners clung to each other in order to prevent themselves from falling. Transportation in such conditions is not in compliance with international standards, which require that “[t]he transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited”.¹⁰⁵

Information received by Amnesty International indicated that the detainees’ ability to maintain contact with the outside world was a persistent problem, extending beyond the initial period of detention. Access to and by family members while on remand at Kamiti Maximum Security Prison was an issue for all.

The seven were standing trial in Nairobi at the time Amnesty International spoke with them for crimes committed in the coast provinces, where they and their families live. Their relatives faced difficult logistical and financial problems to travel to the capital city from Mombasa and Lamu to be present at the trial and to visit them. Given that most of those detained were men who were sole breadwinners of their families, many relatives have not had the means to travel to Nairobi. One of the seven detainees told Amnesty International delegates:

“We do not see our families often, because they have to come from Mombasa and Lamu, all the way up to Nairobi and it is too expensive for them to visit regularly. The last time I saw family members from Mombasa was three months ago. There was nobody left to support our family. I want to point out that only the seven of us are not allowed to see visitors on weekends, while all other inmates are able to. Our visiting hours are from Monday till Friday and only in the mornings. Visiting time is just fifteen minutes. These restrictive hours also cause problems for family and friends to visit us. We were told that this is for security reasons.”¹⁰⁶

The prison authorities explained this special regime in relation to the seven detainees on the grounds that their visits required supervision by a senior prison officer as security precautions needed to be taken “*considering the magnitude of the alleged offence.*” The prison authorities have been consistent in maintaining that the seven prisoners were treated no differently from others. International standards provide that “*subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution*” untried prisoners shall be given “*all reasonable facilities for communicating with his family and friends, and for receiving visits from them*”¹⁰⁷.

¹⁰⁵ Ibidem, Rule 45(2).

¹⁰⁶ Amnesty International interview on 24 May 2004.

¹⁰⁷ Rule 92, Standard Minimum Rules for the Treatment of Prisoners.

However, allowing visits only during morning hours on week-days appears to be restrictive when family and friends need to travel long distances from the coast to Nairobi to be able to visit their relatives.

7. Violations of the Rights of Refugees and Asylum-Seekers

Amnesty International is concerned that the rights of refugees and asylum-seekers were violated in the context of the "counter-terrorism" actions taken by Kenyan government.¹⁰⁸ International law provides that no one should be returned to a country where he or she would be at risk of serious human right abuses. Everyone should be given an opportunity to have their claims for protection assessed in a fair and satisfactory procedure, with all the safeguards required under human rights law and standards respected, including those prohibiting arbitrary arrest and detention.

Abdel Mohamed Al-Dahas is a 57 year-old Iraqi national, a pilot by profession. Al-Dahas was recognized as a refugee by the office of the United Nations High Commissioner for Refugees (UNHCR) in Nairobi. He was held in police custody at Kileleshwa Police Station, in Nairobi, Kenya from 8 October 2001 until February 2005 without any explanation being given regarding his detention. Al-Dahas was handed into the custody of UNHCR on 28 February 2005.

According to information gathered by Amnesty International, Al-Dahas fled Iraq in 1996, fearing for his life and was subsequently forced to move onwards between various countries, including Yemen, in search of protection. He reached Nairobi on 13 December 1999, where he attempted to apply for refugee status at the UNHCR, Nairobi. UNHCR advised Al-Dahas to return to Yemen in order to apply for refugee status with the UNHCR office there.

In the process of making arrangements to leave, Al-Dahas was arrested and taken to Gigiri Police Station on 24 April 2001. He was brought to court on 18 May 2001, where he was found guilty of being in Kenya illegally and sentenced to four months' imprisonment or to a fine of Ksh 8,000 (approximately US\$ 105). The court also ordered his deportation to Iraq. He paid the fine and was taken back to Gigiri police station, pending deportation.

While in custody Mr Al-Dahas managed to contact UNHCR officers who wrote to the Immigration Department of Kenya on 13 September 2001, requesting them not to proceed with the deportation as Al-Dahas' case was being examined. On 14 September 2001, UNHCR sent another letter to the Immigration Department confirming that Al-Dahas had been granted refugee status and requesting the Kenyan authorities to release him into UNHCR protection.

¹⁰⁸ See AFP, "Kenya to deport five Somalis for alleged terrorism links", 10 April 2004.

On 6 October 2001, in contravention of the fundamental principle of *non-refoulement* and its obligations under the 1951 Refugee Convention, Kenya deported Al-Dahas to the United Arab Emirates, from where he was to be sent on to Iraq. However, on informing the authorities at his transit point of his fear to return to Iraq because of a serious threat to his life, he was brought back to Kenya on 8 October 2001. Upon his arrival in Kenya, he was taken straight to Kileleshwa Police Station where he was held until 28 February 2005.

Al-Dahas challenged his detention and in a judgment delivered on 15 December 2003, the judge said the following:

*“I take judicial notice of the following notorious facts. That on 07.08 98 the American Embassy in Nairobi was bombed and damaged... That many innocent Kenyans died and others maimed for life. That on or about 28.11.02 Paradise Hotel at Kikambala near Mombasa was bombed and flattened. That the media reported that about 15 people died and 80 others injured and that most of the victims were, again, Kenyans.”*¹⁰⁹

The judge made reference in this context to the fact that Al Dahas is a “*foreign pilot bomber engineer and trained military personnel*”, though the judgment establishes no link between the events referred to above and to Al-Dahas. Al-Dahas came to Kenya on 13 December 1999 and was already in custody at the time the Kikambala bombing took place.

Amnesty International is concerned that Mr. Al Dahas, despite his status as a refugee pursuant to UNHCR’s mandate, was held in detention for over three years without having been given reasons for his detention in a police cell.

8. Conclusions and Recommendations

Kenya is a state party to all major international and regional human rights treaties, including the *International Covenant on Civil and Political Rights* (ICCPR), *and Convention against Torture and Other Cruel, Inhuman or Degrading the Treatment or Punishment*, and the *African Charter on Human and Peoples’ Rights*. Amnesty International is concerned that measures taken to counter “terrorism” violate the rights guaranteed by these and other instruments and by customary international human rights law. Yet it is precisely during challenging times that governments must be scrupulous in their adherence to international human rights law and standards. To do otherwise undermines rather than reinforces the search for justice.

While recognising Kenya’s duty to ensure the security of its citizens and other persons within its territory and subject to its jurisdiction, Amnesty International is concerned that the rule of law and respect for Kenya’s obligations under international human rights international

¹⁰⁹ High Court of Nairobi, Judgment in the Criminal Application No. 684 of 2003, 15 December 2003.

law and standards were being disregarded as the country come to grips with how to counter "terrorist" acts.

During its mission in May - June 2004, Amnesty International was confronted with the functioning of the Kenya Police Force in their investigations to bring to justice perpetrators of attacks on civilians in Kenya. In the light of its findings the organisation makes a number of general, as well as specific recommendations.

Amnesty International urges the Kenyan Authorities to:

- Ensure respect for the rights of anyone arrested or detained as recognized under international law and standards, including being made aware of reasons for arrest and detention. The services of a competent interpreter should also be provided whenever proceedings are in a language that suspects or those accused do not fully understand
- Ensure that no incommunicado detentions are carried out. Anyone arrested or detained should be given prompt access to legal counsel, relatives and medical care if needed. Anyone arrested or detained should only be held in recognised places of detention.
- Anyone arrested or detained should know where they are transferred to and their relatives notified of any transfer promptly.
- All arrested or detained persons should be brought promptly before a judge. They should have access to courts so that they may challenge the lawfulness of their detention. There should be periodic review of the necessity for and lawfulness of continuing the detention by a judicial authority.
- Ensure that any reports or allegations of torture or cruel, inhuman or degrading treatment or punishment are promptly, thoroughly, independently and impartially investigated. Statements made as a result of torture should be excluded.
- Investigate all crimes under international law and other human rights abuses and, where there is sufficient admissible evidence, prosecute the suspect.
- Ensure that all prisoners and detainees are treated humanely in accordance with international human rights law and standards, whether in police cells or in prisons.

- Establish promptly an independent, efficient and external Police Complaint/Oversight Mechanism in order to improve the effectiveness of the police and for the population to regain confidence in the police.
- Ensure that suspects have access to a counsel as soon as they are questioned or detained, whichever occurs first, and that they are able to communicate in confidence with the counsel and that no questioning takes place without the presence of counsel.
- Ensure that the rights to a fair trial of all persons investigated or prosecuted for alleged “terrorist” activities, as guaranteed by Kenyan law and Kenya’s international obligations, are fully respected.
- Respect the principle of *non-refoulement*, and refrain from sending anyone to countries where he or she would be at risk of serious human rights abuses, including unfair trial, torture and death penalty or other cruel, inhuman or degrading treatment or punishment.
- Ensure that refugees and asylum-seekers are able to exercise their right to seek and enjoy asylum in a fair and effective procedure.

Amnesty International urges the Kenya Police Force to:

- Send out a strong message to all law enforcement officials that any action that does not adhere to the rule of law and respect for human rights will be dealt with severely, including prosecution if so required.
- Ensure the development of high-quality preliminary investigations, including forensic investigations in order to avoid unlawful arrests, detentions and holding people without charge or trial in violation of their human rights.
- Train police officers at all levels in human rights law in order to improve the quality and effectiveness of the policing and to gain the respect and confidence of the population.