KENYA

I. INTRODUCTION

1. The legal framework

1.1. The Constitution

The Republic of Kenya has a population of about 31 million people and is composed of a large number of ethnic groups.

Kenya became independent on 12 December 1963. The Constitution was also adopted on that day but has been amended several times since. Chapter V of the current Constitution includes a catalogue of human rights guarantees, including the right to life, personal liberty, freedom from torture and protection against discrimination, as well as a range of fair trial rights.[1] These are set to increase with the constitutional reforms proposed by the Constitutional Reform Committee.[2]

The judiciary is comprised of the High Court, the Court of Appeal and the first instance courts, the Court of Appeal and the High Court. The High Court has the power to "supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts".[3] Additional courts that are subordinate to the High Court can be established by the Kenyan Parliament. The Constitution does not expressly stipulate the independence of the judiciary but provides safeguards against the removal of judges.[4]

1.2. Incorporation and status of international law in domestic law

Kenya has ratified the following relevant international treaties:

- Refugee Convention (16 May 1966)
- Geneva Conventions (20 September 1966)
- ICCPR (1 May 1972)
- ICESCR (1 May 1972)
- CEDAW (9 March 1984)
- CRC (31 July 1990)
- The African Convention on Human and Peoples Rights (10 February 1992)
- Convention against Torture (21 February 1997)
- Additional Protocols I and II to the Geneva Conventions (23 February 1999)
- CERD (13 September 2001)

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[1] Article 70-72, 73 and 77 of the Constitution.

[2] For more information see www.kenyaconstitution.org/index.shtml.

[3] Article 64 of the Constitution of Kenya.

[4] See Article 62 of the Constitution.

The Kenyan Constitution is the supreme law of the land and is superior to any statutory legislation.[5] The Constitution does not clarify the status of international law in the domestic legal system.[6] In principle, however the legal system follows the dualist tradition and English common law has been used to guide the incorporation of treaties into domestic law. In this respect, it was recommended that the Kenyan Parliament adopt enabling legislation before treaties becomes national law.[7]

Kenya adopted the Geneva Conventions Act[8] but has not incorporated the Convention against Torture or other human rights treaties into domestic law. Municipal courts have demonstrated reluctance in taking human rights instruments such as the Convention against Torture into account when invoked by human rights lawyers, citing the lack of binding force of such treaties.

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of Torture

In late 2002, the National Rainbow Coalition under the lead of Mwai Kibaki won the national election in Kenya and ended the 24 year reign of President Moi and the Kenya African National Union party. Under Moi's rule, torture was widespread and systematic.[9] The main perpetrators have been police, detention and prison officers. Torture has predominantly been used to extract confessions and obtain information but also as a means of extortion and as a method of extra-judicial punishment. A high number of victims have died as a result of torture and cruel, inhuman and degrading conditions of detention.[10] Victims of torture and ill-treatment include those suspected of having committed criminal offences, members of religious groups, human rights defenders and political opponents. Additionally, there are many reports of sexual violence against women in custody.[11] Children have also been subjected to torture and ill-treatment, mainly in the form of corporal punishment.[12]

2.2. Domestic Responses

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[5] Article 3 of the Constitution.

[6] This is currently under review by the Constitutional Review Commission. See, specifically, Article 10 of the draft Constitution.

[7] English common law is applicable pursuant to the Judicature Act, 1897 (Chapter 8 of the Laws of Kenya).

[8] The Geneva Conventions Act, 1968 (Chapter 198 of the Laws of Kenya).

[9] Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32, Addendum Visit of the Special Rapporteur to Kenya, UN Doc. E/CN.4/2000/9/Add.4, 9 March 2000, para.86.

[9] Ibid., para.92.

[10] See, on the types of torture methods employed in Kenya, the report by the Kenya Human Rights Commission, ***Mission to Repress: Torture, illegal detentions and extra judicial killings by the Kenyan police***, 1998. In October 1995 a government minister stated that more than 800 prisoners had died in prison in the first nine months of that year. In 1997 at least 630 prisoners reportedly died, the majority from infectious diseases. . See also Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32, Addendum Visit of the Special Rapporteur to Kenya, UN Doc. E/CN.4/2000/9/Add.4, 9 March 2000, para. 11, according to which "a number of deaths in custody allegedly as a result of torture were also reported."

[11] See Amnesty International, ***Kenya: Rape - the invisible crime***, March 2002, AI Index: AFR 32/001/2002.

[12] See, ***Rights of the Child in Kenya: Report on the implementation of the Convention on the Rights of the Child by the Republic of Kenya***. Report prepared by the World Organisation Against Torture (OMCT) for the Committee on the Rights of Child, Geneva, June 2001.

In its Report to the Committee on the Rights of the Child, the Government stated that it "has acknowledged that there are reported cases of police using excessive force and methods amounting to torture, cruel, inhuman or degrading treatment or punishment on children, especially street children.[13]"

In 1996, the government launched a Standing Committee on Human Rights, "an independent institution empowered ... to investigate complaints of alleged injustice, abuse of power and unfair treatment of any person by a public officer in exercise of his official duties." In practice the Committee is subject to considerable executive control and has not operated as a truly independent body. In 2000, the Government introduced a bill on a National Commission on Human Rights. The bill would, if enacted, create an independent human rights commission.[14]

The Government has introduced a number of legal and other reforms including: the 1997 amendments to the Police Act to incorporate the crime of torture; the issuance of directives to police stations on the prohibition of torture and the training of police in investigation techniques that comply with human rights standards. However, even though some of the recommendations put forward by the Special Rapporteur on Torture following his visit in Kenya in 1999 have been implemented, more comprehensive institutional reforms have not been adopted.[15] Also in 2000, the Constitutional Review Commission began a review process, which resulted in a draft constitution issued in September 2002 which would strengthen the protection of human rights in Kenya. Its work is continuing.[16]

With the election of Kibaki in late 2002, the new government has started to fight corruption and tackle human rights violations. For instance, it recently suspended Kenya's most senior judge, Justice Bernard Chunga pending an investigation into corruption and "planning, condoning and executing a programme of torture."[17]

2.3. International responses

Kenya has not yet submitted its initial report to the Committee against Torture, due on 22 March 1998. The United Nations Special Rapporteur on Torture, following a visit to Kenya in September 1999, came to the conclusion that the use of torture by law enforcement officials in Kenya was widespread and systematic.[18] He recommended that: "The government should ensure that all allegations of torture and similar treatment are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators."[19]

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[13] See Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Initial reports of States parties due in 1992, Kenya, UN Doc. CRC/C/3/Add.62, 16 February 2001, para. 228. "Torture, cruel and inhuman punishments have caused a lot of concern in Kenya."

[14] See Human Rights Watch, ***Protectors or Pretenders? Government Human Rights Commissions in Africa***: Kenya, 2001. See also comments by Amnesty International, ***Ending the cycle of immunity***, June 2001, AI Index: AFR 32/011/01, pp.3 and 7.

[15] See ibid., supra, p.3. The Criminal law amendment of 2002, which seeks to outlaw corporal punishment, and confessions made to police awaited presidential assent to become law in early 2003.

[16] According to the Constitution of Kenya Review Act. See www.kenyaconstitution.org.

[17] See James Astill, Kenya launches inquiry into £400m export scam, in Guardian, 26 February 2003.

[18] Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32, Addendum Visit of the Special Rapporteur to Kenya, UN Doc. E/CN.4/2000/9/Add.4, 9 March 2000, para.86.

[19] Ibid., para.92.

In 2001, the Committee on the Rights of the Child: "expresses grave concern at the high and increasing numbers of street children. In particular, the Committee notes their limited access to health, education and other social services, as well as their vulnerability to police brutality, sexual abuse and exploitation, economic exploitation and other forms of exploitation."[20]

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Article 74 (1) of the Constitution provides that "No person shall be subject to torture or to inhuman or degrading punishment or other treatment." This general prohibition is qualified by Article 74 (2) of the Constitution which reads: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."[21]

Torture is also explicitly prohibited by Article 14A (2) and (3) of the Police Act[22] and Article 20 (1) and (2) of the Chiefs Authority Act.[23] There is, however, no specific prohibition of torture in the Penal Code or in the Criminal Procedure Code, nor has torture been defined in the jurisprudence.

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal offences and punishment

The Police Act provides that police officers that perpetrate torture or any other form of ill-treatment are guilty of a felony.[24] As the Penal Code does not contain a specific offence of torture, perpetrators of acts that constitute torture will only be charged with other offences. Assault and assault causing bodily harm are punishable by imprisonment of up to five years and by five years or more respectively.[25] Rape is a crime that carries a maximum punishment of life imprisonment.[26] The indecent assault of women is punishable by up to five years imprisonment with or without corporal punishment.[27] Rape or indecent assaults in custody are not considered to be

[20] Concluding observations of the Committee on the Rights of the Child: Kenya, UN Doc. CRC/C/15/Add.160, 7 November 2001, para.57.

[21] A derogation of Article 74 appears to be possible in accordance with Article 83 (1) of Constitution by virtue of an order made under Article 85 (1) bringing into operation Part III of the Preservation of Public Security Act.

[22] The Police Act (Chapter 84 of the Laws of Kenya) as amended in November 1997. The provision reads:"2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment; 3) Any police officer who contravenes the provisions of this Article shall be guilty of a felony."

[23] "1) No chief shall subject any person to torture or any other cruel, inhuman or degrading treatment; 2) No chief shall maintain a cell or any other confinement place for persons. A chief who contravenes the above shall be guilty of an offence."

[24] Supra, offences categorised as felonies carry a term of imprisonment of three years or more.

[25] Articles 250 and 251 Penal Code (Chapter 63 of the Laws of Kenya).

[26] Articles 139-141 Penal Code. There is no minimum sentence specified.

[27] Article 144 (1) Penal Code.

aggravating circumstances. Manslaughter is punishable by life imprisonment and murder carries the death penalty.[28]

Grave breaches of the Geneva Conventions of 1949 are punishable by a term of imprisonment not exceeding fourteen years and, if it involves wilful killing, a mandatory sentence of life imprisonment.[29] Disciplinary sanctions can be imposed in accordance with the Police Act.

2. The Procedural Law

2.1. Immunity

There are no amnesty laws for officials. Article 241 of the Penal Code stipulates that: "Any person authorized by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and the quality of the act which constitutes the excess."[30]

2.2. Statutes of Limitations

In the absence of an express statutory limitation for the crime in question, no limitation period is applicable.[31] This general rule is reflected in Article 219 of the Criminal Procedure Code, which stipulates that prosecutions are not time barred.

2.3. Investigations

A complaint may be made to a police officer, the officer-in-charge of the prison or to a magistrate. The complaint can come from the torture survivor or by any other person who believes that an offence has been or is being committed.[32] It can be made orally or in writing.[33]

Investigations will be carried out by the departments for criminal investigation with the support of local police officers and in collaboration with the office of the Attorney General. There are no specialised bodies with a mandate to investigate allegations of human rights abuses, nor are there special procedures to be employed when complaints are lodged against law enforcement officers or other public officials.

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[28] Articles 205 and 203 Penal Code respectively.

[29] Article 3 (1) of the Geneva Conventions Act: "Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following articles respectively of those Conventions – (a) article 50 of the Convention set out in the First Schedule to this Act; (b) article 51 of the Convention set out in the Second Schedule to this Act;(c) article 130 of the Convention set out in the Third Schedule to this Act; (d) article 147 of the Convention set out in the Fourth Schedule to this Act, is guilty of an offence and (i) in the case of a grave breach involving the wilful killing of the person protected by the Convention in question, shall be sentenced to imprisonment for life; and (ii) in the case of any other grave breach, is liable to imprisonment for a term not exceeding fourteen years."

[30] See also Article 14A (2) and (3) of the Police Act, supra.

[31] However, in a recent case the court found that the prosecution was oppressive and did not accord with Article 77 of the Constitution given the unexplained delay of nine years between the time of the offence and the initiation of the prosecution by the Attorney-General. See *R v. Kipng'eno Arap Ng'eny & Paul Gachanga Ndarua,* Nairobi Chief Magistrate's Court Criminal Case No.808 of 2001.

[32] See Article 89 (1) Criminal Procedure Code (Chapter 75 of the Laws of Kenya).

[33] Article 89 (2) Criminal Procedure Code.

When a complaint is made, the police will take statements from the complainant and any other witnesses. According to the standing orders of the police, investigations must be carried out promptly and thoroughly.[34] If the police do not carry out an investigation or discontinue an investigation, the complainant is entitled to lodge a challenge with the complaints department of the Commissioner of Police, which can forward cases to the Attorney-General.[35] Alternatively, he or she may lodge a private prosecution.[36]

If an investigation is carried out, a suspect may be arrested and taken into custody.[37] A victim of torture has the right to request that the police issue an official medical examination form (P3 Form) on demand.[38] While most judges appear to accept only the completed P3 Form as evidence, a victim may also use a medical report provided by a private doctor as evidence. Unnatural deaths, including deaths in police custody, are to be reported to a magistrate who is obliged to initiate an inquest and carry out an autopsy.[39]

Committal proceedings will precede the full trial. The judge, in committal proceedings, will either discharge the accused if there are insufficient grounds for a prosecution or commit him or her for trial.

2.4. Victims' rights

There is no specific legislation providing procedural protections for victims of human rights violations or crime in general. Victims have the right to bring a private prosecution,[40] but they will have few procedural rights if the prosecution is brought by the Attorney-General. In case of threats or harassment, victims and/or witnesses the Court can issue an order against the person(s) responsible for contempt of court.

2.5. Trials

Trials of alleged perpetrators of torture will generally take place in the court of first instance, i.e. the district or resident magistrates courts. They may also be tried in the High Court.[41] Allegations involving members of the armed forces and others subject to military law for crimes committed during or related to service are tried by court-martial.[42]

Trials are adversarial in nature. The burden rests on the prosecution to prove its case beyond a reasonable doubt. The courts follow the best evidence rule. Circumstantial

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[34] Investigations are to be carried out by a police officer above the rank of inspector. See, the information given by Commissioner of Police to the Special Rapporteur on Torture, see 2000 report on visit to Kenya, supra, para. 69.

[35] Ibid.

[36] See infra.

[37] See Articles 21 et seq., 38 et seq. and 102 et seq. Criminal Procedure Code.

[38] See circular issued by Attorney-General on 28 July 2000 informing police officers that it is the right of every individual who requires a P3 form to be issued with one. AI, Ending Impunity, supra, p.4.

[39] Articles 385-388 Criminal Procedure Code.

[40] See Articles 88 and 89 Criminal Procedure Code.

[41] See Articles 4 and 65 ibid.

[42] Article 84 Armed Forces Act (Chapter 199 of the Laws of Kenya).

evidence is admissible but only carries persuasive weight and requires corroboration. The prosecution is conducted by the public prosecutor or by a private prosecutor.[43] A public prosecutor may, with the consent of the court or on the instructions of the Attorney-General, withdraw the prosecution at any time before judgment is pronounced.[44] A private prosecutor has the same power of withdrawal.[45]

The court has discretion in the imposition of a sentence and may impose a fine, community service or a prison term, which may be suspended for a period under certain conditions.[46] The President has the power to grant pardon to a person convicted of an offence.[47]

3. The practice

No comprehensive statistics on the number of allegations of torture are available. Many torture survivors or relatives of victims reportedly do not file complaints. Victims are often unaware of their legal rights and their right to complain about torture, particularly since torture is perceived as being a normal component of law enforcement. Many refrain from bringing complaints out of fear, borne out by the many reports of harassment and intimidation, not only of the victims but also of their relatives and other witnesses.[48] The lack of awareness and the fear of intimidation are particularly prevalent in rural areas where police officers enjoy wide powers vis-à-vis the population, seemingly unfettered by any controls. The low number of successful prosecutions also acts as a disincentive. Moreover, judges have rarely entertained complaints made pursuant to Article 89 of the Criminal Procedure Code.[49]

Investigations have proceeded slowly, if at all. Many complaints are apparently not recorded or acted upon. Police often close investigations, citing lack of evidence, or keep the files open indefinitely without taking any action and/or informing complainants about the state of affairs. Victims and witnesses have been intimidated into withdrawing complaints and to not give evidence against the perpetrators. The delays in the collection of evidence in torture cases have meant that in some cases, crucial evidence is lost. Perpetrators of torture and their colleagues, who are usually not suspended or arrested, have also manipulated evidence or obstructed complainants' attempts to obtain evidence. There have been repeated reports about police officers refusing to issue P3 Forms to complainants or "losing" the form after it had been returned by the complainant as neither the doctor nor the complainant are allowed to keep a copy.[50]

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[43] Article 88 (1) Criminal Procedure Code.

[44] Article 87 ibid. If such withdrawal is made before the accused person is called upon to make his or her defence, he or she shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him or her on account of the same fact. If it is made after the accused person is called upon to make his defence, he shall be acquitted.

[45] Article 87 (2) ibid.

[46] See on sentencing Patrick L.O. Lumumba, A Handbook on Criminal Procedure in Kenya, Nairobi, 1998, 233-256.

[47] Article 27 of the Constitution.

[48] See 2000 Report by Special Rapporteur, supra, para.8.

[49] According to Mr. Samuel Mohochi, Kenya Human Rights Commission.

[50] See 2000 Report by Special Rapporteur, supra, paras.7 et seq.

Victims have also refrained from requesting P3 Forms out of fear of hostile reactions by the police officers concerned. P3 Forms are also seen as inadequate as they do not allow a detailed record of injuries sustained by torture or rape victims in accordance with internationally recognised standards. Moreover, police are known to have harassed doctors to force them not to issue a report documenting any signs of torture. In a recent development, NGOs have convinced courts to admit independent medical reports since the police medical reports, even if completed, are usually scanty in detail. Post-mortems and inquests have also in several cases not been carried out and in those instances when they have been carried out, the findings have often not been properly acted upon.[51]

If a defendant, in the course of a criminal trial, raises an allegation of torture, the judge is supposed to hold a separate *voire dire* within the trial to decide whether or not the confession or other evidence obtained as a result of torture is admissible. According to Article 26 of the Evidence Act "a confession or any admission of a fact tending towards the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by an inducement, threat or promise having reference to the charge against the accused person."[52] This type of hearing is often only carried out at the insistence of the victim or his or her lawyers and the burden of proof is, in practice, if not in law, on the victim. Magistrates rarely direct the police to carry out independent investigations into allegations of torture,[53] nor is the Attorney-General known to have taken a pro-active role in cases where allegations have been raised.[54]

While a victim of a crime may bring a private prosecution, the Attorney-General's office has rarely granted victims permission to exercise this right. If victims proceed without the consent of the Attorney-General, proceedings will be terminated by means of a Writ of the High Court.

Consequently, few perpetrators of torture have been tried, and those that have, usually only on charges of assault.[55] No statistics on the number of trials and

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[51] See AI, Kenya, Ending the cycle of impunity, supra, pp.3 et seq.

[52] However, Article 31 of the Evidence Act (Chapter 80 of the Laws of Kenya) stipulates that "notwithstanding the provisions of Article (s) 26 ... when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." See also, comments of the UN Special Rapporteur, supra., para.62-64.

[53] Kenya Human Rights Commission, ***Mission to Repress,*** supra, p.25. In this report, one magistrate, who directed the Commissioner of Police to take action against the policemen who had tortured the defendants, is cited as saying that: "it would be good practice where matters of torture are apparent in the course of a trial to direct that investigations be conducted by the Commissioner of Police."

[54] Ibid. See also report of the Special Rapporteur, supra, para.72.

[55] According to statistics for the years 1998-1999 provided to the Special Rapporteur on Torture by the Attorney-General, 134 criminal proceedings against law enforcement officers were pending before the courts, 2 were under investigation, 8 arrests were pending and 63 were finalised. 103 of the proceedings were for offences against the person (i.e. murder, manslaughter, rape, assault, unlawful wounding, grievous harm, defilement, indecent assault, unnatural offence and attempted murder). See Report of the Special Rapporteur, supra, para.78. The Special Rapporteur added that very few cases were the subject of civil proceedings. The Independent Medico Legal Unit, a Kenyan NGO, noted only three cases of criminal proceedings against alleged perpetrators of torture. In one case, the police officer was committed to the High Court to face charges of murder, in another, an inquest had been proceeding for several years and the policeman accused of murder was still on duty, and in the third, also relating to death in custody, the inquest returned a verdict of suicide without having interviewed the doctors who had treated the victim before his death or the policeman who had been identified as the torturer the day before the death. See "The Torture Project", Report of the Independent Medico - Legal Unit April 1999- March 2000, available at www.imlu.org/TortureProjectReport.htm.

sentences imposed are available, however according to information provided by human rights lawyers, few prosecutions have been successful.[56] The low success rate has also been attributed to the fact that the judiciary is highly compromised and open to bribery.[57] Moreover, alleged perpetrators reportedly intimidate human rights defenders.[58] With the denial of those responsible and the absence of others willing to testify, a conviction will invariably depend on strong medical evidence.

Disciplinary measures have reportedly been taken in some cases but these sanctions were imposed in lieu of criminal prosecution and nevertheless, there does not appear to be a consistent practice.[59]

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

Torture survivors can seek reparation before civil courts pursuant to rules of common law.

1.1. The Constitution

The Constitution does not provide for an express right to reparation for serious violations of human rights.[60] However, it provides victims with access to the High Court. Article 84 (1) reads: "... if a person alleges that the provisions of Articles 70 to 83 ... has been, is being or likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges that a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

The High Court has the discretionary power to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provision of Articles 70 to 83."[61] While the High Court has found violations of human rights, including torture, it has not

[56] Out of all the cases pursued by the Litigation Fund against Torture, established in 1999 by the Kenya Human Rights Commission, the Independent Medico-Legal Unit (IMLU) and the People against Torture (PAT), only 14 cases have been brought to trial. As a result, 11 police and prison officers are standing trial for either murder or manslaughter in relation to custodial deaths. In one case concerning ill-treatment by a member of the army, the Attorney-General refused permission to allow a private prosecution. As of late 2002, not a single police officer has been charged with 'torture' as provided by Article 14 of the Police Act.

[57] See on the extent of corruption in Kenya, ranked 96 out of 102 in Transparency International's Corruption Perception Index 2002, in the Global Corruption Report 2003, Transparency International, pp.237-247.

[58] See 2000 report by Special Rapporteur, supra, para.67.

[59] See IMLU, Torture Project Report, supra.

[60] The draft bill for a new Constitution, dated 27 September 2002, prepared by the Constitutional Review Commission, envisages an express power of the High Court to award compensation for violations of human rights. Article 74 reads: "(1) The High Court has jurisdiction to hear applications for redress for a contravention of the Bill of Rights; (3) In any matter brought before it in terms of Article 73, a court may grant appropriate relief, including (c), an order for compensation against the state or any person responsible for the violation of rights..(4) In proceedings against a public authority for a violation of human rights, a Court may not award costs against the plaintiff, or applicant, unless the court determines that the case was frivolous, vexatious or totally devoid of merit; (5) Without prejudice to the full scope of this Bill, it is the obligation of the state to pass necessary legislation and establish necessary machinery to give the fullest effect to its provisions."

[61] Article 84 (2) b) of the Constitution.

interpreted Article 84 of the Constitution as granting it jurisdiction to enforce the human rights provisions in Chapter V of the Constitution. As such, victim must seek compensation through the common law.[62]

1.2. Civil Law

A torture survivor or relatives of a torture victim may claim damages for torture in common law for the torts of trespass to the person, such as assault and battery. The courts can award damages for pecuniary and non-pecuniary harm as well as exemplary damages. The perpetrator and the state can be held jointly liable. Also, the state is vicariously liable for the actions of its servants while on duty.

Civil claims are set in motion by the filing of a complaint in the High Court.[63] The time limit to file a claim against the Government is twelve months[64] and three years against other defendants. If a claim is brought against a government official after the expiry of the twelve-month period, the court may at any stage during the proceedings enter judgment for the defendant.[65] The claimant is required to pay the fee prescribed in the Judicature Act, the amount of which depends on the magnitude of damages sought (between Kshs.175 ($2.29) and Kshs 70,000 ($915.4). No legal aid is available to pursue such claims. The plaintiff carries the burden of proof to substantiate his or her claim. Damages must be pleaded as special damages on strict proof and/or general damages, the award of which is discretionary. The award of damages is not linked to the outcome of any criminal prosecution.[66] Costs are at the discretion of the court.[67]

The court has the power, on the application of the successful plaintiff, to order execution of the judgment.[68] The plaintiff must apply for permission to execute against the government. However, even if such an application is granted, state assets cannot be attached. Thus, if the State fails to honour a decree or an order, the plaintiff needs to set in motion a special process seeking to compel the relevant Accounting Officer of the State to honour the award.

1.3. Criminal Law

There is no possibility to pursue a civil claim for damages through criminal proceedings. However, a criminal court does have discretion to award compensation as part of the punishment. Article 24 (g) of the Penal Code provides that: "the following punishment may be inflicted by a court – payment of compensation." According to Article 31 of the Penal Code: "Any person who is convicted of an

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[62] See report of the Special Rapporteur on Torture, supra, para.58.

[63] See on civil suits, Part II of the Civil Procedure Act (Chapter 21 of the Laws of Kenya).

[64] Article 3 (1) of the Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya).

[65] Article 3 (3) ibid. :"Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or by a local authority and the proceedings were brought after the end of:- a) twelve months, in the case of proceedings founded on tort;... from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant." The question whether torture is considered to be "acting in the course of his employment by the Government" has apparently not been a subject of any court decision.

[66] However, see Articles 6 and 7 of the Civil Procedure Act.

[67] Article 27 Civil Procedure Act.

[68] Article 38 of the Civil Procedure Act. See on execution in general, Part III of the Act, Articles 28 et seq.

offence may be adjudged to make compensation to any person injured by his offence, and such compensation may be either in addition to or in substitution for any other punishment."

2. The Practice

Only a few torture survivors have taken legal action to claim reparation. This is due to several factors, such as a lack of awareness of their rights and fear of reprisals, already elaborated upon in connection with criminal complaints. Other major barriers to the initiation of civil proceedings include the inability of victims to finance such cases (there is no applicable legal aid scheme) and the lack of sufficient medical documentation to satisfy the burden of proof. Moreover, the short time periods in which actions can be brought has also inhibited claims. Many, particularly those that remain in custody but also others without access to resources or information on their rights are often either unable to access or unaware of the existing avenues for redress. Others still are simply not able to contemplate it within the short period since the torture occurred and in light of their traumatic experiences.

It is against this background of a range of considerable obstacles that three Kenyan human rights organisations established the Litigation Fund against Torture in 1999 to offer legal assistance through public interest litigation to victims and survivors of torture in Kenya.[69] The strategy of the Fund is to select at least ten high impact cases of torture annually to litigate in the courts. At its inception the Fund approved 14 cases, which are either pending or have been resolved.[70] Presently, out of these cases four civil suits are pending and one has been settled out of court.[71]

In one successful torture case, the High Court in 1995 awarded 500,000 Kshs ($9,728) to a torture survivor. Another case has been reported but to date these rulings have not been honoured by the State.[72] The fact that the Government has often failed to honour the awards made against it is another disincentive for torture survivors to pursue claims.

V. GOVERNMENT REPARATION MEASURES

There is no reparation scheme for victims of serious human rights violations. There are NGOs, such as the Independent Medico Legal Unit, that provide rehabilitation for torture victims.[73]

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[69] Supra.

[70] Information on the Fund has been provided by Mr. Samuel Mohochi, Project Coordinator of the Litigation Fund Against Torture. In the case of Yusuf Anitwani Maina who died as a result of torture, his family sued the Attorney-General and two police officers for special damages. The case has apparently been set down for hearing three times and at each hearing the magistrate was unavailable and none of the police officers involved have been questioned. See, AI, Impunity, supra, p.5.

[71] In the latter case, the army reportedly tortured six officers for two weeks, alleging that they had planned a mutiny. While the private prosecution was dismissed because the Attorney-General did not consent to it, the civil suit for compensation was settled out of court with the Department of Defence.

[72] See 2000 Report by Special Rapporteur on Torture, supra, para.80.

[73] See their website for further information www.imlu.org.

Since the elections in late 2002, there are a number of proposals in discussion that envisage the setting up of a Truth and Reconciliation Commission for past human rights violations. These may include a reparation component.[74]

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in third countries

1.1. The Law

1.1.1. Criminal Law

Universal jurisdiction can be exercised for grave breaches of the Geneva Conventions pursuant to Article 3 (1) of the Geneva Conventions Act, 1968.[75] This is provided for specifically in Article 3 (2) of the Act.[76] A prosecution, which is not dependent on the presence of the suspect, cannot be instituted except by or on behalf of the Attorney-General.[77] Moreover, any questions arising during the prosecution concerning the existence of an armed conflict shall be determined by the Minister and are presumed to be sufficient evidence on that point.[78]

Diplomats enjoy immunity from criminal proceedings in accordance with the Vienna Convention on Diplomatic Relations, which has been incorporated into Kenyan Law.[79] Moreover, other persons enjoy immunity as specified by the Minister by order.[80]

1.1.2. Extradition Law

The Extradition (Contiguous and Foreign Countries) Act (Chapter 76 of the Laws of Kenya), the Extradition (Commonwealth Countries) Act (Chapter 77) and the Fugitive Offenders Pursuit Act (Chapter 87) govern Kenyan extradition law. Extradition operates on the basis of reciprocity, i.e. only where there is an extradition agreement with the state requesting extradition.[81] The extradition acts contain separate schedules, which list extraditable offences, including most offences covering acts of torture, such as murder, manslaughter, inflicting bodily harm, assault and rape. A

[74] See "Kenya plans truth inquiry", The Guardian, 14 February 2003.

[75] Supra.

[76] "Where an offence under this Article is committed outside Kenya, a person may proceed against, indicted, tried and punished therefore in any place in Kenya, as if the offence had been committed in that place, and the offence shall, for all purposes incidental or consequential on the trial or punishment thereof, be deemed to have been committed in that place."

[77] Article 3 (3) Geneva Conventions Act.

[78] Article 3 (4) ibid.

[79] Article 4 (1) The Privileges and Immunities Act, 6 April 1970 (Chapter 179 of the Laws of Kenya).

[80] Article 4 (4) ibid.

[81] See for example Article 3 (1) of the Extradition Act: "Where an agreement has been made with any country other than a designated Commonwealth country within the meaning of the Extradition (Commonwealth Countries) Act, with respect to the surrender to that country of any fugitive criminal, the Minister may, by order published in the Gazette, declare that this part shall apply in the case of that country subject to such conditions, exceptions and qualifications as may be specified in the order, and this part shall apply accordingly."

Kenyan national may be extradited to a foreign country if the treaty in question so provides. Extradition may be refused where a Magistrate is not satisfied that there is sufficient evidence to warrant surrender or where a Minister is of the opinion that the offence is of a political character.[82]

1.2. The practice

There are no known cases in which a perpetrator of grave breaches of the Geneva Conventions has been tried in Kenyan courts. Neither have there been any cases where perpetrators of torture or ill-treatment have been extradited to another state.

2. Claiming reparation for acts of torture committed in third countries

As a general rule, Kenyan courts have jurisdiction at the place where the defendant resides or carries out business or where the tort was committed.[83] Jurisdiction can also be established by serving process on the defendant even if he or she is only temporarily present in Kenya provided that he or she acquiesces to the institution of the suit.[84] Foreign nationals may sue in Kenyan courts with the exception of "alien enemies" who are only allowed to sue with the permission of the President if they reside in Kenya.[85] If the court exercised jurisdiction, the applicable law would be the one where the tort was committed.

Diplomats are immune from civil proceedings according to the Privileges and Immunities Act. Kenyan courts have applied the principle of restrictive state immunity when considering the scope of state immunity from legal proceedings.[86]

No cases are known in which torture survivors have sought and obtained reparation before Kenyan courts for torture committed abroad.

[82] Article 16 of the Extradition Act.

[83] Articles 14 and 15 Civil Procedure Act.

[84] Article 15 (b) ibid.

[85] Article 56 ibid.

[86] *Ministry of Defence of Govt of UK v Ndegna*, Kenya Court of Appeal, 17 March 1983 (103 ILR 235).