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

SUMMARY OF KEY ISSUES FROM PREVIOUS UPR CYCLES

During the previous UPR cycle, the Government of Kenya was recommended to adopt anti-torture legislation that includes mechanisms for giving reparations to victims. These were reflected in recommendations 142.49, 142.79; 142.89; 142.96; 142.102.

More specifically they were asked Ensure that legislation to counter torture includes mechanisms for giving reparations to victims; and ensure that the report of the Truth, Justice and Reconciliation Commission and its recommendations are implemented, in particular on access to justice for victims of post-election violence; In line with the conclusions of the report produced by the Truth, Justice and Reconciliation Commission in 2013, take all necessary steps to put in place a programme to give reparations to all victims of the 2007–2008 post-election violence.

NATIONAL FRAMEWORK

The Constitution of Kenya under Article 25 provides that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment cannot be limited. This is also articulated by Article 26(1) of the Constitution of Kenya which provides that: Every person has the right to life; Article 26(3) provides that: A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or the written law.

The Prevention of Torture Act 2017 provides for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment, and reparations to victims of torture and cruel, inhuman or degrading treatment or punishment. The Act provides for redress and reparations, as provided for under the UN Convention against Torture, the African Charter on Human and Peoples Rights, and the Victims Protection Act 2014. This will include compensation as well as medical and psycho-social rehabilitation.

CHALLENGES

While the Prevention of Torture Act 2017 provides a strong legal framework for providing reparations to torture victims, there has been very limited implementation of all aspects of reparations.

The Presidential directive of 2015 established the Restorative Justice Fund. However, this has not been done to-date due to absence of a clear implementation regime.
There has only been very limited forms of assistance to victims, unaccompanied by any measure of accountability, truth seeking or acknowledgment that the recipients are victims of human rights violations.

Court cases for victims of human rights violations tend to take up to 7 years or more in court. Where victims obtain a court order for compensation for torture, extrajudicial executions and enforced disappearances, the government is slow in paying out the compensation. IMLU has 9 cases where compensation amounting to approximately Kenya Shillings 19 million (USD 19,000.) was awarded to the victims as far back as 2011 but the government is yet to honor them.

The government is also not offering rehabilitative services including medical and physiological services to victims of torture, extra judicial killings and enforced disappearance. This means that most victims are forced to either pay for private services or depend on civil society organizations such as IMLU for support.

These problems are partially caused by the government’s failure to ensure adequate budget allocations for the payment of judgements entered against it for compensation and provision of rehabilitative services to the victims/survivors of human rights violations. Despite the enactment of the Victim Protection Act (No 17 of 2014) and of the Victim Protection Trust Fund, the infrastructure to support the Victim Protection Trust Fund is not fully formed, and while the Fund’s Board is in place, a secretariat has not been established and the Fund has also not been resourced.

The courts have however began holding the individual perpetrators liable for their actions including payment of compensation. The High Court of Kenya in 2019 ordered six police officers to pay Sh4 million to a lawyer they had arrested and detained illegally. The officers were also ordered to pay KSh 3.8 million to 19 other people they had arrested and locked in a cell at the Ongata Rongai police station. Each of the 19 complainants was to get Sh200,000.10

**RECOMMENDATIONS**

- Allocate an appropriate budget to ensure that the government can provide redress to victims of torture, extra judicial killings and enforced disappearance.

- Ensure prompt and effective disbursement of the compensation funds to the survivors of torture, extra judicial killings and enforced disappearance.

- Promptly develop regulations under the Prevention of Torture Act 2017, using a consultative process, to ensure that the victims of torture and ill treatment can access rehabilitation services to be financed by the victim protection fund.

- Develop a clear guideline on how the Restorative Justice Fund will be accessed by victims in a timely and effective manner.

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

SUMMARY OF KEY ISSUES FROM PREVIOUS UPR CYCLES

During the previous UPR cycle, the Government of Kenya was recommended to investigate and ensure accountability torture, ill-treatment and extrajudicial executions. These were reflected in recommendations 142.86; 142.99, 142.100; 142.101 and 142.103

Specifically, the government was urged make further efforts ensure greater accountability and transparency of police and security forces, including by publishing the results of investigations by the Independent Policing Oversight Authority; End impunity for the perpetrators of violence related to the 2007 elections; Implement the recommendations made by the Truth, Justice and Reconciliation Commission, including investigation and punishment of those responsible for serious human rights violations and reparation for victims of such violations and . Continue to strengthen internal accountability mechanisms for all security agencies, including by investigating and prosecuting members of security agencies responsible for human rights violations

NATIONAL FRAMEWORK

The Constitution of Kenya under Article 25 provides that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment cannot be limited. This is also articulated by Article 26(1) of the Constitution of Kenya which provides that: Every person has the right to life; Article 26(3) provides that: A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or the written law.

The Prevention of Torture Act 2017 provides for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment, and reparations to victims of torture and cruel, inhuman or degrading treatment or punishment. The Act brings all State agencies and officials under the ambit of accountability for torture and cruel, inhuman, or degrading treatment or punishment, and provides clear penalties for such atrocities. Prior to this, torture was expressly outlawed under different pieces of legislation covering only members of the National Police Service, the National Intelligence Service, and the Kenya Defence Forces. Other law enforcement agencies that have historically and more recently been increasingly involved in perpetrating torture and cruel, inhuman, or degrading treatment or punishment such as council askaris, the Kenya Wildlife Service, and the Kenya Forest Services had no legal provisions prohibiting them from perpetrating these heinous acts.

The National Coroner’s Service Act 2017 provides for investigation of reportable deaths and the complementary role of complementary role of forensic medical science services to the police in handling investigations involving decedent bodies and scene management. The Act ensures a comprehensive framework for effective investigation of suspicious deaths especially at the hands of the police who continue to face frequent allegations of covering up killings in during the conduct of police operations.
In 2016 IMLU commissioned a survey on the prevalence of torture in Kenya, 30.3% of the respondents indicated that they had undergone torture which is a rise from 23% in 2011 when the survey was last conducted. During the reporting period IMLU documented 98 cases of extra judicial killings, 18 cases of enforced disappearances and 269 cases of torture with the most frequent perpetrators being the police officers. In addition, IMLU has produced high quality medical evidence documenting torture in a total of 24 cases.

Despite the comprehensive legislative framework and the high number of cases documented by IMLU, it is our experience that there have been very few and very slow investigations of extrajudicial killings and torture allegations. The general data on Independent Policing Oversight Authority (IPOA) investigations between 2015-2018 indicate that it received 6632 complaints from the public, investigated 3173, completed 610, forwarded 75 to the Office of the Director of Public Prosecution and have secured 3 convictions.  

There has been the pattern in cases involving police perpetrators: investigations resulting in claims of insufficient evidence, loss of witnesses who in some cases were intimidated or murdered, and/or compromised crime scenes. Other cases have simply gone cold. The victims are unable to record complaints to get OB numbers and p3 forms from police stations inhibiting access to justice. Even when the victims are able to get documents the documentation is not carried in line with the Istanbul protocol and the Minnesota Protocol.

We however take note that following investigations by the Independent Policing Oversight Authority, the Judiciary has sentenced several officers responsible for human rights violations, they include Titus Ngamau a.k.a Katitu, Constables Benjamin Kahindi Changawa, and Stanley Okoti, and Nahashon Mutua. This shows some level of commitment by IPOA in safeguarding the rights of victims of police killings & torture including serving officers as was in the cases.

### RECOMMENDATIONS

1. Fully implement the international standards established in the Istanbul and Minnesota Protocols in the conduct of investigations of torture and Extrajudicial Executions.
2. Ensure publication of outcomes of investigations by the Independent Policing Oversight Authority and the police Internal Affairs Unit to allow for public oversight and avoid impunity.
3. An official statutory database should be established and managed on behalf of relevant agencies, including the National Police Service (NPS), the Independent Police Oversight Authority (IPOA), the ODPP, KNCHR, the National Crime Research Centre, and the Judiciary for synthesizing and administering investigation, prosecution and conviction data of persons including public officials conviction data of persons including public officials.

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5. [http://kenyalaw.org/caselaw/cases/view/149253/](http://kenyalaw.org/caselaw/cases/view/149253/)
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LEGISLATIVE FRAMEWORKS

SUMMARY OF KEY ISSUES FROM PREVIOUS UPR CYCLES

During the previous UPR cycle, the Government of Kenya was recommended to ratify the Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention Against Torture (OPCAT) and to adopt comprehensive legislation criminalising torture.

NATIONAL FRAMEWORK

The Constitution of Kenya under Article 25 provides that the right to freedom from torture and cruel, inhuman or degrading treatment or punishment cannot be limited. This is also articulated by Article 26(1) of the Constitution of Kenya which provides that: Every person has the right to life; Article 26(3) provides that: A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or the written law.

Persons Deprived of Liberty Act 2014 establishes strong provisions for securing the rights of persons deprived of liberty and monitoring compliance.

There are two new acts that have come into force during the second and the third reporting cycle which are:-
The National Coroner’s Service Act 2017 provides for investigation of reportable deaths and the complementary role of forensic medical science services to the police.;
and
The Prevention of Torture Act 2017 provides for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment, and reparations to victims of torture and cruel, inhuman or degrading treatment or punishment.

CHALLENGES

In 2017, Kenya made a tremendous step in the enactment of the Prevention of Torture Act and the National Coroners Service Act, which were to ensure that perpetrators of torture and extra judicial killings are held accountable and victims receive redress. However, a lack of progress in implementation of the Acts increases the risk of human rights abuses and limits the preparedness of the state to handle such abuses in a fair and effective manner.

The state has not operationalized the National Coroner's Service Act 2017 and the National Coroner's Service is not yet set up which inhibits the effective investigations of reportable deaths.

While the Kenyan Constitution and Persons Deprived of Liberty Act 2014 establishes an excellent basis for securing the rights of persons deprived of liberty and monitoring compliance, these rights are rarely implemented in practice. The key mechanisms and institutions established by the act, notably the Consultative Committee on Persons Deprived of Liberty and the complaints and disciplinary procedure, are not effectively operational. The Kenya National Commission on Human Rights (KNCHR) has no reported instances of the complaint’s procedure being used and there is no comprehensive data collected on compliance with legal safeguards by security officials. This leaves persons deprived of liberty without effective access to claim their rights and it severely complicates external monitoring of places of detention.

Kenya is yet to ratify the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and establish a system of regular visits by independent international and national bodies to places where people are deprived of their liberty.

RECOMMENDATIONS

1. Fully implement the National Coroners Service Act 2017 and the Prevention of Torture Act 2017 and develop a monitoring and evaluation tool to access the progress of implementation.

2. Invest in immediate capacity building for actors in the administration of justice sector, including security and law enforcement officials, Judicial officers, prison officials, and prosecutors.


4. Fully implement, the Persons Deprived of Liberty Act, including through the establishment and capacitation of the Consultative Committee on Persons Deprived of Liberty and the operationalization of the complaints and disciplinary procedure.

5. Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

6. Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.