



ALTERNATIVE REPORT IN RESPONSE TO THE SECOND PERIODIC REPORT BY KENYA TO THE COMMITTEE AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Prepared by Independent Medico-Legal Unit (IMLU) for submission to the Committee Against Torture and Other Cruel, Inhuman and Degrading Treatment Or Punishment

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In collaboration with:

Coalition on Violence against Women – Kenya (COVAW), Muslims for Human Rights (MUHURI), Rights Promotion and Protection Centre (RPP), International Justice Mission-Kenya, Children’s Legal Action Network (CLAN), Kenya National Commission on Human Rights (KNCHR), Refugee Consortium of Kenya (RCK), International Centre for Transitional Justice (ICTJ) Kenya, East Africa Centre for Human Rights, Constitution & Reform Education Consortium (CRE-CO), International Commission of Jurists – Kenyan Chapter, National Coalition of Human Rights Defenders Kenya (NCHRD), Federation of Women Lawyers-Kenya [FIDA-K] and Centre for Law and Research International (CLARION)

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Abbreviations

ACHPR:	African Commission on Human and Peoples' Rights
CAT:	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CIPEV:	Commission for Investigating the Post Election Violence
CRPD:	Convention on the Rights of Persons with Disabilities
EAC:	East African Community
EACJ:	East African Court of Justice
FGM:	female genital mutilation
ICC:	International Criminal Court
IEBC:	Independent Elections and Boundaries Commission
IMLU:	Independent Medico-Legal Unit
IREC:	Independent Review Commission
KNCHR:	Kenya National Commission on Human Rights
Kshs:	Kenya Shillings
MOJNCCA:	Ministry of Justice, National Cohesion and Constitutional Affairs
MRC:	Mombasa Republican Council
MUHURI:	Muslims for Human Rights
NPM:	National Preventive Mechanism
OP-CAT:	Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
TJRC:	Truth, Justice and Reconciliation Commission
UN:	United Nations
UPR:	Universal Periodic Review

I: Introduction

1. This is an Alternative Report to Kenya's Second Periodic Report¹ to the Committee Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the Committee). It is prepared by the Independent Medico-Legal Unit (IMLU) in consultation with a number of human rights organisations which have furnished primary data for this report.
2. IMLU is a human rights organisation which began working in Kenya in 1992. Its mission is: promoting the rights of torture victims and protecting Kenyans from all forms of State-perpetrated torture by advocating for legal and policy reforms, monitoring adherence to human rights, rehabilitating victims of torture and building the capacity of key stakeholders.² IMLU similarly prepared a report that informed the Committee when it was reviewing Kenya's Initial Report to the Committee in 2008.
3. This Alternative Report provides information covering the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereinafter 'the Convention' or 'CAT') which the Committee may draw upon as it engages Kenya during the country's presentation of its Second Periodic Report to the Committee. It raises concerns and suggests recommendations which the Committee may consider as it makes its concluding observations and recommendations for Kenya. Insights for this report have been gained by IMLU as it has continued to undertake its programmes within Kenya during the last many years.
4. The Alternative Report draws its information from the following basic documents:
 - a. The List of Issues Prior to the Submission of the Second Periodic Report of Kenya (CAT/C/KEN/2), adopted by the Committee at its 45th Session;
 - b. The Second Periodic Report of Kenya (CAT/C/KEN/2), submitted to the Committee on 28 September 2012; and

¹ UN Doc. CAT/C/KEN/2, At <http://www2.ohchr.org/english/bodies/cat/cats50.htm>.

² For more information about IMLU, see: <http://www.imlu.org/>

- c. Concluding Observations of the Committee Against Torture, Kenya, November 2008.
5. The Report is divided into this introduction and three other sections. Section II explains Kenya's present overall constitutional and political context. Section III of the Report offers analysis of pertinent issues as well as providing suggestions which IMLU trusts the Committee will consider while preparing its concluding observations for the State. Part IV of the Report provides a summary of the recommendations made in the Report.

II: Present Kenyan context

The general elections

6. On 4 March 2013, Kenyans participated in the first general elections under the Constitution of Kenya 2010. Unlike the 2007 general elections which resulted in deep inter-communal violence, no pronounced interethnic violence took place around polls day. Kenyans voted in larger numbers than has ever been witnessed before – at over 86 per cent of registered voters, and for days on end waited for the results with exasperated patience. While the results of the presidential elections were contested, that happened via a judicial process lodged at the Supreme Court and not via mass action on the streets or actual inter-communal clashes. Concerns remained though that Kenyans now had found a new medium to express their pent-up frustrations: social media sites like Twitter and Facebook became hot cauldrons of negative interethnic exchanges between supporters of the key political protagonists, the Jubilee Coalition on one hand and the Coalition on Reforms and Democracy on the other. While the Supreme Court ruled that the Jubilee presidential candidate, Uhuru Kenyatta, had been validly declared as the next President of Kenya, the conduct of the 2013 polls by the Independent Elections and Boundaries

Commission (IEBC) remains under intense scrutiny since even by the IEBC's own admission the elections raised huge logistical and administrative challenges.

7. The period preceding the general elections had witnessed instances of mass violence which led to multiple deaths of civilians and security officers. In 2012, Kenyans witnessed interethnic conflict between the Pokomo and Orma communities in Tana River County (Cf: para. 69-72); and the country had to deal with fallout from the Mombasa Republican Council (MRC) which sought secession of the Coastal region. Worse still, Kenya had to combat Al-Shabaab terrorists infiltrating the country largely from Somalia.

The 2010 Constitution

8. The 2010 Constitution revised Kenya's governance structures by better defining and allocating powers amongst different institutions both horizontally and vertically. On the vertical score, the country was devolved into 47 Counties, each with an executive arm and a legislature. Horizontally, the National Government would be headed by the President checked by a bi-cameral legislature comprising a primarily law-making National Assembly and a Senate principally for dealing with devolution matters. Both these arms of State would be checked by a revitalised Judiciary which for the first time in Kenya would include a fully-dedicated Supreme Court. The Constitution also established an array of Constitutional Commissions and Independent Offices to deal with key themes such as human rights, land, corruption, prosecutions, revenue allocation, financial management, and security. The country's revitalised security institutional arrangements included: the National Police Service, the National Police Service Commission, and the Independent Police Oversight Authority (Cf: para. 42-44).

Freedom from torture

9. For purposes of this Alternative Report, it is necessary to highlight that Kenya's Bill of Rights legislates specifically for the right to freedom from torture as an unlimited right. Every person has the right to freedom and security of the person. This right is detailed to include the right not to be subjected to torture in any manner, whether physical or psychological, and the right not to be treated in a cruel, inhuman or degrading manner - Article 29 (d) and (f). Protection against torture or ill-treatment is only one of four rights in the Constitution which is unlimited (Article 25). Other unlimited rights are freedom from slavery or servitude, the right to a fair trial, and the right to an order of *habeas corpus*.
10. While the Constitution focuses on the right to freedom from torture specifically, it also lists and outlaws other acts which can be classified under a broader definition of torture and definitely fall within the ambit of cruel, inhuman and degrading treatment or punishment. Freedom and security of the person in terms of Article 29 of the Constitution includes the rights not to be: subjected to any form of violence from either public or private sources; or subjected to corporal punishment - Article 29 (c) and (e). This means that what would amount to torture or ill-treatment within the domestic sphere or within the business sphere is protected too.

Engagements with human rights mechanisms

11. During the last four years, the State has continued to have robust engagements with multiple international and regional human rights mechanisms, with varied levels of success or failure. In 2010, Kenya underwent its initial review before the United Nations (UN) Human Rights Council under the Universal Periodic Review (UPR) mechanism. In the course of that process, the State made a number of important representations on questions of torture and ill-treatment in the country. In particular, Kenya committed to:
 - a. Take all steps to eradicate the use of torture and ill treatment by public officials, and prosecute and punish those responsible;

- b. Introduce in its national legislation the definition of torture, reflecting that set out in Article 1 of CAT, and accede to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OP-CAT); and
 - c. Continue human rights education and training, and in particular provide human rights training to judges, police officers, prison guards and all law enforcement officers.³
12. Kenya also continued to engage with other human rights treaty bodies, including the Human Rights Committee in 2012, the Committee on Elimination of Racial Discrimination in 2011, and the Committee on Elimination of Discrimination Against Women in 2011. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, visited Kenya in early 2009 (Cf: para. 88).
13. It must be pointed out that Kenya has been extremely lax in its engagements with the continental human rights mechanisms. In fact, it has not made appearances at most sessions of the African Commission on Human and Peoples' Rights (ACHPR) during the last three years.

III: Key Issues and Recommendations

14. This section of the Report draws from the list of issues which the Committee prepared and the responses on those questions given by Kenya in its State Report. IMLU recognises and commends the State to the extent that it has taken policy, legislative and administrative measures to prevent torture and ill-treatment. As indicated below, though, the Committee should take cognisance of multiple instances where the State's responses to dealing with torture have either been inadequate or ill-advised and have had the effect of undermining the letter or spirit of the Convention.

³ For analysis of Kenya's overall pledges, see: Accounting for Human Rights Protection Under the UPR: The Difference Kenya's Stakeholders Made, Kenya National Commission on Human Rights, 2011

Definition of torture and its punishment

Prevention of Torture Bill

15. As explained in the State Report, IMLU wishes to confirm that the Prevention of Torture Bill, 2011, was prepared collaboratively by an axis comprising human rights organisations, the country's national human rights institution - Kenya National Commission on Human Rights (KNCHR), and the Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA). IMLU participated in preparing the Bill alongside other human rights organisations such as the Kenya Section of the International Commission of Jurists, and the Muslims for Human Rights (MUHURI).
16. If passed in its present form, the Bill would offer appropriate protections against torture. The Bill's aim is to enable Kenya's obligations under the Convention and all other relevant international conventions to which Kenya is a party. The Bill: defines torture; creates crimes of torture and ill-treatment; makes evidence gained from torture inadmissible; establishes a complaints procedure; protects vulnerable witnesses; provides for restitution and compensation; establishes an institutional framework for supporting victims of torture; establishes a framework for extradition; and clarifies that limitations in respect of an act of torture should begin to run from the time it is reasonably practicable for a person to lodge a complaint.
17. IMLU's concern is that since its finalisation in 2011, this draft law remains mired in State bureaucracy. Despite pledges by MOJNCCA, passage of the Bill has not received prioritisation: the Bill has still not been tabled before Cabinet, and it is not clear at all when it may be presented to Parliament. Indications from certain sections of the State (particularly the security sector) have tended against passage of a substantive anti-torture law, suggesting that single-clause provisions in various laws or amendments to particular provisions are sufficient to deal with prevention of torture. Yet no law as yet makes anti-torture norms comprehensively operational in the country.
18. The National Police Service Act (No. 11 of 2011) defines torture as well as cruel, inhuman and degrading treatment or punishment. Yet its only substantive reference

to torture and ill-treatment is in Section 95 which makes it unlawful for a police officer to subject a person to torture or to cruel, inhuman and degrading treatment or punishment. Punishment for the crime of torture is set at a maximum of 25 years whereas the crime of ill-treatment is punishable by a maximum sentence of 15 years. Replica provisions criminalising torture are established in Section 51 of the National Intelligence Service Act (No. 28 of 2012). While the Constitution provides that torture is an unlimited right, the absence of a comprehensive law may in due course encourage operatives to use defences which would be totally inadmissible in the context of one overarching legislation. It is for instance quite feasible that an intelligence officer who perpetrates an act of torture might use the defence in Section 73 of the National Intelligence Service Act which provides that: 'Proceedings shall not lie against the Director-General or any member of the Service in respect of anything done or omitted to be done in good faith in the performance of the functions of the Service or the exercise of the powers of the Service under this Act.'

Broadening definition of torture to cover health settings

19. Another pertinent definitional issue arises from IMLU's persuasion in line with the latest report by the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in the context of health-care settings.⁴ The Rapporteur has concluded that certain abusive practices within health settings do meet the definition of torture. Practices in health settings which may amount to torture or ill-treatment include: provisions allowing confinement or compulsory treatment in mental health settings; denial of legally available legal services such as abortion and post-abortion care; coerced sterilisations; forced abortions and sterilisations; female genital mutilation (FGM); forced psychiatric treatment including prolonged seclusion and restraint; and medical treatments of an intrusive and irreversible nature without therapeutic purpose or to correct or alleviate

⁴ A/HRC/22/53, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Human Rights Council, 22nd Session

disability when administered without the free and informed consent of the person concerned.⁵

20. In light of the foregoing, IMLU believes that whenever persons with mental illnesses do not access adequate treatment and care, that situation can amount to systematised torture and ill-treatment. In March this year, IMLU launched a research report on the extent to which mental health patients suffer torture and ill-treatment.⁶ The study was constituted by 226 respondents who were in-patients in nine hospitals from different parts of Kenya. The study reveals that torture of persons with mental illnesses takes place in schools (68 per cent); police stations (38.9 per cent); prisons (58.5 per cent); and hospitals (38.9 per cent).⁷ In hospitals, torture takes the form of physical assault by other patients (28.8%), physical assault by hospital staff (12.8 per cent), and caning as part of treatment (6.2 per cent). Other forms of torture in hospitals include deprivation of food (4.4 per cent) and water (1.3 per cent), sexual abuse (3.5 per cent), hard labour as part of treatment (3.5 per cent), and being denied contact with relatives (2.2 per cent) and doctors (3.1 per cent). The study noted that although occupational therapy is a recognised form of treatment, engaging patients in involuntary tasks such as mopping floors or uprooting tree stumps for use as firewood could be construed as forced labour.

21. In view of the paradigm shift encapsulated in Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), it is NOTABLE THAT of the 226 interviewees for the study, only 11.9 per cent were admitted to hospital voluntarily; a staggering 88.1 per cent of the respondents were admitted to hospital involuntarily, either being referred directly from prison or brought there by relatives.

22. IMLU urges the Committee to:

- a. Require that Kenya should not regress or digress from its aim of passing fully-fledged anti-torture legislation with apt definitions, criminal sanctions and other supporting provisions. The Government should offer a timed

⁵ Ibid

⁶ See: The State of Mental Health in Kenya, Independent Medico-Legal Unit, 2013

⁷ See <http://www.nation.co.ke/News/Study-says-torture-of-mental-patients-rife/-/1056/1727976/-/13sc487z/-/index.html> (accessed on 5 April 2013)

set of actions which will lead to the passage of the Prevention of Torture Bill of 2011.

- b. Recommend that the Bill should ensure that the definition of torture is couched in a broad enough manner to protect persons from torture or ill-treatment that may occur in health-care settings. It should for example take account of legal capacity considerations as established in Article 12 of the CRPD.

Age of criminal responsibility

23. Various human rights mechanisms including the Committee have consistently made recommendations to Kenya covering the age of criminal responsibility.⁸ The latest such recommendation was made by the UN Human Rights Council when it reviewed Kenya under the UPR mechanism in 2010. Kenya made a specific commitment to the Council that it would revise appropriately its age of criminal responsibility. This has not happened to date; and this is a clear instance where the value of treaty body committees is questioned by a State Party. The State's repeated promises that this will be changed from eight to 12 years has always come to naught.

Torture of children generally

24. Children continue to experience torture at the hands of security forces, in institutions and in family settings. An illustrative example of this is of a 17-year old youth from Pokot County who while a minor was tortured by the Kenya Police in 2009 when herding his father's cows in the mistaken belief he was a cattle-rustler. Even though the Police Commissioner promised to bring the perpetrators to book within seven days,⁹ IMLU is not aware that any mitigative action has been taken on

⁸ Similar recommendations were made by the Human Rights Committee in 2005 (CCPR/CO/83/KEN) and by the Committee on the Rights of the Child in 2007 (CRC/C/KEN/2).

⁹ See: <http://citizennews.co.ke/news/2012/local/item/1283-pokot-boy-brutalized> (accessed on 5 April 2013)

this matter. Internally displaced children have also told horror stories of being mistreated by their carers or guardians.

25. IMLU recommends that the State:

- a. Be sanctioned by the Committee for continually not living up to its pledges on increasing the age of criminal responsibility from eight to 12 years. It should weight-list the Children's Act (Amendment Bill) 2011 for passage as a priority bill.
- b. Undertake effective investigations and prosecutions in every instance where minors have been tortured by the Police.

Violence against women

Forced sterilisation of women

26. A study undertaken in the informal settlements of Kibera and Embakasi between August and December 2011¹⁰ following anecdotes that HIV-positive women in Kenya were being sterilised found that of 48 respondents:

- a. Eight had undergone forced sterilisation and nine had undergone coerced sterilisation.
- b. 60 per cent separated with their spouses after the sterilisation.
- c. The sterilisation was initiated by health-care workers, spouses or family members.
- d. Impacts included emotional problems, reduced sexual desire, domestic violence, desertion by spouses, and negative impact on adherence to antiretroviral medication.

27. The study concluded that: 'Forced and coerced sterilisation among HIV positive women perceived to be poor was demonstrated in the findings.'¹¹ Another study¹² conducted in Kakamega and Nairobi in 2012 showed that 75 per cent of forced

¹⁰ See: <http://pag.aids2012.org/Abstracts.aspx?AID=7499> (accessed on 6 April 2013)

¹¹ Ibid

¹² See: <http://allafrica.com/stories/201208240201.html> (accessed on 6 April 2013)

sterilisations were conducted in public hospitals and that the majority of women were poor. They did not understand what they were asked to sign since they were in difficult and active labour or they were unconscious or illiterate. 40 such women now have lodged a case in court.

Violence against women with disabilities in health settings

28. Women with disabilities in health settings have also had harrowing experiences. The Public Inquiry on Sexual and Reproductive Health Rights undertaken by KNCHR in 2011 found that health workers performed medical procedures on persons with disabilities without first obtaining their informed consent. When a woman with disability inquired from the surgeon why a hysterectomy was performed on her without her consent, she was reportedly told that persons with disabilities should not be allowed to give birth to children because they have no potential to adequately bring up the children. Another woman went through what she deemed an unnecessary caesarean section: the health practitioner assumed this would be in her best interest merely because she had a disability. Instances were narrated to the Inquiry where health care providers forcefully and without the consent of their disabled clients sterilised women with disabilities. This often happened with the collusion of relatives. Some women were even subjected to forced abortions by care givers or relatives.¹³

Sexual crimes

29. IMLU notes with satisfaction that following advocacy by human rights organisations, the State in 2012 did repeal Section 38 of the Sexual Offences Act (No. 3 of 2006). This Section had made it an offense for a victim to falsely allege a sexual crime,

¹³ See: Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality? A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, Kenya National Commission on Human Rights, 2012, available at: <http://www.knchr.org/reproductivehealth.aspx>

effectively seeking to punish a woman when the prosecution of her case even possibly through no fault on her part failed.

30. IMLU notes again with concern that sexual and other gender-based crimes arising during the 2007-8 election violence have not been investigated to conclusion. The most common responses to this failure from the State is that there is inadequate evidence to mount successful prosecutions. Our concern is that the authorities may easily by design fail to mount effective investigations thereby leaving perpetrators scot-free while victims remain without justice or redress.

Marital rape

31. During the 48th Session of the Committee on Elimination of Discrimination Against Women that took place between 17 January and 4 February 2011, concerns were raised about Kenya's reluctance to expressly prohibit marital rape. Intimate partner violence (including marital rape) is a common problem across Kenya and is overwhelmingly driven by factors ranging from the low status society accords women, to poor policy and legal frameworks that condone the prevalence of domestic violence.¹⁴ According to the 2008-09 Kenya Demographic and Health Survey, 13 per cent of married women are raped by their male partners. Marital rape remains an under-reported crime because it is still socially tolerated. Another aspect is that women who are abused fear reporting the violence since they are financially dependent on their spouses.

FGM

32. IMLU commends the State for passing the Prohibition of Female Genital Mutilation Act (No. 32 of 2011). The purposes of the Act include prohibiting the practice of FGM and safeguarding against violations of a person's mental or physical integrity through the practice of FGM. The Act creates a number of offences in regards to the

¹⁴ Gender-Based Domestic Violence in Kenya, Federation of Women Lawyers in Kenya, 2008, p. 6.

practice of FGM as well as the Prohibition of FGM Board. This board is yet to be constituted and this is stalling implementation of the law as it is charged with ensuring adherence to the Act. Clearly, criminalisation of FGM in and of itself will not resolve this problem which stems from engrained social and cultural practices. The State needs to keep taking concerted awareness-raising and educational steps to rid Kenya of this scourge. We do therefore commend the approach of encouraging communities to undertake alternative rites of passage ceremonies.

Sexual and reproductive health rights

33. Violence has also been perpetrated on women in the context of sexual and reproductive health rights. A public inquiry on sexual and reproductive health rights undertaken in 2011 by KNCHR, among other things, found that:

- a. One in five Kenyan women (21 per cent) have experienced sexual violence.
- b. Victims do not seek needed medical and psychosocial services due to the stigma around sexual violence.
- c. There is no one-stop facility where survivors can access all essential health services.
- d. Victims are not aware of the major components of post-rape care and do not seek treatment; this engenders higher risks of unplanned pregnancies or contracting HIV or other sexually transmitted infections.
- e. If a survivor wants to bring a legal claim, the Kenya Police Medical Examination Form (P3 Form) must be completed. Most police stations, however, do not have sufficient copies or police may demand bribes to prepare the report.
- f. The average cost of post-rape care is Kshs 3,000, making it unaffordable for many women.
- g. Sex workers suffer: violence from their clients who demand sex and sometimes decline to pay; and rape and harassment by law enforcement agents.

- h. Lesbian, gay and bisexual persons face physical violence and harassment by the public for their sexual orientation, a situation compounded by Kenya's criminalisation of same-sex acts.¹⁵

State of care during pregnancy and child-birth

34. IMLU wishes to bring to the Committee's attention one other matter which impinges on the sexual and reproductive health rights of women. A 2011 study undertaken by the Federation of Women Lawyers Kenya (FIDA Kenya) and the Population Council shows continued undignified treatment of women undergoing child-birth. Pregnant women are inhibited from seeking delivery services in health facilities, among others, on account of the disrespectful and abusive treatment carried out by health-care providers in maternity units. According to the study, the maternal mortality rate in Nairobi's informal settlements was at 706 deaths per 100,000 live births, higher than the national average. Nearly half of expectant women in these settlements delivered at home using traditional birth attendants or in unlicensed and unregulated health clinics. Many women preferred traditional birth attendants because nurses in public health facilities had bad attitudes and were abusive towards pregnant women.¹⁶ The Committee should recognise these abuses on women as amounting to torture or in the least as ill-treatment.

35. IMLU urges the Committee to make the following recommendations to the State:

- a. That it should undertake investigations to identify and punish those who contrived or participated in coerced or forcible sterilisation of HIV-positive women and women with disabilities; and that appropriate legislative and administrative counter-measures are deployed. Victims of such sterilisations should be identified, counselled and compensated.
- b. That the Sexual Offenses Act be amended to criminalise marital rape.

¹⁵ Supra note 13

¹⁶ 'Issues and Perspectives Arising From an Analysis of the Policy and Governance Landscape in Kenya That Relates to the Right to Health and Dignified Care', Federation of Women Lawyers Kenya (FIDA Kenya) and Population Council, 2011

- c. That it urgently constitute and properly resource the Prohibition of FGM Board.
- d. That it provides better protections for sex workers, towards which end sex workers should not be hunted down like criminals.
- e. That it should protect lesbian, gay and bisexual persons from violence, towards which end it should decriminalise homosexual sex.

Judicial reforms

36. The State has taken concerted steps to ensure substantive judicial reform in the country. The Constitution of Kenya has established a new judicial structure, including establishing the Supreme Court, and expanding the Court of Appeal, High Court and Magistracy. The Judicial Service Commission has been reformed by making it more inclusive, more independent and more accountable; and a cadre of new judicial officers is continually being appointed into the Judiciary. Judicial pronouncements in the last three years are markedly different from the past, and the jurisprudence on torture is growing rapidly. The courts have concluded several cases of torture by providing compensation to victims who had successfully showed they had been tortured. In *Harun Thungu Wakaba and Others v. Attorney General* (2010) EKL, the High Court awarded millions of shillings to persons who successfully showed they had been tortured while in State custody during the 1980s and 1990s; and the Court was even able to override any statutory limitations to arrive at its decision.¹⁷ At the same time, the Judiciary has made firm decisions where security forces have been involved in killings. In a particularly horrific instance, an inquest recommended the prosecution of four police officers from the Special Crime Prevention Unit who had been involved in the cold-blooded killing of five individuals on 12 November 2007 in Malindi who they dragged from a motor vehicle, forced to lie down and shot point-blank (Kilifi Principal Magistrate's Court, Inquest No. 7 of 2008).

¹⁷ See http://kenyalaw.org/CaseSearch/view_preview1.php?link=72211625476390547026563 (accessed on 4 March 2013)

37. The State has provided reasonable support to the Judiciary. For example, in the financial year 2012-2013, the Judiciary got the budgetary outlays it sought totalling over Kshs 16 billion to proceed with its reform agenda.
38. IMLU wishes to bring to the Committee's attention its concerns relating to the use of sub-regional judicial mechanisms to offer human rights redress. The East African Court of Justice (EACJ) is an essential judicial tool that should be availed to all East Africans when they are no longer able to use domestic courts to get redress. IMLU tested this when it lodged a case at the EACJ against Kenya for its failure to take appropriate investigatory actions in relation to the Mount Elgon violations of 2007-2008 in which many individuals were killed or maimed. In *Attorney General of Kenya v. IMLU*,¹⁸ The State's contention against IMLU's claim was purely technical: that IMLU had filed its case outside the strict timelines established in the East African Community (EAC) Treaty. While the State lost this argument in the court of first instance, the EACJ Appeals Chamber struck out IMLU's reference on the basis that indeed that matter had been filed out of time. IMLU's concern is that the Court overly pandered to technicality rather than putting its mind to the substantive justice issues that were before it. IMLU is pursuing some of these matters at the continental level with the ACHPR.
39. IMLU requests the Committee to make the following recommendations:
- a. The State should commit to continue providing the Judiciary with the budgetary outlays it requires to proceed with its reform agenda.
 - b. As a matter of urgency, Kenya should work with its East African Partner States to make the necessary changes to the EAC Treaty so that emphasis on technicality covering human rights cases lodged before the EACJ becomes a thing of the past.

¹⁸East African Court of Justice, Appellate Division, Appeal No. 1 of 2011, available at: www.eacj.org/docs/.../Attorney-Gen-of-Kenya-v-IMLU-15-03-2012

Access to justice

40. Constitutional requirements guaranteeing access to justice by all are non-equivocal.

Article 48 of the Constitution provides that: ‘The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and it shall not impede access to justice.’ Yet putting this into practice has fallen far short of the ideal. In practice, even where the Constitution has waived court fees, this has not empowered individuals to seek legal redress since in practice lawyers’ fees comprise the bulk of litigation costs; and most litigants cannot really mount effective cases without professional help, and the entitlement to legal counsel at State expense is executed in extremely limited situations. A number of groups which have sought to mount challenges to the 2013 general elections (for example regarding abuses in the composition of legislative seats reserved for women, youth and persons with disabilities) have been ill-able to do so because they could not afford lawyers’ fees.

41. IMLU recommends that the State should take more concrete steps to make the envisaged legal aid scheme fully operational throughout the country.

Institutional changes to manage policing

42. Following passage of the 2010 Constitution, a number of institutions have been reformed or newly established to ensure rights-based approaches to policing. The National Police Service under an Inspector General has been established – National Police Service Act (No. 11 of 2011). the National Police Service Commission has been established – National Police Service Commission Act (No. 30 of 2011). Finally, the Independent Police Oversight Authority has been established to provide civilian oversight to the National Police Service – Independent Policing Oversight Authority Act (No. 35 of 2011).

43. These three institutions have encountered teething problems with some of them seeking to dominate in or undertake functions co-assigned or assigned to their counterparts by the laws. These laws for example assign Police disciplinary

functions to both the National Police Commission and the Independent Police Oversight Authority. Most recently, immediately following on the 4 March elections, it has been reported that the Inspector-General of the National Police Service will seek changes to the laws which established the Independent Police Oversight Authority so that the Service will no longer be obliged to report instances of deaths caused by the Police.¹⁹ If this change was to happen, it would draw back important gains for ensuring Police accountability, and the Committee should make a firm statement against this.

44. Even more serious though is the continued abuse of exercise of Police powers. Instances of Police excesses continue to be catalogued, as illustrated below:

- a. Following passage of a law enforcing stiffer sanctions for traffic offenses in 2012, members of the Police Service have been overzealous in stopping motorists violating the new laws with the expectation that harassed motorists would bribe the Police.
- b. Despite the new burgeoning institutional context for policing, the National Police Service is still using lethal force against civilians who undertake political protests. During the night of Saturday 30 March 2013, the Police shot dead at least two and injured 11 civilians in Kisumu County with live ammunition when riots broke out following the Supreme Court decision disallowing the petition of Raila Odinga who had challenged the declaration of Uhuru Kenyatta as validly elected to the presidency (Cf: para. 6). The Police justified the use of live ammunition, with Nyanza's head of Police stating that Police actions were necessary to prevent loss of life and property; that Police are provided with firearms to protect the public and they use them in accordance with the law; that they are trained to use their discretion in the use of a firearm if they judge life is being threatened.²⁰ The killing of two civilians is presently being investigated by the Independent

¹⁹ <http://www.nation.co.ke/News/Kimaiyo-fights-police-agencies-/-/1056/1743022/-/gi046pz/-/index.html> (accessed on 12 April 2013)

²⁰ See: <http://www.nation.co.ke/News/politics/Police-defend-use-of-live-bullets-in-riots-/-/1064/1736590/-/o59uuv/-/index.html> (accessed on 2 April 2013)

Police Oversight Authority,²¹ and it will be necessary that the resultant recommendations are both publicised and acted upon as necessary with decisiveness.

45. One report²² cites arbitrary and indiscriminate detention of hundreds of ethnic Somalis particularly in the Eastleigh area of Nairobi in November and December 2012; and continued police killings of suspected robbers (possibly as many as 65) instead of taking them through a judicial process;

meaningless deaths of law enforcement officers

46. During the last quarter of 2012 alone, over 60 Police officers were killed while on duty in Tana River, Samburu, the North Eastern region and the urban counties of Nairobi and Mombasa. This year, operatives ostensibly from the MRC have also killed Police officers. During the two weeks immediately following the 4 March elections, at least five Police officers or other civil servants have been killed in Garissa alone apparently by Al-Shabaab terrorists.²³ One poignant memories for Kenyans last year of the Police killings both in the Tana Delta and in the Baragoi situations is that the dispatched security forces comprised largely raw recruits just out of training.

47. IMLU recognises that law-enforcement officers play critical roles in ensuring the security of Kenyans. The public have in the past vilified human rights organisations for being overly critical when Police officers kill civilians but not similarly condoling with the Police when their officers get killed in the line of duty. This accusation cannot be further from the truth; and IMLU finds it necessary for the Committee to affirm to the State that the lives and livelihoods of security officers should be protected since only then will they be able to protect and not take advantage of civilians.

²¹ See: <http://www.nation.co.ke/News/Probe-launched-into-killing-of-two-rioters/-/1056/1737610/-/xt0k0hz/-/index.html> (accessed on 3 April 2013)

²² Police Reform in Kenya: Drop in the Ocean, Amnesty International, 2013

²³ For example see: <http://www.nation.co.ke/News/Three-officers-shot-dead-in-Garissa-as-attacks-increase/-/1056/1737630/-/y1ej12/-/index.html> (accessed on 3 April 2013)

48. IMLU requests the Committee to make the following recommendations to the State:

- a. The monitoring roles of the Independent Police Oversight Authority should not be curtailed in favour of the Inspector-General of the National Police Service.
- b. Use of lethal force by security forces should be investigated, including the shootings which happened in Kisumu following the Supreme Court decision in the presidential petition filed by Raila Odinga.
- c. The State should take proactive steps to stop the profiling and harassment of Kenyans of the Somali community merely on the basis of their ethnicity.
- d. Security officers should be trained and tooled appropriately for the security tasks at hand. Their welfare should be looked into; and proper intelligence should be on hand when they are deployed to manage insecurity.

Restructuring of Kenya's National Human Rights Institution

49. The 2010 Constitution established the Kenya National Human Rights and Equality Commission as a strong, unified body with multiple protective and promotive human rights mandates and functions. Parliament subsequently opted to split this single strong Commission into three Commissions: the KNCHR, National Gender and Equality Commission, and Commission on Administrative Justice. Whereas arguments may be made that three Commissions are better than one Commission, IMLU is seeking clear State commitments that the three Commissions will be provided with adequate resources to fulfil their mandates. Kenyans are still trying to work out the practical implications of the distinctions between the three Commissions, and the State should assist with this process while not interfering with the Commissions' independence.

50. The Committee should make the following recommendations in this regard:

- a. The State should make an unequivocal commitment that it will properly resource the three human rights Commissions to fulfil their mandates.
- b. The Government should affirm that it will not undermine the independence of the KNCHR owing to the fact that Commission undertook the first

substantial human rights investigations of the 2007-8 post election violence which eventually led to the indictment of the President and Deputy President by the International Criminal Court (ICC)²⁴ (Cf: para. 66).

Extra-judicial Killings

51. The Constitution provides for the right to life in Article 26 (1). This right is qualified in Article 26 (3) which states that 'A person shall not be deprived of life intentionally, except to the extent authorised by the Constitution or other written law.'
52. Although as already noted (Cf: para. 36) great strides have been made to reform the Judiciary, there has not been any tangible progress in the investigation and prosecution of the widespread extrajudicial killings by the police reported from 2007. Hardly any successful prosecutions of the 2007 post election violence have taken place (Cf: para. 66).
53. Although the State Report acknowledges that there has been a major challenge arising out of unlawful killings by the Police, contrary to this, allegations of unlawful killings are rarely investigated conclusively, and the perpetrators are rarely tried and convicted of crimes committed, and where unreasonable force is used. 63 per cent of Kenyans are unhappy with Police performance owing to claims of corruption, brutality and a culture of extrajudicial killings.²⁵
54. The killings that occurred in Mount Elgon during the joint Police-Military operation, Operation Okoa Maisha, in 2008 have never been properly investigated or prosecuted. Following its investigations, IMLU found there existed systematic torture and ill-treatment of individuals at the hands of security officers and the criminal militia, the Sabaot Liberation Defence Front. Moreover, there were allegations of enforced disappearances of persons in custody perpetrated by both the Police and the Military. The Operation was characterised by secrecy, lack of

²⁴ See: 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence', KNCHR, 2008, available at: <http://www.scribd.com/doc/18177155/knchr-2007-pev-report>

²⁵ IMLU, Up- scaling Torture Prevention and Response in Kenya National Torture Prevalence Survey Report, 2011.

transparency and accountability. Although the operation was intended to preserve law and order, instead it systematically engaged in gross human rights violations on a population hitherto terrorised by criminal gangs.²⁶ Since Kenya did not take any action to ensure effective investigations into all the reports of unlawful killings, torture and enforced disappearances and prosecute those responsible, IMLU filed a case with the EACJ and the ACHPR (Communication Number 381 of 2010).

55. The Government is obliged to provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment. However, information on the number of investigations launched against alleged perpetrators of extrajudicial executions since 2007 and the type of charges brought against perpetrators has not been documented or has not been made public.

56. IMLU recommends that Kenya should:

- a. Ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the Police and the Military during the different 'operations' since 2007, to prosecute and punish perpetrators appropriately and to adequately compensate the victims.
- b. Pursue all cases of post 2007 election violence to ensure that all allegations of human rights violations are thoroughly investigated and that the perpetrators are brought to justice, and that victims are adequately compensated. In this regard, the State party should ensure that the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV) are duly implemented.
- c. Provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment.

²⁶ IMLU, Double Tragedy Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon "Operation Okoa Maisha", August 2008.

Expulsions, renditions and returns

57. Extraordinary renditions have been used as a measure to counter terrorism activities. For instance, the arbitrary detentions in Kenya and transfers to Somalia, Ethiopia and Guantánamo Bay in 2009 violated a range of Kenya's obligations under international law, including the absolute prohibition of torture and other cruel, inhuman or degrading treatment, the absolute principle of non-refoulement, the absolute prohibition of enforced disappearance, the right to liberty and security of the person, the right to consular access and the right to due process.²⁷
58. In September 2010, the Government of Kenya arrested at least five Kenyans and without any due process handed them over to the Ugandan authorities. The five, including Omar Awad Omar, had allegedly participated in the Kampala terror bombings which took place on 11 September 2010, executed by the Al-Shabaab terror group, leaving at least 74 civilians dead. Kenya did not abide by its extradition laws while taking the five to Uganda; nor indeed did it get guarantees from Uganda that those persons would not be tortured. Various allegations have been made that indeed those persons were tortured by Ugandan security personnel as well as personnel from some Western countries. Instructively, Ugandan authorities arrested two Kenyans, including lawyer Mbugua Murithi, who sought to intervene in Kampala for the five to be released. While Murithi was deported immediately back to Kenya, the other arrested Kenyan, Al-Amin Kimathi, was released only over a year after his arrest and it is clear that trumped up holding charges were pressed on him to keep him incarcerated for as long as possible.²⁸
59. A number of State agencies, including the Attorney General, the KNCHR, and Parliament decried the Government for breaking the law. In May 2012, Parliament endorsed a report prepared by its Defence and Foreign Relations Committee. The report observed that legal provisions for extradition were not followed and that the whole process was unconstitutional: 'The rendition and subsequent holding of

²⁷ See Redress and Reprieve, Kenya and Counter-Terrorism: A Time for Change, 2009 at <http://www.redress.org/downloads/publications/Kenya%20and%20Counter-Terrorism%205%20Feb%2009.pdf>.

²⁸ See: http://www.unhcr.org/refworld/publisher,THE_JF,,UGA,4e78667d2,0.html (accessed on 27 March 2013)

Kenyans in Ugandan prisons facilities violates the fundamental freedoms and liberties of the affected Kenyans as provided for under the Constitution, customary international law, as well as International Treaties and Conventions on Human Rights which Kenya is a signatory.’²⁹

60. IMLU remains greatly concerned by the activities of security operatives from Western countries such as the United Kingdom (UK) and the United States of America (USA). Judicial decisions in Western courts are increasingly protecting the possibly illegal activities of Western security forces particularly when they alongside local security forces participate in acts of torture. In the Omar Awed Omar case, the High Court in London declined to order UK authorities to disclose what they may have known regarding the torture of Omar possibly by British agents investigating terror attacks. The High Court stated that while the applicants may have had an arguable case of wrongful treatment, the Court would not force the authorities to disclose what they may have known; and that the legal test for such compulsion had not been met.³⁰

61. Kenya’s relations with its Western allies continue to worry IMLU in one other area. The USA is apparently planning to equip Kenya with eight drones to combat terrorist threats in the country and region. These drones which reportedly will be unarmed will pin-point targets which then can be attacked by air or land.³¹ The USA has set extremely bad precedents in its use of drones in war-theatres like Iraq and particularly Afghanistan-Pakistan. Kenya may very easily learn from the bad habits of this key ally, and it is essential that the Committee speak firmly affirming that on no basis at all may Kenya execute an individual using drones or other weapons merely because of suspicions that such person is a terrorist. Kenya’s anti-terrorism operations must aim to capture and bring to book suspected terrorists; not, in the euphemism, ‘take them out’.

²⁹ <http://www.the-star.co.ke/national/national/77758-police-may-be-prosecuted-over-uganda-renditions>, article by Francis Mureithi.

³⁰ See: <http://www.bbc.co.uk/news/uk-18599117> (accessed on 27 March 2013)

³¹ See: <http://www.standardmedia.co.ke/?articleID=2000062348> (accessed on 7 April 2013)

62. IMLU urges the Committee to ask the State to:

- a. Amend national laws so that any deportation, extradition, expulsion or return where an individual would appear at risk of torture or other ill-treatment is legally prohibited.
- b. Ensure that counter-terrorism measures including those mounted with other States comply with its international obligations.
- c. Immediately reverse the renditions of the Kenyan nationals to Uganda and to try them locally for any terrorism charges.
- d. To commit not to use drones to execute suspects and to ensure clear civil control of such weapons.

Status of post election violence cases

63. The institutions which the State deployed in 2008 to stem the post election violence and help the country to move forwards have had various levels of success. Key such institutions were the Independent Review Commission (IREC), CIPEV, and the Truth, Justice and Reconciliation Commission (TJRC).

64. While IREC undertook intense scrutiny of the 2007 elections and made careful recommendations to inform future elections, some of its recommendations were not implemented effectively preceding the 2013 general elections. It is as a subsequence of this that the main losing candidate in the 2013 elections challenged the presidential results. IREC had for example recommended that an electronic tallying system should be deployed to ensure that results would be beamed almost spontaneously from polling stations to the national tallying centre. Yet IEBC procured and deployed the electronic tallying mechanism so late in the day that in the end it failed for want of testing.

65. The TJRC was established to investigate and make recommendations covering long-term injustices that had been perpetrated on Kenyans. Yet since it was established in 2009 the TJRC has been mired in never-ending controversy. Bethuel Kiplagat insisted on remaining the Commission's Chairperson even despite serious integrity questions being raised against him: in effect the Chairperson insisted he could lead

the Commission while it umpired subject-matters to which he would figure. Worse still, the TJRC has on at least three occasions requested for its lifespan to be extended, arguing in each case despite earlier commitments to the contrary that it needed more time to finalise its report. The effect of all this is that Kenyans have by and large lost any faith they may have had that a truth process would be at the heart of resolving the country's historic injustices. Key swathes of the population and sections of civil society simply opted not to engage with the TJRC; and it is doubtful their report will make a substantive contribution to the country's future trajectory. The State's commitment to this process is itself in great doubt following decisions of many State officers to disregard summonses to attend sittings of the Commission: on 8 April 2013, the head of the National Intelligence Service, the Chairperson of the National Police Service Commission and a top civil servant failed to turn up at a sitting of the Commission to explain allegations made against them.³²

66. One other institution established after the 2007 election debacle was the CIPEV. CIPEV's key recommendation was that the State establish a local framework for prosecuting alleged perpetrators of the 2007 election violence; but that failing this, the ICC should step in to investigate and prosecute high-level perpetrators. Despite several attempts by the Government to legislate a local prosecution tribunal, Parliament doggedly declined to pass necessary legislation; and in the end it was the ICC Prosecutor that undertook investigations and in due course sought indictments against six Kenyans for alleged crimes against humanity. The Committee will be aware that out of the original six, three Kenyans including the new President and Deputy President of the Republic of Kenya are scheduled to stand trial before the ICC from this year.
67. The challenge for human rights advocates and the Committee is how to ensure that the democratic will of Kenyans does not send the message that impunity against grave human rights crimes will be entertained. The Committee must not easily dismiss the message from Kenya's electorate that persons charged before the ICC are electable in a democratic process; yet the ICC's credibility will suffer perhaps

³² <http://www.nation.co.ke/News/Police-bosses-snub-Truth-team-/-/1056/1742918/-/qcuq9cz/-/index.html> (accessed on 12 April 2013)

irretrievably if the Kenya cases which have been in the limelight for years crumble at this point. Perhaps on a more positive note the anticipated trials may have had a deterrent effect on persons desirous to cause chaos following the 4 March 2013 elections.³³ Another of IMLU's concerns regarding these trials is the fact that hardly any middle or lower level perpetrators of the violence have been tried six years since the violence. Even when the Director of Public Prosecutions established a task force to review over 6,000 files in 2012, the arising main recommendation was for file closures on the basis that adequate investigations on specific cases had not been undertaken.

Inter-communal conflict

68. As we have already stated (Cf: para. 6-7), Kenya's 4 March polls by and large went off without any interethnic conflict. Indeed, the only specifically reported instance of violence during polling day related to an attack on security forces apparently by operatives of the MRC.
69. IMLU though wishes to bring to the Committee's attention the fact that the period preceding the polls witnessed heated inter-communal conflict. The Committee should bear in mind the conflict between the Pokomo and Orma in Tana River County which continued throughout much of 2012 from April and into August and September.
70. Both communities live cheek by jowl along the fertile Tana Delta. Various investigations³⁴ show trouble began initially when livestock from the Orma community were driven to graze on land cultivated by the Pokomo. In turn cattle from the Orma community began to be appropriated by the Pokomo. This in due course escalated into counter-attacks between the two communities. This conflict left at least 200 villagers from both communities dead; over 112,000 people

³³ For example, see: <http://www.nation.co.ke/News/politics/Fear-of-ICC-helped-prevent-poll-violence/-/1064/1740582/-/sco1qy/-/index.html> (accessed on 6 April 2013)

³⁴ For example see: <http://www.knchr.org/29DAYSOFTERRORINTHEDELTA.aspx> 29 Days of Terror in the Delta: KNCHR account into the atrocities at Tana Delta, 2012, available at:

displaced; many security officers killed; and property like houses, crops and cattle destroyed. Atrocities were also alleged on the part of security officers.

71. The genesis of the conflict is at least in part rooted in socioeconomic resource and cultural considerations since the Pokomo are largely a sedentary agricultural community while the Orma community is nomadic pastoralists: as it were, the Pokomo claim the land resource along the Tana while the Orma claim the water resource in the Tana. Various inquiries and investigations of the conflict though confirm that political considerations also stoked the conflict; and in particular, that considerations of which community would play what roles in the eminent general elections may have engendered dissension that turned into violence. It is also clear that the State's response to the conflict was shambolic and that more people died on this account. Guns had proliferated in a conflict-situation which preceding this time had been conducted largely using basic weapons like arrows and spears.
72. IMLU is concerned that the State may simply sweep the conflict in Tana River County under the carpet and that no firm reviews, prosecutions and other actions will be enforced to mitigate the conflict or offer redress. The State established an inquiry to investigate this conflict, and it is essential that the results of this inquiry are publicised and processed expeditiously with the aim of providing succour and justice to victims as well as making the necessary changes to ensure such conflicts do not happen again.³⁵

Protection of human rights defenders

73. IMLU wishes to bring to the Committee's attention the fact that human rights defenders remain at great risk in Kenya. A 2010 study³⁶ on the state and status of human rights defenders in the country covering the two decades up to 2009 found that:

³⁵ See: <http://www.nation.co.ke/News/-/1056/1742162/-/woygvvz/-/index.html> (accessed on 12 April 2013)

³⁶ See: 'Promoting and Protecting the Rights of Human Rights Defenders,' Release Political Prisoners (RPP) Trust, Nairobi, 2010

- a. The key role of Kenyan human rights defenders was advocating for justice, respect for human rights and rule of law and mobilising community members to defend their rights against violations.
- b. Human rights defenders saw their work as difficult and challenging; yet many in the communities they worked in perceived human rights defenders as trouble-shooters and alarmists with vested leadership and political interests.
- c. 40 per cent of human rights defenders said they received protection from human rights organisations or networks or colleagues; 11 per cent received protection from courts/lawyers; 10 per cent received protection from the media; 6 per cent received protection from the local communities; and Only 4 per cent of human rights defenders received protection from the State.
- d. 50 per cent of the respondents said their greatest challenge was lack of financial support; while 34 per cent indicated limited understanding and application of the law relating to human rights.
- e. In terms of risks facing human rights defenders, 35 per cent of the respondents mentioned police harassment/brutality; 31 per cent cited trumped-up charges and malicious prosecutions; and 13 per cent mentioned extrajudicial killings. Eight per cent indicated negative community perception; six per cent mentioned isolation from the community; and five per cent cited sabotage by potential witnesses and perpetrators.

74. IMLU requests the Committee to make the following recommendations to the State:

- a. A programme should be put in place to enable skills development for human rights defenders who have had to confront traumatic experiences. Many still require legal aid while others require financial support, and this should be supported.
- b. Protection of human rights defenders also continues to be a live issue in Kenya, and protection guarantees should be put in place. The Witness Protection Agency established by law should be better attuned to support the needs of human rights defenders broadly defined and not just witnesses in specific cases.

Death penalty

75. Three years following promulgation of the Constitution, Kenya remains a *de facto* but not *de jure* abolitionist State. Article 26 of the Constitution states that every person has the right to life; but that the Constitution or legislation may authorise the taking away of life. The death penalty remains on statute books such as the Penal Code (Cap. 63) which legislates capital punishment for convictions against murder - Section 204, treason - Section 40 (3), robbery with violence - Section 296 (2) and attempted robbery with violence - Section 297 (2). Yet no person has been put to death by the State since 1987, and President Kibaki in 2009 commuted death sentences for over 4,000 capital convicts into life sentences. The President also requested all relevant Government ministries and departments to conduct empirical studies and engage stakeholders to determine whether the death penalty should continue in Kenya. To date, however, no such studies have been completed or published.
76. The Government's perennial responses to the question of *de jure* abolition is that the public support capital punishment. It is essential for the Committee to stress the key political and moral leadership roles which the Government needs to play in order for the public to realise the need to abolish capital punishment in law. In any case, application of minimum human rights standards should not be premised on the popular mood or opinion.
77. In the meantime, since 2010, the Judiciary has sought to carve out a jurisprudence on capital punishment. In July 2010, the Court of Appeal, in *Godfrey Ngotho Mutiso and Republic (EKLR) 2010*, determined that Section 204 of the Penal Code was unconstitutional to the extent it provided mandatory death sentence for a murder convict and that the penalty was: 'antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial.' While the case only applies to the crime of murder, the Court expressly stated that the reasoning behind its rejection of the mandatory death penalty for the crime of murder might also apply to other capital crimes that carry the mandatory death sentence such as treason, robbery with violence and attempted robbery with

violence. This view was upheld by a number of Court of Appeal and High Court judgements between 2010 and 2012, including the Court of Appeal decision of March 2011 in David Njoroge Macharia and Republic (EKLR) 2011; and the 2011 Court of Appeal case of Boniface Juma Khisa and Republic (2011) EKLR. At the same time though, the High Court has on occasion deviated from this position to apply the death penalty. In Republic and Dickson Mwangi Munene and Another (2010) EKLR, the High Court held that the death penalty was the only sentence imposable in law for the crime of murder and that the Court of Appeal had taken a step in the wrong direction. The Court moreover stated that the President was failing to exercise his legal duty by not signing pending death warrants.

78. IMLU's concern here is that such jurisprudence should not suffer internal contradiction; and indeed it may be necessary for the Supreme Court in due course to put its mind to this matter. Its suggestions are that the Committee recommend to Kenya as follows:

- a. The State should repeal Penal Code sections which became null following the 2010 decision of Godfrey Ngotho Mutiso and Republic.
- b. The Government should commit to be far more proactive in taking political and moral responsibility for leading abolition of the death penalty. If indeed the Government deems it impossible to pass the necessary legislation, it should seek an interpretive opinion on the matter from the Supreme Court.
- c. Kenya has not acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Government should move towards doing this.
- d. It should provide training to judicial officers on the interpretation and application of international human rights instruments, which would contribute towards harmonising the divergent and conflicting judicial philosophies on the right to life principle.

Prevention of Terrorism

79. Discussions on anti-terrorism legislation became a national priority again particularly after Kenya sent its troops into Somalia in 2011. Since that time, multiple attacks have been perpetrated on mostly civilian targets in Nairobi, the Coast and the country's North-Eastern Counties of Garissa, Wajir and Mandera. Churches have been attacked; civilians have been killed or injured; bombs have been left in public service vehicles; and security officers too have been killed or injured. IMLU appreciates the importance of securing the country and its people against foreign or local terror attacks. Its concern is that the State should adopt the right balance between ensuring national security on one hand while on the other not undermining individual liberties.

80. In the event, the Government took advantage of the terror attacks and the arising fear to rush little-discussed anti-terrorism legislation through Parliament. The Prevention of Terrorism Act (No. 30 of 2012)³⁷ aims to provide measures for detecting and preventing terrorism, and legislates at least 27 offenses to deal with terrorism in the country. In IMLU's assessment, the Act includes a number of provisions which potentially undermine the spirit if not the letter of the guarantees established in Kenya's Bill of Rights. For example:

- a. Concerns remain that the Act's definition of 'terrorist act' could be manipulated to curtail legitimate political protests as acts of terrorism. Political protest could be clamped down under the following scenario as envisaged in Section 2 of the Act: "terrorist act" means an act or threat of action— (a) which— ... (ii) endangers the life of a person, other than the person committing the action ... (b) which is carried out with the aim of— ... (ii) intimidating or compelling the Government ... to do, or refrain from any act ... Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph (a)(i) to

³⁷ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

(iv).’ The stated exception to this definition focuses on work-related protest, meaning that demonstrations or what Kenyans refer to as ‘mass action’ could be defined as an act of terror if it coincided with the elements of crime listed in the above definition. East Africans have witnessed situations where Governments have used terrorism legislation to quell opposition politics; and this must not be allowed to happen in Kenya.

- b. Section 3 of the Act, which enables the Inspector General of Police and the relevant Cabinet Secretary to declare a group to be a terrorist organisation, does not include adequate due process measures. While the Inspector General is required to give an entity a hearing before advising the Cabinet Secretary on whether it is a terrorist group, no procedure is established for this purpose. Indeed, this provision was totally excluded in the Prevention of Terrorism Bill of 2012, and it seems the provision is meaningless despite its eventual inclusion in the final statute. There is no review from a decision of the Cabinet Secretary in sub-section (3) to declare an entity to be a terrorist group. Even where judicial review is allowed in subsection (7), it is directed to the Inspector-General of Police instead of the Cabinet Secretary who actually makes the proscribing decision.
- c. The Act obfuscates the rights of arrested persons relative to the constitutional provisions on that same matter by injecting an unhelpful nuance to the constitutional provision. Section 32 (1) of the Act provides that: ‘A person arrested ... shall not be held for more than twenty four hours after his arrest unless— ... (b) the twenty-four hours ends outside ordinary court hours or on a day that is not an ordinary court day.’ In fact, what Article 49 of the Constitution provides is this: ‘An arrested person has the right- ... (f) to be brought before a court as soon as reasonably possible, but not later than– (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.’ Under the Act unlike the Constitution it is possible for a delay to far exceed the 24-hour requirement. Again, indeed, the Prevention of Terrorism Bill 2012 had the further

qualification permitting an arrested person not to be brought before court within 24 hours on account of force majeure.

- d. We should highlight perhaps the most brazen provision in the Act which attempts to limit the rights of individuals that are guaranteed in the Constitution. Section 35 of the Act purports to borrow its authority from Section 24 of the Constitution which establishes clear bases upon which rights may be limited. Section 35 of the Act then simply lists a number of constitutionally-guaranteed rights which it proceeds to declare limited to certain extents for purposes of investigating terrorist acts, detecting and preventing such acts or protecting one's enjoyment of rights from prejudicing others' similar enjoyment. Section 35 limits include: the right to privacy; certain rights of an arrested person; the freedom of expression, media, and conscience, religion, belief and opinion; the freedom of security of the person; and the right to property. As we have already explained (Cf: para. 9), the Committee should recall that the right to freedom and security of the person includes protection against torture and ill-treatment, which are unlimitable rights under the Constitution. It is not clear what practical purpose Section 35 of the Act has, and this may be a matter for eventual litigation; but it should be noted this framing is repeated in a number of laws, including the National Intelligence Security Act.
 - e. One final note here which IMLU approves is the fact that Section 49 of the Prevention of Terrorism Act establishes the Compensation of Victims of Terrorism Fund. The trouble with this provision is it is far too vague on the Fund's purposes.
81. The Committee should be seized of the fact that the Government has continued to use extralegal means to clamp down on what it perceives as terrorism or acts of terror. A number of persons have been killed in circumstances which make human rights organisations to believe they were, in the euphemism, 'taken out' by the State because of their alleged terrorist activities. For example:
- a. On 28 August 2012, in Mombasa County, Aboud Rogo Mohammed, a Muslim cleric, was killed when a hail of bullets was sprayed on his car from a vehicle

which had been trailing him. Mohammed was on UN and US sanction lists for allegedly supporting Al-Shabaab terrorists.³⁸ He was killed while taking his wife to hospital. A team established by the Director of Public Prosecutions to investigate the matter has still not reported publicly.

- b. ON 28 October 2012, Omar Faraj was killed in broad daylight by officers from the Anti Terrorism Police Unit at his residence in Majengo, Mombasa County.
- c. On 8 November 2011, the Kenya Navy fatally shot four fishermen in Ngomeni, Malindi, even after the fishermen had identified themselves.

82. The Committee should give special attention to the question of enforced disappearances. In 2012 alone, a number of persons were accosted off Kenyan streets and either not seen again or found dead:

- a. In April 2012, Samir Hashim Khan and his colleague Mohamed Bekhit, were abducted from Mombasa, before Khan's mutilated body was found dumped in a national park.³⁹ Bekhit has to date still not been found and is assumed dead.
- b. On 14 November 2012, as reported by MUHURI, Badru Bakari Mramba was arrested by three persons claiming to be Police officers from his place of work in Majengo, Mombasa County; and Mramba has not been seen since then.

83. IMLU suggests that the Committee make the following recommendations to the State:

- a. The Prevention of Terrorism Act should be reviewed to ensure it fits into Kenya's constitutional framework. A policy on security should be prepared which takes account of the importance of balancing between national security and individual liberties.
- b. All instances of extrajudicial killings and disappearances, including of the above-mentioned persons, should be investigated and appropriate action taken accordingly.

³⁸ See: <http://www.nation.co.ke/News/-/1056/1487982/-/y9mumkz/-/index.html> (accessed on 3 April 2013)

³⁹ See: <http://www.somaliaonline.com/community/showthread.php/67109-Who-killed-Sheikh-Aboud-Rogo-Mohammed-of-Mombasa> (accessed on 3 March 2013)

OP-CAT

84. In 2010, while being reviewed by the UN Human Rights Council under the UPR mechanism, the Government of Kenya made an undertaking to consider the ratification of a number of Optional Protocols as soon as a ratifications law was legislated to make Article 2 (6) of the Constitution operational: this sub-article provides that treaties and conventions ratified or acceded to by Kenya automatically become part of Kenyan law. It is IMLU's understanding that the Government's focus when making this commitment was more on Protocols enabling individuals to seek redress before treaty body committees such as the Human Rights Committee (First Protocol to the International Covenant on Civil and Political Rights); the Committee on Economic, Social and Cultural Rights (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights); the Committee on Elimination of Discrimination Against Women (Optional Protocol to the Convention on Elimination of Discrimination Against Women); and the Committee on the Rights of the Child (Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure). This commitment would also have amounted to a declaration in terms of Article 14 of the International Covenant on Elimination of All Forms of Racial Discrimination. IMLU's expectation too is that this pledge would also have applied to the declaration under Articles 21 and 22 of CAT recognising the Committee's competence to receive and consider complaints against Kenya from other States and from individuals respectively.
85. The Government was far more ambiguous about whether it would immediately seek to be bound by OP-CAT. But KNCHR had already advised the Government that OP-CAT be one of the Protocols that the State should accede to.
86. In 2012, Parliament passed the Treaty Making and Ratification Act (No. 45 of 2012)⁴⁰ to give effect to Article 2 (6) of the Constitution and provide the procedure for making and ratifying treaties and conventions. Under the Act, the National Executive is responsible for negotiating and ratifying treaties (Section 4), subject to the requirement that Parliament approves ratification (Section 8). The State should

⁴⁰ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

be commended for passing this law. IMLU is concerned though that the Act may encourage the Cabinet or Parliament to seek to restrict human rights space and options by proposing reservations violative of the essence of such treaty; whereas a basic tenet of treaty-making is that no reservation may be allowed that undermines the essence of a treaty. IMLU notes a nationalistic tone amongst the ruling political elite which in reaction against the trial of President Uhuru Kenyatta and Deputy President William Ruto by the ICC may even seek to denounce key human rights treaties such as the ICC Statute. At a procedural level, the Act does not state explicitly that the Executive plays the function of signing treaties.

87. IMLU therefore makes the following recommendations for consideration by the Committee:

- a. It urges the Committee to require the State to make the necessary declarations particularly in terms of Article 22 of CAT to enable Kenyans seek individual remedies against torture or ill-treatment before the Committee.
- b. IMLU remains desirous that the State do accede to OP-CAT on a priority basis, and the Committee should restate in no uncertain terms its recommendation from the initial Concluding Observations towards that end. IMLU is conscious that resources may not allow for the establishment of a brand new National Preventive Mechanism (NPM); but in fact a number of institutions exist which in combination with other agencies or individuals can become the country's NPM. The Committee therefore should seek a time-specific commitment by the State that it will ratify OP-CAT.
- c. The Committee should also stress to the State that reservations should not be had that undermine the essence of a treaty. Furthermore, treaties should not be denounced on account of short-term political whim or upsets.

Punishing acts of torture

88. We may not repeat in any great detail past calls on the State to investigate and punish all alleged acts of torture. IMLU's concern is that despite best efforts by national and international human rights actors, no conclusive investigations have

been finalised on a host of past atrocities. For example, in 2009, the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Philip Alston, made recommendations covering unlawful killings in the country. Of the 13 key recommendations which he directed to the State, only six recommendations have been acted upon albeit to a limited extent. These are: establishment of a civilian body to oversee the Police Force; replacement of the Attorney General; establishment of an independent directorate of public prosecutions; investigation of crimes against humanity both locally and internationally; assessment of the suitability of judicial officers; and establishment of a witness protection agency. Seven other recommendations have not been acted upon mostly, including: public pronouncement by the President of a commitment to end unlawful killings by the Police Force; clear instructions to security forces that extrajudicial killings would not be tolerated; centralisation of Police killings records; across-the-board vetting of the Police Force; establishment of an independent commission on Mount Elgon; tabling before Parliament of reports from the KNCHR; and compensation of those unlawfully killed by security forces.⁴¹

89. IMLU continues to be greatly concerned by the number of cases which it handles on an annual basis arising from extra-judicial killings, shootings, beatings and assaults, death in custody, and arbitrary arrests. The table below outlines figures of cases handled by IMLU during the period 2008-2012:

YEAR	NO OF CASES HANDLED	MALE	FEMALE	EXTRA JUDICIAL KILLINGS	SHOOTING	BEATINGS/ ASSAULT	DEATH IN CUSTODY	ARBITRARY ARREST	OTHERS
2012	94	78	16	23	9	51	4	2	5
2011	234	201	33	26	28(fatal 9)	85(Fatal 3)	3	52	40
2010	277	240	37	66	-	100		-	111
2009	252	181	71	35	15	140		-	62
2008	645	419	226	16	21(all fatal)	607(fatal 56)	1	-	-
TOTAL	1502	1119	383	166	73	983	8	54	218

⁴¹ See: Press Statement by Prof. Philip Alston, UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Mission to Kenya, 16-25 February 2009; also, see: paras 85-115, A/HRC/11/2/Add.6, 26 May 2009,

90. IMLU recommends that the Committee should not tire from asserting its Covenant-mandate of ensuring individuals are protected from acts of torture and ill-treatment. In this instance, we recommend that the Committee do mention Kenya specifically in its annual report to the UN General Assembly under its Article 24 function for not fulfilling recommendations made repeatedly to it in relation to torture and ill-treatment.

IV: Global List of Recommendations

91. This section of the Report lists the global list of proposals which IMLU urges the Committee to make to the State.

- a. On definition of torture:
 - i. Kenya should not regress or digress from its aim of passing fully-fledged anti-torture legislation with apt definitions, criminal sanctions and other supporting provisions. The State should provide a timed set of actions which will lead to the passage of the Prevention of Torture Bill of 2011.
 - ii. The Bill should ensure that the definition of torture is couched in a broad enough manner to protect persons from torture or ill-treatment that may occur in health-care settings. It should for example take account of legal capacity considerations as established in Article 12 of the CRPD.
- b. On age of criminal responsibility and violence against children:
 - i. The State should be sanctioned by the Committee for continually not living up to its pledges on increasing the age of criminal responsibility from eight to 12 years. It should weight-list the Children's Act (Amendment Bill) 2011 for passage as a priority bill.
 - ii. It should undertake effective investigations and prosecutions in every instance where minors have been tortured by the Police.

- c. On violence against women:
 - i. The State should undertake investigations to identify and punish those who contrived or participated in coerced or forcible sterilisation of HIV-positive women and women with disabilities. Appropriate legislative and administrative counter-measures should be deployed. Victims of such sterilisations should be identified, counselled and compensated.
 - ii. It should amend the Sexual Offences Act to criminalise marital rape.
 - iii. It should urgently constitute and properly resource the Prohibition of FGM Board.
 - iv. It should provide better protections for sex workers, towards which end sex workers should not be hunted down like criminals.
 - v. It should protect lesbian, gay, bisexual and transgender persons from violence, towards which end it should decriminalise homosexual sex.
- d. On judicial reforms:
 - i. The State should commit to continue providing the Judiciary with the budgetary outlays it requires to proceed with its reform agenda.
 - ii. As a matter of urgency, Kenya should work with its East African Partner States to make the necessary changes to the EAC Treaty so that emphasis on technicality covering human rights cases lodged before the EACJ becomes a thing of the past.
- e. On access to justice, the State should take more concrete steps to make the envisaged legal aid scheme fully operational throughout the country.
- f. On institutional changes to manage policing:
 - i. The monitoring roles of the Independent Police Oversight Authority should not be curtailed in favour of the Inspector-General of the National Police Service.

- ii. Use of lethal force by security forces should be investigated, including the shootings which happened in Kisumu following the Supreme Court decision in the presidential petition filed by Raila Odinga.
 - iii. The State should take proactive steps to stop the profiling and harassment of Kenyans of the Somali community merely on the basis of their ethnicity.
 - iv. Security officers should be trained and tooled appropriately for the security tasks at hand. Their welfare should be looked into; and proper intelligence should be on hand when they are deployed to manage insecurity.
- g. ON restructuring of Kenya's national human rights institution:
 - i. The State should make an unequivocal commitment that it will properly resource the three human rights Commissions to fulfil their mandates.
 - ii. The Government should affirm that it will not undermine the independence of the KNCHR owing to the fact that Commission undertook the first substantial human rights investigations of the 2007-8 post election violence which eventually led to the indictment of the President and Deputy President by the ICC.
- h. ON extrajudicial killings:
 - i. Kenya should ensure impartial and effective investigation of all allegations of excessive use of force and torture by the Police and the Military during the different 'operations' since 2007, to prosecute and punish perpetrators appropriately and to adequately compensate the victims.
 - ii. It should pursue all cases of post 2007 election violence to ensure that allegations of human rights violations are thoroughly investigated and that the perpetrators are brought to justice, and that victims are adequately compensated. In this regard, the State party should ensure that the recommendations of CIPEV are duly implemented.

- iii. It should provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill-treatment.
- i. On expulsions, renditions and returns:
 - i. The State should amend national laws so that any deportation, extradition, expulsion or return where an individual would appear at risk of torture or other ill-treatment is legally prohibited.
 - ii. It should ensure that counter-terrorism measures including those mounted with other States comply with its international obligations.
 - iii. It should immediately reverse the renditions of Kenyan nationals to Uganda and try them locally for any terrorism charges.
 - iv. It should commit not to use drones to execute suspects and it should ensure clear civil control of such weapons.
- j. On the inter-communal strife in Tana River County, the Government should immediately release the report of the inquiry which it established in 2012 to investigate the causes of the conflict between the Pokomo and Orma communities.
- k. ON human rights defenders:
 - i. A programme should be put in place to enable skills development for human rights defenders who have had to confront traumatic experiences. Many still require legal aid while others require financial support, and this should be supported.
 - ii. Protection of human rights defenders also continues to be a live issue in Kenya, and protection guarantees should be put in place. The Witness Protection Agency established by law should be better attuned to support the needs of human rights defenders broadly defined and not just witnesses in specific cases.
- l. ON the death penalty:
 - i. The State should repeal Penal Code sections which became null following the 2010 decision of Godfrey Ngotho Mutiso and Republic.

- ii. The Government should commit to be far more proactive in taking political and moral responsibility for leading abolition of the death penalty. If indeed the Government deems it impossible to pass the necessary legislation, it should seek an interpretive declaration on the matter from the Supreme Court.
 - iii. Kenya has not acceded to the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Government should move towards doing this.
 - iv. It should provide training to judicial officers on the interpretation and application of international human rights instruments, which would contribute towards harmonising the divergent and conflicting judicial philosophies on the right to life principle.
- m. On prevention of terrorism legislation:
 - i. The Prevention of Terrorism Act should be reviewed to ensure it fits into Kenya's constitutional framework. A policy on security should be prepared which takes account of the importance of balancing between national security and individual liberties.
 - ii. All instances of extrajudicial killings and disappearances, including of the above-mentioned persons, should be investigated and appropriate action taken accordingly.
- n. ON OP-CAT:
 - i. The State should make the necessary declarations particularly in terms of Article 22 of CAT to enable Kenyans seek individual remedies against torture or ill-treatment before the Committee.
 - ii. It should accede to OP-CAT on a priority basis, and the Committee should restate in no uncertain terms its recommendation from the initial Concluding Observations towards that end. IMLU is conscious that resources may not allow for the establishment of a brand new National Preventive Mechanism (NPM); but in fact a number of institutions exist which in combination with other agencies or individuals can become the country's NPM. The Committee therefore

should seek a time-specific commitment by the State that it will ratify OP-CAT.

- iii. The Committee should also stress to the State that reservations should not be had that undermine the essence of a treaty. Furthermore, treaties should not be denounced on account of short-term political whim or upsets.
- o. On punishing acts of torture, IMLU commends the Committee for its work and urges it not to tire from asserting its Covenant-mandate of ensuring individuals are protected from acts of torture and ill-treatment. The Committee should mention Kenya specifically in its annual report to the UN General Assembly under its Article 24 function for not fulfilling recommendations made repeatedly to it in relation to torture and ill-treatment.