



REPORT OF THE 3RD NATIONAL CRIMINAL JUSTICE AGENCIES WORKSHOP

Theme: "Prevention of Torture and other Cruel and Inhuman or Degrading Treatment or Punishment"

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Table of Contents

1. ACRONYMS	3
2. EXECUTIVE SUMMARY	4
3. OFFICIAL OPENING	5
3.1.1 <i>Sam Mobochi, Executive Director, IMLU</i>	5
3.1.2 <i>German Ambassador- H. E Walter Johannes Lindner</i>	5
3.1.3 <i>Hon Moody Awori, Vice President Republic of Kenya, Minister for Home Affairs</i>	6
3.1.4 <i>Dr. Ling Kituyi, Chairperson IMLU</i>	7
4. PRISON REFORMS	7
4.1 The Reform Programme: Where are we?	7
4.1.1 <i>John Odongo- Deputy Commissioner of Prisons</i>	7
4.1.2 <i>Henry Omusundi Maina- Deputy Executive Director, Legal Resources Foundation</i>	8
4.2 Prison Health Services	10
4.2.1 <i>Dr. John Kibosia, Director Prison Medical Services</i>	10
5. POLICE REFORMS	16
5.1 Police Accountability: a Civilian Oversight Mechanism	16
5.2 Community Policing	21
5.3 Extrajudicial/ encounters killings	28
5.3.1 <i>Facts</i>	28
5.3.2 <i>Forensic investigation of deaths</i>	29
6. PREVENTION OF TORTURE: LAW REFORM	30
6.1 Ratification of International Human Rights Instruments: the Kenya Experience (Successes and Challenges)	30
6.2 Ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment.	34
6.3 The need for legislation against Torture	36
7. THE WAR ON TERROR: AN EMERGING CHALLENGE TO THE ANTI- TORTURE CRUSADE	45
7.1 Torture of terror suspects: is there any justification?	45
7.2 Terror suspects: Have Muslims been victimized?	46
8. RECOMMENDATIONS AND WAY FORWARD	62
9. CLOSING REMARKS	65
10. ANNEXURES	65
10.1 Workshop Programme	65
10.2 List of Participants	67

1. ACRONYMS

ANC	Antenatal Care
ART	Anti retroviral therapy
CJPC	Catholic Justice and Peace Mission
CSO	Civil Society Organisation
GJLOS	Governance, Justice, Law and Order Sector Reform Programme
ICJ	International Commission of Jurists
IMLU	Independent Medico- Legal Unit
KHRC	Kenya Human Rights Commission
KMA	Kenya Medical Association
KNCHR	Kenya National Commission on Human Rights
KEMSA	Kenya Medical Supplies Agency
LRF	Legal Resources Foundation
MCH	Maternal and Child Care
MUHURI	Muslims for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment
PHO	Public Health Officer
PLWHAS	People Living with HIV/AIDS
VCT	Voluntary Counseling and Testing

2. EXECUTIVE SUMMARY

IMLU is a registered non- governmental organisation that seeks to promote the rights of torture victims and protect Kenyans from all forms of State perpetrated torture by advocating for legal and policy reforms, monitoring government adherence to human rights, rehabilitating victims of torture and building the capacity of key stakeholders, forensic documentation and legal redress.

The objective of the Criminal Justice Agencies Conference was to work towards prevention of torture and related human rights violations in the criminal justice system in a holistic way by bringing together all the key government institutions and stakeholders to one forum in which institutional reforms can be discussed and agreed upon. The Conference brought together representatives of government, civil society, the media, international non-governmental organizations and experts on policy and legislative reforms.

The conference afforded all stakeholders an opportunity to share their frustrations with one another and design interventions that would make the task of preventing torture and human rights violations more effective and departing from the blame game.

The Vice President of the Republic of Kenya officially opened the meeting, in his address, he underscored the importance of the process and reiterated the government's commitment to ensuring that Kenya continues to observe the human rights agenda as well as dovetail the Government's efforts towards ensuring that the populace has access to all their fundamental rights. He further highlighted the need for all stakeholders to design preventive measures as opposed to reactionary interventions such as legal aid and rehabilitation as has been the case in the past.

The IMLU Executive Director Mr. Sam Mohochi observed that the conference provided an opportunity to people who are rightly specialists in their fields to identify the problems that impact on human rights in the criminal justice system while collectively developing homegrown solutions.

Finally, the participants unanimously adopted the process, by generating a series of recommendations in a document, which is herein annexed.

This report is a summary of the deliberations and proceedings of the Conference and is intended to act as resource for further action in the process of developing and implementing interventions that will lead to the prevention and eradication of torture as a human rights violation.

3. OFFICIAL OPENING

The session was moderated by Dr. Ling Kituyi, the Chairperson of IMLU.

3.1 Opening Remarks

3.1.1 *Sam Mohochi, Executive Director, IMLU*

Welcomed the Vice President Dr. Moody Awori, the Ambassador of the Federal Republic of Germany Mr. Walter Lindner, the Honorable Justice Milton Makhandia of the High Court of Kenya and all the participants to the 3rd Annual Criminal Justice Agencies workshop.

He pointed out that IMLU and the KMA had organised the previous two workshops whose objectives were to firstly bring together all stakeholders for the purpose of brainstorming on various technical as well as structural aspects of improving service delivery to the people of Kenya. Secondly the for a presented an opportunity to people who are rightly experts in their fields to identify problems that impact on human rights in the system while collectively developing homegrown solutions. Finally, the forum was a rare opportunity that brought together agencies that commonly blame one another for the systematic teething challenges in the criminal justice system, such as backlog in the justice system, delay in the conclusion of criminal cases, congestion in the penal facilities amongst many other problems. He welcomed the participants to take the opportunity to squarely tackle the issues in an objective manner and come up with workable recommendations

He concluded by highlighting the issue of torture which was still persisting within the system and called for identification of preventive strategies especially bearing in mind that torture is constitutionally prohibited in Kenya.

3.1.2 *German Ambassador- H. E Walter Johannes Lindner*

His Excellency pointed out that the issue of human rights was no longer merely an issue for the domestic domain but was currently on the international agenda as well and hence important that Kenya has continued to keep it on the national programme of action in ensuring that Kenyans were enjoying the freedom of expression, association and the prison, penal reform was taking place and interventions were currently underway to abolish the death penalty and torture.

Before taking up his office in Kenya, he had inquired about the state of human rights and was informed that the situation had greatly improved since the early 80s and 90s. He commended Kenya for this advancement while noting that a lot still remained to be done and it was his opinion that the government was working on these issues particularly with regard to the use of excessive force in the prisons and police stations. His view was that as long as the government continued to work hand in hand with the Civil Society Organisations and allowed for the freedom of press as a means of civilian accountability, the problem would soon be solved.

With regards to the prison reforms, having recently visited some German nationals at the Shimo la Tewa prison, he believed that the appointment of a female commandant was very progressive and some changes were already evident. He however identified that issues like food, overcrowding and provision of medical services still needed to be addressed.

On the issue of police reforms he noted the changes that had taken place in the recent past but felt that the police officers needed more appreciation and the best way to achieve this would be through improving their terms of service and working conditions as this would alleviate a lot of their frustrations. He noted that there were still widespread complaints regarding the use of excessive force when the police were dealing with the public and this needed to be addressed.

He concluded by stating that the rule of law was the backbone of any country's democracy. The emphasis on the rule of law should be at the forefront of our minds especially in the recent war on terrorism where several justifications were being used to deny suspect their rights in the quest for clues and information.

3.1.3 Hon Moody Awori, Vice President Republic of Kenya, Minister for Home Affairs

The Vice president delivered the keynote address.

He indicated that this was the second time he was presiding over the conference and he was honored to be attending this meeting that was a follow-up to the one held on the 23rd of February 2005. In his address in the previous meeting he had drawn the participants' attention to the fact that the problems in the penal system were very cross-cutting and therefore their solution demanded a unified and integrated approach by all agencies and stakeholders. He had further challenged the participants to forge a stronger cooperation among agencies involved in the management of offenders at all levels, that they needed to appreciate the role played by each agency and finally that the agencies needed to hold frequent consultations in order to solve the myriad problems facing the sector.

The Vice President expressed his pleasure that his challenge had been taken positively and several stakeholders brought on board to tackle the issues facing the criminal justice sector in a coordinated, holistic and consultative manner.

He identified some of the definitive steps that have been taken to enhance cooperation and fast track the reform process. Since then CSOs have evidently adopted an apolitical stance in fostering inter-agency cooperation. Examples included IMLU and the ICJ which are working closely with the Prison department and the Judiciary respectively, while several other CSOs are involved in the GJLOS initiative.

With regard to the implementation of transitional educational programmes and enhancement of pastoral care for prisoners, the Ministry had increased the number of examination and education centers in prisons countrywide in a bid to ease their transition from prison to society. Through the GJLOS basket fund, various criminal justice agencies had been provided with additional vehicles and computers in order to enhance their capacity to deliver services to the public. Notably also was the establishment of the Prisons Health Directorate and the appointment of a Director of Prisons Medical Services to head it

IMLU was commended for its persistence and commitment to the reform process and for successfully organizing the workshop for the third time. He expressed delight that IMLU in conjunction with the KMA was planning to hold medical camps at the Shimo la Tewa, Industrial Area, Kodiaga and Kakamega prisons. He encouraged other stakeholders to support these kinds of collaborations and partnerships.

The Vice President felt that the theme for this year's workshop "*Prevention of Torture and other Cruel and Inhuman or Degrading Treatment or Punishment*" fits in well within the government's declaration forbidding any form of torture. He called upon CSOs to be vigilant and bring to the government's attention any form of violation of human rights within our criminal justice agencies.

He noted that CSOs had played a key role in the anti- torture campaign by assisting in the rehabilitation of survivors through treatment and counseling, forensic medical documentation of injuries and legal representation of survivors. While commending all these measures, he pointed out that they were all reactionary as they related to violations that had already taken place. He underscored the need to formulate preventive strategies through the enactment of appropriate legislation and policy reform as well as the change of attitude of potential perpetrators.

In conclusion, he wished the participants fruitful deliberations and declared the forum officially opened.

3.1.4 Dr. Ling Kituyi, Chairperson IMLU

She pointed out that the workshop was opening in a very emotive situation where there is an increase in violent crime and the public is now willing to take shortcuts on the judicial process and torture has started to be acceptable once again in investigating crime as well as the upsurge in extrajudicial killings.

She underscored the importance of affording law enforcement agencies professional protection and stated that IMLU had approached parliament to put in place a medical insurance for the security officers the same as that of parliamentarians.

Dr. Kituyi emphasised the need to streamline the judicial process since in its current state even professionals like pathologists and medical doctors are not willing to testify as they do not want to "waste time". As long as the judiciary is not working it is difficult to sustain human rights standards and as long as there is no alternative to the "shoot to kill orders" the extra- judicial killings will continue. Justice is not the same as personal revenge and as much objectivity as can be had should be inculcated.

The media has a role to assist us in enforcing justice to prevent the rule of the jungle from taking over.

She concluded by stating that "*The price of freedom is eternal vigilance*".

4. PRISON REFORMS

The session was moderated by Dr. Abdalla Kibwana, Vice Chairperson Kenya Medical Association

4.1 The Reform Programme: Where are we?

4.1.1 John Odongo- Deputy Commissioner of Prisons

He indicated that the Prisons Reforms Programme was initiated as a result of local and international pressure to institute the principles of transparency, governance and respect for

the rights of offenders. Part of the notable improvements included the introduction by Commissioner Abraham Kamakil of the Open Door policy as well as the establishment of the office of public relations that was opened to enhance free flow of information between the public and prisons authorities.

In October of 2001, a roundtable conference came up with far reaching recommendations.

Interventions- this included decongestion, speeding up the administration of justice, legislative and policy reform, improving living conditions in prison, establishment of an effective prison medical service framework, separation of young children and their mothers, borstal institutions for boys and girls, capacity building of prison staff, enhancing inter-agency cooperation, community involvement on rehabilitation and penal reforms as a poverty eradication strategy

Achievements-so far, a training curriculum has been developed, prisons enterprises and farms are generating more income than ever before, different policies and legislation are under review, resources have been mobilized for the construction of staff houses, a scheme of service is being developed, new uniforms for prisoners, open- door policy has been introduced to enhance feedback mechanisms, improved interaction between prison authorities and the media, improved transport “moody hoppers” to facilitate the transfer of prisoners, capacity of prison staff built on human rights, the government of South Sudan to sign a Memorandum of Understanding with Kenya for training of prison staff in Sudan., the Prison College will soon start offering tertiary education, gender mainstreaming is taking place within the prisons authority and more female staff are being appointed to senior positions and a half- way house for Juveniles has been put up in Kamiti.

Challenges- despite the aforementioned achievements, a lot still remains to be done and some of the challenge yet to be surmounted include overcrowding, inadequate budgetary allocation, insufficiently trained prison personnel, consideration of prisons as “negative investment opportunities”, negative perception of prisons by the public, weak enforcement of non- custodial sentences, absence of a scheme of service and the uncoordinated management of criminal justice agencies.

4.1.2 Henry Omusundi Maina- Deputy Executive Director, Legal Resources Foundation

Defined prison reform as the transformation of culture and prisons as social institutions over time caused by technological and economic changes, modernization, urbanization, bureaucratization, conflict and competition, diffusion, acculturation, political and legal power, ideology, and social movements.

Pointed out that although the capacity of penal institutions stands at 16,866, there are presently approximately 47,295 inmates in prisons all over the country. This is in contravention of the Standard Minimum Rules for the Treatment of Prisoners 1957 &1977. In light of this, even without CSOs, reforms were going to happen and our duty was to influence the direction of reforms and social change since there was evidently an element of dissatisfaction with the existing social system and/or practices. In this way, we change the focus and start thinking of the penal system from a rights perspective and see it as a correctional and rehabilitative force rather than a punitive one.

Some of the existing global paradoxes inhibiting reform in the penal system include:

Tension between the local and the global- some stakeholders do not believe that change is possible with a section believing that we are trying to adopt foreign ideals. Despite this, there are ironically still discrepancies even within the different institutions at the local level, for instance Langata Women's Prison may be clean and Nairobi Remand Prison is filthy. This discrepancies need to be resolved.

Tension between individual and the universal- persons within the system are not treated as individuals. In a recent case, when the city council arrested hawkers trading in the streets of Nairobi, they arrested a number of people living with disability as well. Once in remand, the disabled people's walking aids were considered as dangerous weapons and taken by the prison authority leaving them at the mercy of their fellow inmate. Effective reform ought to take into account the physical, spiritual and emotional needs of all inmates.

Tension between the traditional and the modern- despite advances in technology, prison authorities continue to physically carry out indecent searches on inmates. Reforms such as these call for enhanced budgetary allocation and political will.

Tension between long term and short term consideration- (revolution vs. reform) - for reform to be sustainable, a balance needs to be struck between short, medium and long term interventions.

Tension between competition and cooperation- at times conflict may arise on the part of the CSOs as well as the different government agencies working without coordination. A case in point is Meru where the Moody Hoppers were given to the prison authorities but the fuel money was given to the police as they were the ones who take prisoners to court in that area. Keeping in mind the complexities of different stations, there is need for coordination as well as some flexibility in the solutions provided.

Tension between knowledge explosion and the human capacity to assimilate the knowledge- on the path to reforms, capacity building was one of the interventions designed and a number of prison officials trained. It would be informative to find out whether the people who were taken for training been appointed heads of stations and if so how many are running centers of excellence.

Tension between the spiritual and the material- religious leaders have free access to the prisons while civil society organisations are forced to keep notifying the Commissioner of Prisons. Does this mean that the former is more important than the later in the eyes of the authorities or less threatening?

The phases of reforms that will occur via the agitation of CSOs include dissent, protest and finally culmination into social movements which essentially involve sustained collective mobilization through either informal or formal organization which are generally oriented towards bringing about change in the existing system of relationships.

Human rights advocates belong to a social movement and they aid in creating and strengthening reforms through education and awareness. Human Rights Education is a process that connects the different movements to bring about desired social change using the rights claim; sustains the social movements by "producing" new members and

supporters and integrates human rights as a standard by which people create their personal and social experiences.

Key areas of reforms

Open door policy & NGO coordination office, increased respect of human rights, creation of separate cells for adults, children, invalids, enhanced support from Government and NGOs, increased assistance towards staff training (especially human rights issues), provisions of clothes and other basics, Kenya Prisons Paralegal Project-4 prisons initially to 22 with other organisations like MUHURI, St Martin and CJPC Kitale, increased societal understanding of prisons, treatment /rehabilitation models in place, de-congestion, sentencing policy, prison term review, resource management, striping and searches, bullying, assault and corporal punishment, establishment of Health Directorate and the increased allocation to prison budgets in the last few years

Areas in need of reform

Privilege system, actualization of visiting justices provision, repeal of the Prisons Act/Legislative reforms, Isolation cells, Penal diet, the institutionalization of the open door policy, information to and complaints mechanism for staff and prisoners, revamp of the welfare establishment & take on board social work and paralegal services and the notification of death, illness and transfer

4.2 Prison Health Services

4.2.1 Dr. John Kibosia, Director Prison Medical Services

He began by stating that in recent years international treaties and charters on Human Rights recognize the need to treat Inmates in a humane manner. In health care, inmates should get the equivalent care available to the outside community of their country. In Kenya the Prisons Health Services falls in the Public Health Sector within the Ministry of Health.

Within the Public Health Sector, inefficiency remains one of the major concerns to increasing coverage and access to health care in Kenya. There is low technical and economic efficiency characterized by under utilization of malfunctioning facilities and lack of expenditure containment measures in the public health sector. This inefficiency is a costly waste of resources as inputs are not utilized in the most cost-effective manner. Inefficiency is also the primary attribute of shortages of professional staff, poor combination of inputs, irregular non-functioning theatres and laboratories, transport problems, poor distribution or lack of drugs and medical supplies and poor servicing of machines and equipments.

The Ministry of Health is responsible for running Health Services in Prisons by seconding medical staff and providing medical supplies, maintaining buildings as part of the health care delivery to Kenyans. This arrangement did not however recognize the uniqueness of inmates' health and the prison environment.

Over the years there has been public outcry on the poor health services in prisons. This is attributed by the following among others:-

- Lack of appropriate organizational structure policies and management practices for Prison Health Services.
- Poor working environment to attract and retain qualified and experienced health professionals.

- Lack of sense of ownership. This affects commitment.
- Corruption, lack of integrity
- Low staff morale
- Lack of strategic plans – No clear direction
- Poor maintenance of building
- Lack of medical equipments
- Lack of drugs
- Inmates conditions exacerbated by overcrowding
- Poor nutritional state of inmates
- Poor sanitation
- Inadequate safe drinking water
- Homosexuality
- HIV/AIDS and TB among the prison population

In light of the going, the government has recognized the need to establish Prisons Health Services to address the unique nature of Prisons Health Care. The first step was the posting of a Director to Head the Unit with responsibility of the overall co-ordination and administration of Prisons Health Services in the Republic.

Services are rendered to Inmates within Prisons Compound. Most of the Prisons throughout the country have a health facility within the Prisons compound and those which do not have are situated very close to a Ministry of Health facility. In the outpatient, inmates are able to access curative care of minor ailments, preventive care Ante Natal Clinic, Maternal Child Health, Immunization in few centers, VCT in ten Centers, Diagnosis in few centers which have a laboratory, which are also understaffed and poorly equipped. Only 2 Prisons have X-ray facilities.

With regards to In-patient facilities, 4 major prisons have a sick bay where patients are admitted. These bays are poorly staffed with very few beds and equipment. All cases the staff cannot handle, where there no prison health facilities and where there is a Diagnostic Inpatient Court Order, the matters are referred to a Ministry of Health Facility

Shortcomings of the Prison Health Care Service

- Transparency
 - Favoritism
 - Corruption
- Delays
 - Making in early diagnosis
 - Conflict between Prison staff and Health staff
 - Transport
 - Escort
- Cost sharing in the facilities
- Stigma and negative attitude among health personnel.

The majority of Services are provided by nursing staff except a few who have clinical officers. There is only one Doctor at Kamiti Prison. The number of staff in the whole Prison Health Service countrywide is as follows:-

Doctors	01
Clinical Officers	08
Registered Nurses	26
Enrolled Nurses	88
Pharmacists	02
PHO	06
Physiotherapy	01
Nutritionist	02
Radiographer	01
MRT	01
Medical Lab Technologist	16
PHT	17
Orderlies	04

Common Conditions

Outpatients - Top 10

Malaria, URT, Skin conditions, Diarrhea diseases, Worm infestations, Septic wounds, Dental, TB, UTI/STD, Pneumonia

Inpatient – Top 5

Pneumonia, Diarrhea diseases, Malaria, TB, HIV/AIDS complications

The drugs used in the Prison health services com from the Kenya Medical Services Agency, donors and purchase by the prisons.

Achievements

- Establishment of VCT, DTC and TB clinics
- Provision of free ART
- Training of Health Care workers on TB/VCT and ART
- Establishment of Support Groups for PLWHAS
- Increase in Medical Care Budget
- Appointment of the Director to establish Prisons Health Services.

Way forward

Organizational Structure:

Currently the structure is ill defined

Proposal

An appropriate and rationalized structure should be established.

Equipment & facilities

- Rehabilitate physical facilities
- Acquire modern equipment and maintain them

Human Resource

Imprisonment can have a damaging effect on both physical and mental well being of an inmate. The Unit is obliged to provide for these special needs of inmates. This requires that

those providing this health care be trained in the specific health needs and health problems seen in Prison environment.

Proposal

- Establish staffing norms
- Workout scheme of service for Prisons Health Staff
- To recruit, train and deploy staff on basis of merit, qualification and experience,
- To improve work environment.

Financial

The Unit will continue to depend on the Government of Kenya for funding of the Services.

Proposal

- Cost sharing from Non-inmates
- NHIF – Inmates should be enrolled as members of the scheme.
- Donors

Information Communication Technology

Currently the Prisons Department lags behind in IT. A Prison Service cannot meaningfully establish health information before the whole department embraces modern technology.

Proposal

- To establish ICT infrastructure for Prisons Department
- To recruit qualified and experienced personnel to manage the system
- To establish and maintain an integrated Health Service Management System

Institutional Linkages

A lot of Organizations and Institutions are currently interested in Prison Health Services. Some have formalized proposals and other has not.

Proposal

- To identify and formalize linkages with institutions for mutual benefits
- To review existing memorandum of understanding with various institutions with view of focusing on issue of concern.

Research

This is an area where Prisons Health Services need to develop.

Proposal

- To provide policies and guidelines on Research
- To revitalize medical research for innovative patient care through Inter-institutional linkages and fund raising
- To establish a Research Unit.

Quality Assurance

There is need to benchmark Services and Prisons Health Services

Proposal

Develop and implement quality assurance and control systems.

Plenary Session

Wilson Kiprono, AP

The Prison Health Services is a good initiative. The director needs to incorporate the element of psychosocial support both for the health care providers and the inmates. The World Health Organisation defines health as not just the absence of disease but also the inclusion of all other aspects of good living (emotional as well as spiritual well being) hence the need for the psychosocial support.

Pravin Bowry, Senior Advocate and Board Member IMLU

Raised the issue of Death Penalty is a matter of concern because although it existed in the books, since 1988 nobody has been hanged and yet the judicial officers continue to met out this sentence. *Response:* Dr. Kibosia from a health perspective, a decision needs to be made as it is very stressful for the medical personnel. The inmates are depressed and it is doubtful that they receive the same standard of care that the other inmates do and as a result many die of heart attacks as all they do is eat and sit around without engaging in any exercises.

Hon. Milton Makhandia, Judge of the High Court of Kenya

Informed that participant that there was a constitutional reference case in court to deal with the issue of the death penalty and for that reason he would not comment on the same. He instead recommended all the participants to put pressure on their Members of Parliament to have provision struck out.

Baseley Walker, Kenya National Commission on Human Rights

He informed the participants that the KNCHR was working to have the provision removed from all the statutes and reminded all that this was the year of campaign against Capital Punishment and they could all join the different ongoing initiatives.

He also wanted to know whether there was a likely time- frame for the disposal of cases. *Response:* Hon Makhandia stated that the problem was that in our judicial system the management of cases is left to the litigant who can apply for an adjournment or injunction and when this is done, the court cannot thereafter call for the file until it next comes up for mention or hearing..

Gerry Gitonga, Advocate, Mombasa

He was concerned about the extent of time it takes cases to come to completion and the impact that this had on the prisons systems and the inmates. He wanted to know if there were any interventions in place to address the problem. *Response:* Hon Makhandia explained that one of the causes of this problem was understaffing but that there was a Bill pending in parliament to increase the number of judges since there is a constitutional restriction. He requested the participants to lobby their Members of Parliament to support the Bill.

Pravin Bowry, Senior Advocate and Board Member IMLU

He challenged the participants to become and all Kenyans to become innovative in seeking solutions to problems that have encumbered development for a long time. An example was

the provision on visiting justices where he indicated that if requested to go and act as a magistrate every Friday without cost he would do so without complaint but that an initiative such as this required an agency such as the judiciary to coordinate... He felt that there was a lot of goodwill around that could be taken advantage of and yet was being allowed to go to waste. A second example was of the pharmaceutical companies that spend millions of shillings sponsoring golf tournaments and yet they were not being approached to finance important initiatives like the Prison Health Services which was raising lack of finances as a challenge to its operations.

Justus Kivindyo

He felt that it was the delays in concluding matters before the court that was contributing to congestion in prisons. He sought to know from the judicial officers what factors would assist them in the speedy disposal of cases. *Response:* Hon Miale, a magistrate explained that there were very many players in the criminal justice system- police, judicial officers, prosecutors, prisons etc and the problem of backlog of cases needed to be addressed in a holistic way without exclusively blaming the judicial officers.

Henry Maina. Legal Resources Foundation

He took the position that a lot of the delays in the judiciary were occasioned by lawyers who only look at their clients' interests without regard for the greater public good. He recommended that the judiciary needed to start being activists for human rights with conservatism in the legal fraternity being set aside within reason.

The judiciary needs to address crimes of poverty since some of the congestion was being occasioned by remandees on "bonds to keep peace" and yet they are in prison. A lot of the time, remandees are bonded in this way because the prosecution is unable to find evidence against them. He laid this problem at the feet of the judiciary because most of the people in prison and remand had passed through the hands of a judicial officer.

Hon Miale, Magistrate

She sought to know why it was difficult to provide inmates with simple amenities like soap and water and advised that a simple intervention such as this would greatly reduce of the ailments being discussed such as skin infections that could be solved by basic hygiene. *Response:* Dr. Kibosia explained that this was now being provided but as stated earlier there was a great water shortage and the problem was being dealt with.

Mutinda, Ministry of Justice and Constitutional Affairs

He pointed out that delays are caused by both the bar and the bench, the Attorney General and the Prosecution and stressed the need for an all inclusive effort to hasten the delivery of justice

Sam Mohochi, Executive Director, IMLU

He was concerned about overcrowding in the prisons especially taking into consideration that the majority of the prison population is the remandees and yet the statistics are not usually broken down to reflect this. He cautioned that if the situation was not arrested, the Community Service Order Programme would not work. *Response:* the Deputy Commissioner of Prisons confirmed that the percentage of remandees was about 42% of all the inmates and convicts 58%, depending on the individual institution.

Macharia, Ruai Community Policing Forum

He raised a concern about the multiple powers granted to the police to arrest, prosecute offenders and confine them and emphasised the need for all stakeholders to coordinate their efforts and work in partnership. He underscored the contribution that such a situation contributed to and enhanced corruption.

Kamau Kinganga

He wanted to know whether prisoners were employees since a perusal of the Prisons Act showed provisions that expect them to work. He also sought to know their remuneration and if they were not paid for their labor did that mean that the prison services condone slavery. *Response:* the deputy commissioner of prisons stated that even under the UN minimum rules inmates are expected to be employed in skillful employment to help them survive upon their release. One aspect is that of vocational training out of which products come out and they are sold. In countries with strong trade unions, the goods would not be sold in the open market but in Kenya they are sold in the open market. They are supposed to be paid some money and the amount was set in 1963 and the specifications of 10, 15, 20 cents are still being applied.

Hon Justice Makhandia was of the opinion that something provided for in a statute cannot be termed as slavery.

Mbugua, People against Torture

He cautioned the participants that although the media keeps highlighting Langata Prison it was not a true reflection of the other prisons.

With regards to HIV/AIDS, STI and homosexuality, he wanted to know why there weren't any prosecutions from the prison systems of persons accused of sodomy and other criminalized sexual behaviour. *Response:* Dr Kibosia admitted that homosexuality did exist in prisons but it was not easy to prosecute as people do not report. He however gave the example of Kericho Prison where the perpetrators of sodomy were jailed for an extra 5 years. He further stated that there has been clamor by the inmates for the institutionalizing of a gay VCT centre but this was challenging because the law in Kenya considers homosexuality illegal.

5. POLICE REFORMS

The session was moderated by Wanjiku Miano, Advocate

She set the backdrop for discussions by pointing out that the workshop was taking place at a good time in light of the current situation with vigilantism, trigger happy police and the media and public condoning of the same being covered in the media on a daily basis.

5.1 Police Accountability: a Civilian Oversight Mechanism

Dan Juma, Programme Officer, Kenya Human Rights Commission

He started out by highlighting the role of the police in Human Rights Protection. He indicated that the Role of the Police dovetails with the protection of human rights. And according to section 14 of the Police Act, Cap 84 of the Laws of Kenya, the Police are established in the Republic of Kenya to perform the following functions of maintaining law and order, preservation of peace, protection of life and property, prevention and detection of crime, apprehension of offenders and the enforcement of all law

All these roles implicate human rights in several ways hence the need to keep the debate on human rights among Police Officers, in particular: helping them to understand their rights and the rights of others whom they relate with in their day-to-day lives, to demonstrate how and when policing activities affect specific human rights, to appreciate importance and limitation of the rights and duties of the police and the rights and duties of the public.

Some of the essential principles of police work are fundamental and found within the UN Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly on 17th Dec, 1979 after it acknowledged the important task that law enforcement officers play in upholding Human Rights. They were intended by the Gen. Assembly to govern the relationship between the Police and the citizenry form part of the creed of every law enforcement official.

With regards to respect for and protection of human rights:-

- Law enforcement officials shall at all times fulfil the duty imposed on them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.
- Law enforcement officials shall not commit any act of corruption. They shall rigorously oppose and combat such acts.
- Law enforcement officials shall report violations of laws, codes and sets of principles which promote and protect human rights.
- All police action shall respect the principles of legality, necessity, non- discrimination, proportionality and humanity.

Service to the community: what about democratic policing

- Service to the community is intended to include particularly the rendition of services of assistance to all members of the community who by reason of personal, economic, social or other emergencies are in need of protection or immediate aid.
- Effective policing is dependent upon the consent and cooperation of the community.
- If democratic policing enhances effectiveness and efficiency in policing, in this sense, it is a means of ensuring the mandate of the Police in protecting human rights
- Democratic policing a means of Police service to the community. It is democratic if it is
 - representative of
 - responsive to and
 - accountable to the community as a whole
- These standards laid out in resolution 34/169 overlap one another in significant ways and tend to reinforce one another. Yet they are distinct and as such, can also be in tension with one another. Together, the three are essential for democratic policing to prevail.

Representative Service

For a police agency to be representative of the community as a whole its membership must be representative of that community according to such criteria as race/tribe, colour, sex, language and religion. Minority groups must be adequately represented and individuals from those groups able to pursue their careers fairly and without discrimination.

Unfortunately, very few police agencies are representative of the community in this sense. However, when embarking upon a reform programme to democratize the force, priority must be given to developing and implementing strategies that will increase representation from all sections of the community and ensure gender balance.

The case in South Africa

The discriminatory system in the apartheid era was reflected in the demographic representation within the South African Police (SAP). In embarking on the police reform, questions of equity and non-discrimination were prioritized.

Responsive police service

The basic premise here is that the police exist for the benefit of the people and their primary responsibility is to ensure that the people are safe (literally) and that they feel safe. There is no one method by which the police can become more responsive. Rather, a multifaceted approach would be more effective

Elements of responsive policing

Police are aware of the public concerns and expectations in relation to matters which can be addressed by policing, and in relation to police methods and performance and these concerns and expectations are then reflected in police policy, strategy and action. Some Examples include emergency telephone systems, such as 911 in America have resulted in a more responsive police force, in the UK, the local police constable, who patrols the neighborhoods on foot, Community Policing initiatives, where community concerns inform police priorities in crime management and citizen safety – the Community Policing Forums in South Africa.

An Accountable Police Service

This element requires that the police are accountable for their actions based on the principles of legality, subsidiarity and proportionality. Accountability refers both to the processes – chains of command, complaint procedures, oversight mechanisms, courts of law, freedom of information among others – as well as the values – openness, responsiveness, responsibility, professionalism and adherence to the law.

The concept of accountability does not refer to a particular process but to a variety of processes, both internal and external, and does not reflect the ascension of a particular value within the police force but rather a cluster of related values. The essence of accountability is openness. Citizens cannot hold the police accountable if they do not have the information with which to do so.

The principle of legality refers to whether the police have a clear and public legal authority to act; the principle of subsidiarity asks whether any action was the least intrusive and least damaging to a person's rights and the principle of proportionality asks whether any action is neither excessive nor inefficient to deal with a situation or problem

Accountability demands both that the police answer to officials identified in law as having a legitimate role in shaping law enforcement policy, and that the police answer to these officials, not through back channels, but through processes that are transparent and set forth in law.

Processes of Accountability include both the internal and the external processes. Internal accountability mechanisms are the basic building blocks of a disciplined police service – chains of command, internal regulations, systems for the enforcement of discipline, procedures for handling internal grievances, procedures for handling citizen complaints etc. External accountability mechanisms mean both traditional and non-traditional mechanisms through which the police are held to account by individuals and institutions outside the force, including formal oversight by the legislative branch, litigation and other judicial processes, human rights commissions and supervisory entities like the policing board in Northern Ireland, the Police Service Commission in Nigeria and civilian oversight panels like South Africa’s Independent Complaints Directorate (ICD).

Some questions that arise for discussion include; does the Draft Police Strategic plan for reform contain within it, the elements for democratic policing? How can democratic policing be achieved in Kenya? To whom should the police be held accountable? What institutional arrangements need to be put in place, both internally and externally, to ensure democratic policing? What role do the stakeholders have to play to ensure democratic policing?

Proposals for Accountability in Kenya

- State control – comprises of the 3 branches of government – legislative (parliament), judicial (criminal and civil justice), government departments such as auditors-General, service commissions and treasuries and the executive
- Independent external control – such as Human Rights Commissions, public complaints agents to oversee and limit police abuse of power.
- Internal control within the police organisation such as disciplinary systems linked to a public complaints system, training, mentoring and supervision and systems for recording performance or crime data
- Social control – police are publicly held accountable by the media and community groups (such as victims of crime,

External Accountability Mechanisms

- An independent judiciary which will identify bad practice, monitor the application of the law, criticize bad performance and act as a practical accountability mechanism. The Government prosecutors must be scrutinized in the police methods of investigation whilst assessing evidence
- Defense representation – may limit police misbehavior in investigation and prosecution of cases
- Civil proceedings – by individuals using the courts to hold the police accountable
- Democratically elected representatives through question time, annual departmental review and parliamentary committee systems
- The Executive through direct or indirect policy control over the police
- The media – by exposing wrong doing, raising public awareness and making comments
- An independent statutory institution e.g. a Human Rights Commission, anti-corruption commission
- Civil society oversight through gather data and published reports, instituting court proceedings against violators, free legal services, counseling, raised public awareness

The Role of the civilian Oversight Body

- Promoting democratic policing within the Kenya Police
- The body will be an advocacy tool for community members to engage the police and promote accountability, transparency and mutual trust
- Promote rights compliance and adherence to the rule of law and effectiveness
- Ensure public confidence in the police and their complaints system
- Provide feedback to the Kenya Police about individual officers and staff agency practices, procedures and operations
- Be fair to complaints and police officers taking into account the requirements of natural justice and privacy considerations
- Provide the appropriate response, particularly the appropriate level of investigation for all complaints
- Provide feedback to the Kenya Police about individual officers and staff agency practices, procedures and operations
- Take into account appropriately other police priorities such as law enforcement operations
- Use resources efficiently

Methods of Formation

- 1st there need for an overhaul of the prevailing constitutional and legal order.
- The process used will be transparent and meritorious
- An oversight body to check and balance the police

Membership of Civilian Oversight Body

- The Government
- Civil Society Organisations
- Members representing women's interests
- The Kenyan press
- The citizenry
- Human rights organisations
- The private sector

How will the Police benefit from the Oversight Body?

- Reduce apprehension with the erratic and often punitive nature of deployment and dim prospects for career
- Progression within the Kenya Police ranks
- Reduce favoritism, nepotism and corruption in hiring and promotions
- Foster job security
- Improve respect of senior police officer by junior officers
- Direct more resources towards improving remuneration, terms of service and expand the available housing facilities
- Provision of adequate security related equipment, facilities and technologies to enhance effective policing
- Eradicate misappropriation of funds while procuring security related equipment and technology
- Ensure adequate staffing levels in the force
- Rights and ethics training

How will the Public Benefit?

- It will crate an avenue for community members to engage police

- Impunity for all manner of violations, injustices, crimes and malpractices will cease
- Promote accountability and transparency
- It will build mutual trust and promote good relations between citizens and the police
- Sense of safety in the community
- Crimes are likely to be prevented and solved as the public begins to see the police as an ally in keeping peace rather than an instrument of oppression
- Will lead to respect of the police and change in perception

5.2 Community Policing

1. How effective is it?
2. The emergence of non- state actors: a challenge to human rights

Kinuthia Mbugua, AP Commandant

In the Kenyan context, community policing is defined as strategy where:-

“The security agencies work in accountable and proactive partnership with the community; the community thereby is to participate in its own policing and the two work together in mobilizing resources to promote long term community safety and support security initiatives, rather than the security agencies alone reacting on ad hoc”

Principles of Community Policing

- Building partnerships between security agencies and communities and confining them to a distinct administrative area that communities find themselves.
- Volunteerism among the community member
- Adhere to the existing laws and procedures of public safety and security.
- Empowerment of the community in the public safety and security issues
- Awareness and respect of regional diversity and cultures.
- Respect for and protection of human rights
- Building trust between the security agencies and the community.
- Sharing information between security agencies and public that result in intelligence policing.
- Acknowledge that community policing is not a forum for advancing political or other private interests, nor is it synonymous with vigilantism that is illegal.
- Training and empowerment of police personnel at all levels and community members to participate in developing common community safety.
- Shred responsibility between the police, community and other relevant stakeholders.

Importance of Community Policing

- Acts as catalyst in enhancing public safety and security
- Reduces the fear of crime in the society. As the security agencies are able to come up with effective strategies for security management based on the information provided by the community members.
- Contributes to improving quality of life as community members become more effective in their socio – economic activities.
- Enhances a harmonious relationship between the security agencies and the community members, which is crucial for intelligence, based policing. Community members improve on their reporting of crime.

- Makes security agencies and community members accountable and responsive to each other. It also facilitates in efficient utilization of resources both in community and security agencies

Core values

To realize the set objectives, the implementation process must adhere to the following community policing values: Trust , Integrity, Accountability, Openness, Professionalism, People centered and sensitive to gender, age and groups, Visible and accessible, Consultative and participative and Proactive and preventive

Goals

The main goals of community policing are to:

- Reduce the incidents of crime and the fear of crime in the community.
- Build a safe and secure environment with well informed community members on public safety and security issues.
- Develop a harmonize relationship between the law enforcement agencies and community members
- Increase accountability in provision of policing services

Community based policing, the rule of law and good governance

To be effective police reform must link other criminal justice institutions. The entry point to the justice system and the part in closest contact with the public, a fair, competent, non-discriminatory, and respectful police is integral to upholding the rule of law.

Along with courts and the correctional service, the police are an essential part of the ‘triad’ of institutions needed to make a justice system run effectively. Experience suggests that positive impacts to one of this triad of institutions will be nullified without similar concentration on other institutions.

Community-based policing: development, and poverty reduction

Community-based police reform can contribute to a wider poverty reduction strategy. High levels of crime stifle development in any community – business become the victims of crime, commercial activities (including those of the informal sector) are interrupted, and outside investment leaves. The poor and marginalized also suffer disproportionately from the effects of crime and violence. They lack adequate protection from corrupt or dysfunctional security institutions.

The poor are often marginalized when it comes to political or social structures and are likely to have very little influence over the policies and programs that affect their daily lives. In addressing local needs while effectively combating crime improves safety and security, and with it strengthens the conditions for development to take place.

Community based policing: stemming small arms proliferation

Controlling the availability and circulation of small arms and light weapons (SALW) is vital in the effort to increase community safety, the aim of community-based policing. However, citizens will only be willing to hand over firearms in their possession if they perceive an improvement in public safety and security and have a certain degree of trust in the police and other security agencies.

This is where community-based policing can play an important role in strengthening SALW initiatives. Similarly, if there is a good working relationship between the police and the community, it will be easier for the police to obtain information about arms caches or transit routes for arms trafficking. Provide public with high quality services designed to achieve peace, order and security within the community and do so with sensitivity to the particular needs of victims, minorities and vulnerable groups such as women, children and the elderly.

Focus on identifying strategies that address safety and security rapid response capability by working in partnership with other agencies providing services to the public, with other levels of government and with other parts of the criminal justice system. Be accountable to the public, both formally through established democratic mechanisms, new structures and informally through public consultation and meeting.

Community policing and informal security actors [vigilantism]

Since 2003, the government of Kenya has embraced community based policing as a form of policing that values the role of police officers and the public who are the customers or the consumers of the police services. However, it should clearly be understood that: - the responsibility to provide security policing services to the Kenya public rests on the government

Any other body, vigilante group or separate police group of whatever nature, is not allowed to play role of self-policing except with the power of the Kenya Police Act cap84 and Administration Police Act cap85 of the laws of Kenya. In this case, access to police services is a right to the people of Kenya that must be provided for by the government.

In conclusion, The government of Kenya has accepted a community based policing as a strategy that allows police to deepen their understanding about police core functions under the following objectives: -

- To transform the Kenya Police and Administration Police Culture with an aim of increasing democratic accountability;
- Build and sustain the structures that support police-community co-operation with a view of building trust and confidence and help the police preserve peace, prevent and detect crime and apprehend offenders.
- Develop institutional partnerships arrangements between the police, other stake holders and the communities to improve the enforcement of all the laws and regulations with which they are charged.
- Propose the establishment of police stakeholder's forum, to increase the synergy in maintaining law and order, protection of life and property and raise awareness about local policing problems.

Richard Lumbe, Secretary- Community Policing Foundation

He started off by explaining that Community policing had been adopted by governments around the world for several reasons; the most common being the need to transform police forces into people friendly, accountable, effective and transparent service organizations.

While the term “community policing” is widely used, it has come to mean quite different things to different people. Some understand it as policing with the exclusion of the formal

law enforcement agencies (especially in situations where formal agencies are perceived as agents of oppression rather than protectors of the community). At the other end of the spectrum community policing is seen as partnership between law enforcement agencies and citizens in public safety and security.

Community policing has also been a subject of debate among academics and practitioners. Purists (in academia) see community policing as a practical social science in action whose end result should be an *emancipated* society. This may seem to be somewhat idealistic but there is an example here in Kenya that suggests this may not be so far-fetched after all.

Ruai – a Community Policing Model

Community policing (CP) in Ruai has its origins in the evangelical work of the Christian Police Association (CPA) in 2000 that aimed partly at building trust between the people and the police. In February/March 2001 the Nairobi Central Business District Association, with the support of the Ford Foundation, facilitated a special community policing training for 20 police officers who were later deployed to the newly formed Community Policing Unit (CPU) at Nairobi Provincial Police Headquarters.

CPA introduced CPU to Ruai residents and over a period of 6 weeks, the Unit together with NCBDA officials convened a series of trust building meetings. The result was the Ruai Community Policing Stakeholders Forum, launched in May 2001, which now serves a constituency of more than 100,000 residents as far east as Joska, as far west as Kayole.

Since the introduction of community policing in Ruai, crime has been much more subdued than in neighboring areas. Residents have made investments in security by constructing the Mawe Mbili Police Post, and a dog kennel at Ruai Police Station, and upgrading two patrol bases for Administration Police.

Neighbourhood watches (with police officers) have increased the level of surveillance; residents have made their property more secure; an elaborate reporting network has increased residents' capacity to report crime and disorder; a follow up mechanism keeps residents informed of progress on complaints and crime reported.

These achievements can be attributed to the high level of social organization generated by the Forum. The most basic unit of the Forum is the 10-household unit headed by three elected officials – a man, a woman and a youth. The next level is the sub zone committee, made up of the elected representatives of each unit in the sub-zone.

Membership of the sub zone extends beyond households to include institutions such as schools, community organizations and business concerns. After the sub zone committees are zone committees; and after the zone committees is the Ruai Community Policing Stakeholders Forum (RCPSF).

The Forum – currently with a membership of 66 elected representatives - includes the Chief and assistant chiefs, the Officer Commanding Station and Assistant OCS, and the Warden of the Nairobi City Council. RCPSF has an executive committee and an advisory committee. It forms ad hoc committees to deal with special concerns and issues as they arise.

The Forum and its constituent bodies meet at least once a month. The minutes of Forum's meetings are disseminated to all members as well as the District Officer, the Officer Commanding Division and Town Clerk. Where higher level intervention or action is required, the Forum formally makes a request via covering letter – drawing the attention of the appropriate authority to the relevant recommendation or resolution contained in the minutes.

Over the years, several public officers reported by residents for misconduct have been investigated by Government; the guilty have been punished. This has heightened levels of trust and consolidated faith of residents in community policing. It has also demonstrated the inherent oversight nature of the Forum.

Government, in particular Provincial Administration, has found the Forum an ally in provision of services. The Forum has been instrumental in timely and transparent distribution of famine relief; in conducting medical camps and immunization campaigns; and in citizen registration. Several civil society organizations and Government institutions (such as NACADA) are advancing their causes in Ruai with the support of the Forum.

The Forum has expanded its scope of work to address the socio-economic causes of crime. The Forum has enlisted the support of the Tana and Athi Rivers Development Authority (TARDA) in a programme that aims to create jobs for the 2,000 plus unemployed youth through an afforestation and soil conservation programme. Nearly 10,000 trees have been planted during the past year.

Apiculture, horticulture, fish and livestock farming are some of the business options being considered. There plans to create green parks for recreation. An annual football competition was launched last year, in collaboration with Provincial Administration, to strengthen social cohesion.

In summary, Ruai CPSF has demonstrated it is a model for improving public safety and for promoting community based social, economic and political development. It has also demonstrated its potential as a community oversight mechanism that can be useful in monitoring Government performance at the local level.

Therein stands the threat to community policing. It is a threat to non-performing Government officers, corrupt individuals in the community, criminal elements and bad leaders (particularly undemocratic leaders and local dictators).

The Status of Community Policing in Kenya

During the last couple of months, as violent crime appears to be on the ascendancy, questions have been raised (in the media) whether community policing has been effective. Perhaps what should be asked is whether community policing has taken root in Kenya.

Information that would help answer these questions is not in the public domain. What is known, however, is that a large number of law enforcement officers have been sensitized on community policing.

The Provincial Administration, for example, has over the past year trained thousands of Chiefs and Assistant Chiefs in community policing. The manual *Management Training for Sustainable Development* (Office of the President 2006) being used in this training has “A Practical Guide to Community policing” based on the Ruai model.

Whereas sensitization and training have been conducted for law enforcement agencies, there does not appear to have been much of the same for citizens and local authorities – the other key partners in community policing. The person-in-the street has only a vague perception of community policing is; what it entails; roles and responsibilities.

The Kenya Police website has some information on community policing, but its audience is a fraction of citizenry. Information sent through the media seems to suggest that community policing is only about residents reporting crime, suspicious characters, etc – quite a narrow view.

The Way Forward

Community policing was launched nationally as part of police reform by President Mwai Kibaki at Ruai in February 2005. In his address to the nation, the President observed community policing initiatives had contributed positively to crime management and directed that successful initiatives, such as Ruai, be replicated in other parts of the country.

Two years after the national launch, community policing has yet to make a discernible impact – a loud statement to attesting its efficacy. Although some progress has been made within the law enforcement agencies there has been little action in the public domain. The community policing strategy is largely unknown (by the public). There is a dearth of information from the Government; which is not helpful in nurturing partnership.

a) Wider Participation by non-Government Actors

Rolling out community policing nationwide is a long term process that will be made easier with wider involvement of non Government actors, particularly civil society organizations concerned with administration of justice, human rights and community development. The current situation seems to suggest only a small number of CSOs are involved.

b) Policy on Community Policing

Efforts over the past couple of years to develop a policy on community policing seem to have floundered. It is unclear how far this process has gone. Wider consultation is required to develop a sound policy that will take into account the diversity of peoples and environment.

c) Mobilizing citizens for community policing

This goes beyond merely raising the awareness of citizens to building their capacity to participate more effectively. Both Government and civil society should play a role in mobilization; the Government as facilitator and CSOs as skills providers and motivators. Community leaders involved in successful initiatives are ideal “talking heads” they will authoritatively speak on benefits, challenges, threats – based on their experiences.

d) Establishing Community Policing Forums

This is an elaborate process that should involve law enforcement agencies, local authorities and civil society (residents). Representation of the community should reflect the profile of that particular community (inclusive). Community leaders must be elected by their “constituency” and not appointed, or the Forum will be perceived as an appendage of law enforcement agencies.

Vigilantism

Mr. Lumbe pointed out that vigilantism was illegal in Kenya. It is not a form of community policing. According to Collins Concise Dictionary, “A vigilante committee (U.S.) is a self appointed body of citizens organized to maintain order, etc., where an efficient system of courts does not exist.” Vigilantes are usually notorious for their militancy, bigotry and violence. Vigilantism can be described as an anarchic response to anarchy.

Community policing offers a way in eliminating vigilantism as it empowers residents to organize themselves and work more effectively with law enforcement agencies in combating crime and social disorder.

In conclusion, it was emphasised that there was an urgent need for citizens to be empowered to participate in community policing. The general concept of community policing – partnership for public safety and security – is simple enough to understand. However, its application was complex.

Community policing has a wide range of mechanisms ranging from neighbourhood watches to business improvement districts; from victim support centres to community resource centres. Its tools are also varied, ranging socio-economic profiles to crime maps; from call centres to closed circuit television. The choice of mechanisms and tools will depend on the prevailing environment and social context.

Given these dynamics, and in view of the urgency to enhance public safety and security, there is need for a much more inclusive, comprehensive and focused approach to implementing community policing.

Plenary Session

Justus Kivindyo

With regards to Small Arms and Light Weapons he wanted to know how effective the gun detector is and how it complements the voluntary reporting and surrender of weapons. *Response:* the Kenya Police Service are the ones handling the gun detector it is still at a pilot stage and I cannot fully comment but I know that it has been successful in detecting firearms. Lack of finances has been a challenge in operationalising the same across the country.

Jeanette Mwangi- Attorney General’s Chambers

Wanted to know what practical strategies were in place to combat the vigilantism? *Response:* as defined by Mr. Lumbe vigilantism can be a positive intervention. However, in Kenya

people have started to misuse it and some groups formally acting as watchdog started to commit crimes and this was the reason why the government has discouraged these groups.

Kamau Njoroge

At the start of the NARC government the reservist system was disbanded. How is Community Policing different? *Response:* This was a police reform aspect. It was realised with time that the reservists were had to monitor since they were elected in a corrupt manner and had not undergone any training to help them do their work.

Baseley Walker, Kenya National Commission of Human Rights

He raised concern about the attitude of the police and their absence in forums such as the present one. How can this be corrected since they give the impression that they are not open to dialogue? *Response:* I note your concern. We are trying but I also understand you to mean that there is still room for improvement.

5.3 Extrajudicial/ encounters killings

5.3.1 Facts

1. Kamanda Mucheke, Senior Human Rights Officer- KNCHR

He indicated that the Kenya National Commission on Human Rights has been striving to following up on the extrajudicial killings. Since the beginning of 2007, the commission had recorded 142 crime –related deaths from petitioners and the media and 98 of the said deaths have been as a result of shootings by police officers. The preliminary investigations indicate that in 22 of the 30 killings, the victims were shot at contact or very close range an indication that they may have posed no danger to the police. 15 were reportedly shot after they had surrendered.

He highlighted article 10 of the Universal Declaration on Human Rights which provides that

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”

Article 11 further provides that

“Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense”

This provision to secure the protection of the law for individual is found in Section 77 of the constitution of Kenya which guarantees that persons charged with criminal offences shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

He further highlighted Section 71 of the constitution which provides that

“no person shall be deprive of his life intentionally save in execution of the sentence of a court in respect of criminal offence under the law of which he has been convicted.”

He reminded the public and the media that they must never condone or applaud the summary elimination of suspected criminals, however wanted by the police these men and women may be and however dangerous we hear they may be. He highlighted that only the courts of law are competent to determine the guilt or innocence of suspects. By forming a

police hit squad complete with snipers to take out suspects, how different are the police from the organised criminal gangs? The distinction between the police work funded by the tax payer and organised crime lies in the following due process of the law and securing protection for all suspects however little sympathy the public may have for them.

In conclusion, he proposed that ordinary citizens need to be provided with a sense of security at the hands of a police force that is efficient, honest and professional to the core. He also recommended the formation of a civilian oversight of the police, for instance a Police Service Commission which would supervise the performance and conduct of the police similar to the Nigeria Police Service Commission as well as investigate citizen complaints against the police, similar to South Africa's Independent Complaints Directorate. (ICD)

5.3.2 Forensic investigation of deaths

Dr. Emily Rogena, KMA Human Rights Committee

She laid out the rationale for conducting the forensic investigations of deaths as being that deaths are sensitive, inadequate information available to the pathologist especially where there is no police investigation system, wide array of cases, multi disciplinary approach required and there are no things to support the post mortems, e.g., x- ray machines. In 5% of autopsies you will not find the Cause of Death and doctors acting as gate- keepers of medical services and human rights.

The process of investigation entails filling out the identification autopsy form 21, collecting information from the police who may not give adequate information since the documentation form is not friendly to the police and the use of clothing especially in gunshot wounds to tell whether it was a close contact wound or beyond arms length but sometimes pathologists get the body after the clothes have been removed thus hampering investigations.

Some of the challenges faced in the forensic investigation of deaths include lack of training of medical officers in pathology, forensic investigations and human rights, lack of infrastructure, e.g., cameras, x- ray machines, ultra- violet lights and documentation systems which are not user friendly.

Plenary Session

Gerry Gitonga, Advocate

The public feels that CSOs don't care about the fate of victims of crime but only come up to defend criminals when they are shot. How do we convince them otherwise? *Response:* he was informed that stakeholders were coming up with a victim support programme under the GJLOS programme. CSOs were also informed that the position of human rights defenders was that even suspected criminals have human rights. Participants were advised that they could assist the police force by conducting research on the causes of crime and interventions that would stop the upsurge.

Francis Etole, Advocate

In dealing with matters of police torture, how much cooperation do you get from them? *Response:* **Sam Mohochi.** This is very difficult and the police have a tendency to cover up the cases by in many cases purportedly conducting their own post- mortems. There is therefore

need to amend the Form A23 so that family members even have a place to sign once they have identified the body. **Emily Rogena** It depends. Most of the time there is lack of cooperation in terms of no information being availed or the police officer who filled the Form A23 not availing themselves.

What is the role of the AG in these investigations? I believe there is a missing link. *Response:* the AG is a constitutional office and has delegated his prosecutorial role to the Commissioner of Police.

Commandant Mwangi, AP

He informed that participants that there was no shoot to kill order in effect and the extra-judicial killings were being conducted outside of the law. He however noted that the security forces are faced with the challenge of the increasing violent nature of crime that forces the police to use greater force in apprehending criminals.

6. PREVENTION OF TORTURE: LAW REFORM

Moderator- Pravin Bowry, Senior Advocate and Board member IMLU

6.1 Ratification of International Human Rights Instruments: the Kenya Experience (Successes and Challenges)

Hon Sylvester Bifwoli, Parliamentary Committee on the Administration of Justice

He explained to the participants that despite having been invited to the forum in advance, he had forgotten the appointment and he therefore had not prepared a presentation and therefore was going to speak as a layperson. Hon Bifwoli informed the participants that as a teacher, although he belonged to the Parliamentary Committee on the Administration of Justice and had undergone several trainings including a recent one in Switzerland, he still failed to understand what human rights were about.

The honorable Member of Parliament was of the opinion that the problem in Kenya was that many times politicians like him go to sign regional and international protocols even though they are not experts in the law or even international relations. He recommended that stakeholders be informed of the laws and protocols coming up for signing in order for them to advise the government on the pros and cons.

Although previously all accusations were leveled against the police and the government, of late it is ordinary wananchi who are torturing one another. The laws and policies being formulated ought to protect the innocent. Currently in practice this does not seem to be the case. He stated that criminals must be exposed to the same violence and hardship that they meted out on their victims in the commission of crimes. His opinion was that violent criminals were in effect beasts and were therefore not entitled to human rights especially in light of the fact that with the current reforms prisoners were living a life of luxury within the penal institutions. Hon Bifwoli felt that it was ironical that the average Kenyan was living below a dollar a day while remandees and inmates were living above a dollar a day.

It was his recommendation that Human Rights organisations should hold training for criminals to teach them how to respect the rights of ordinary mwananchi whose human rights they were always violating.

In conclusion, the Honorable Member of Parliament stated that these were his personal views and he did not believe in human rights although the committee he was representing was serious about human rights and committed to ensuring that all Kenyans were realising them.

Ann Muthoni, Programme Officer- ICJ

Mechanisms under the International Human rights system

The International Human rights protection system is based on both the Charter Based mechanism and the Treaty mechanism. The Charter based mechanism is a result of resolutions and decisions of the UN system. It includes the Universal Declaration of Human Rights, the Human Rights Commission (now Human Rights Council) on Human rights and the Sub Commission on the protection of human rights.

The treaty based mechanism is set up as a result of legally binding human rights documents called treaties, also referred to as Conventions or covenants. The treaties set international norms and standards and are the most effective way of imposing legal obligations. The system of treaties operates under the principle of *pacta sunt servanda*-meaning agreements shall be kept. This is found in the Vienna Covenant on Treaties of 1993.

Goal of the UN Human Rights Systems

Since 1948, the UDHR has served as the foundation for over 20 major human rights conventions. Many human rights conventions have entered into force, some are still in the process of ratification. As the needs of certain groups of people are recognized and defined and as the world events point to the need for awareness and action on specific human rights issues, human rights law instruments be they Declarations, conventions or principles are developed. The ultimate goal of the UN human rights system is to protect and promote the basic human rights of every person everywhere

Kenya's Ratification Record

- The International Covenant on Civil and Political Rights, ICCPR- 1972
- The International Covenant on Economic Social Cultural Rights, ICESCR-1972
- International Convention on the Elimination of all Forms of Racial Discrimination, ICERD-2001
- Convention on the Elimination of all Forms of Discrimination against Women, CEDAW-1984
- Convention against Torture, CAT- 1997
- The Convention on the Rights of the Child, CRC- 1990

Pending ratification of treaties by Kenya

- The Convention on the Rights of Migrant Workers and the members of their families-
- The Optional protocol under CAT on visits and reports
- The Optional protocol on the CRC on sale of Children-Kenya has signed but not ratified
- Optional Protocol I of the ICCPR on individual complaints to the human rights committee
- Optional Protocol II of the ICCPR on the abolition of the death penalty
- Optional Protocol under CEDAW on individual complaints and inquiries to the CEDAW Committee
- The Protocol on the Rights of Women in Africa

- The International Convention for the protection of all persons from enforced disappearance
- The United Nations Conventions for people with disabilities

Process of creating binding treaties

International human rights treaties are developed by a process of negotiation among United Nations Member States to produce a commonly acceptable set of standards. Before they become codified as binding law, human rights concepts must pass through this lengthy process that involves consensus building and practical politics at the international and national levels. NGOs and other interest groups have also been involved in very successful campaigns that achieve international change by laying the groundwork for new treaties and standards. Individual states then decide for themselves whether to be legally bound by the treaty.

Steps in the evolution of treaties/conventions

- Drafting by working groups
- Adoption
- Signature
- Ratification
- Deposit of the instrument of ratification
- Registration and publication
- Entry into force

Effects of ratification

When a government signs a convention: it becomes legally bound to uphold the standards, it gives consent to be monitored, the state is expected to change its laws to conform to the convention, it is expected to report at regular intervals on its progress in implementing the convention. This is the principle of *Pacta sunt servanda*

Reservations

A state can ratify a convention but also indicate its reservations about specific articles. A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in the application to that state. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to. However, reservations must not be incompatible with the object and purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations to be made.

Derogations

Even where a state has committed itself by ratifying a treaty, it might include conditions for derogations in its domestic legislation. Under International Covenant on Civil and Political Rights, derogation is permitted under an emergency that threatens the life of a nation. For a state to exercise the principle of derogation:

- Existence of emergency must be strictly tied to exigencies of the emergency
- Existence of the emergency must be publicly announced
- It must be consistent with the state's international obligations
- It must not involve discrimination based on race, sex, colour, language, religion or social origin

There are however rights which a state cannot derogate from no matter the circumstances. These include:-life, freedom from torture or cruel and inhuman punishment, slavery and involuntary servitude, imprisonment for breach of contract and retrospective criminal legislation

Obstacles to the ratification of treaties

Some of the considerations states make in deciding whether to ratify a treaty or not include:

- Costs of implementation
- Inappropriateness to culture e.g. the Kenya government argues that the Protocol on the Rights of Women in Africa has provisions which are inconsistent with the Kenyan culture and morality
- Political reasons
- Issues of morality and inconsistency with current laws.

Role of civil society in the Ratification process

- Engaging with government institutions to build and strengthen their capacities to protect and promote human rights
- Identifying obstacles and opportunities to the ratification of treaties and developing recommendations to encourage ratification
- Building consensus and sharing best practices as well as promote dialogue aimed at ratification
- Publicizing/disseminating and creating awareness on the contents of the treaty to be ratified to show the relevance of the treaty to local circumstances
- Advocacy and monitoring the process of ratification to ensure speedy ratification
- Monitor the states performance in the fulfillment of its obligations under international law which are the duty to respect protect and fulfill human rights obligations

Civil society success stories

- The NGO coalition for the International Criminal court which successfully campaigned for the establishment of the International Criminal Court in 2002
- The International Campaign to ban landmines that laid the groundwork for the International Mine Ban Treaty in 1997
- In Kenya the Civil Society played a big role in advocating for the ratification of the protocol establishing the African Court on Human and people's Rights

The process of domestication

In a dualist system like Kenya, a convention which has been ratified must be domesticated to become enforceable. The domestication process is through the constitution, statute, judicial precedent or other administrative measures. Domestication need not be verbatim-international law does not specify any particular method of domestication

In case of ambiguous or uncertain domestic legislation, it is presumed that parliament intended to legislate in accordance with international obligations. One of the most successful domestication processes in Kenya is the Convention on the Rights of the Child which was domesticated through the Children's Act of 2002-though the ratification was done in 1990

Principles to apply in using human rights instruments

- Presumption that government intended to legislate consistently with international obligation
- Courts may draw upon international obligations to resolve uncertainty and ambiguities in the law
- The doctrine of legitimate expectation –that the government would ensure those rights are guaranteed
- Where the treaty and statute deal with the same matter, the proper principle of interpretation is that the court will construe them so as to give effect to both without acting contrary to the wording of either
- If the treaty has been incorporated, such a convention will be treated as part of the domestic law

Plenary Session

Aggrey Onyango, PRO Prisons Department

The role of the prisons is to provide correctional services and rehabilitation. As such we want to treat them in a humane way so that they are not vengeful upon release from their sentences. They are there to be corrected and not punished.

Would the Hon. Bifwoli comment on the fact that many Member of Parliament depend on the news to find out the situation in prisons. They should go into the prisons in their constituencies to really see what is happening as many are complaining that prisoners are being made too comfortable. The inmates are unable even to bath. *Response:* the prison and police authorities are not fair to us. When we went to Mombasa we found that there were only 5 prisoners in a very clean cell. Why are they showing a false picture? How then can we assist because our reports usually depict a good state of affairs?

Gerry Gitonga

Are the sentiments expressed by the MP those of the Parliamentary Committee on the Administration of Justice. If his party were to win the elections, what changes would be effected to push the human rights agenda. *Response:* they were my personal views. Officially we support human rights and we are looking for all mean of domesticating and enforcing regional and international human rights standards.

Moses Otsieno

The KNCHR Act automatically domesticates all ratified instrument. *Response:* I believe the best domestication should be through the constitution by virtue of it being the supreme law of the land. The Act however opens a new avenue for interaction.

I am also concerned about the inadequate number of CSO undertaking the role of observer status in the regional and international standards. *Response:* There is a method of applying for observer status to all the regional and international committees that local CSOs can take advantage of.

6.2 Ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment.

Sam Mochochi, Executive Director- IMLU

This is a very unique instrument as it is very proactive. Following the rapid growth of the European Union, the committee on the prevention of torture could not fulfill its mandate

and the recommendation was for member states to ratify the Optional Protocol to the Convention against torture

Overview of the OPCAT

The Protocol was adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. So far there are 56 Signatories and 32 who have ratified out of which 10 African states have signed and 6 have ratified although none of the African countries is from the East African region.

Salient features of the OPCAT

-It's the only voluntary preventive mechanism within the UN system and consists of 37 Articles in 7 parts. The member states reserve the rights to sign without ratifying, unilateral denunciation with notice- can leave at any time and join at any time as well as self enforcement, through statutory bodies and other mechanisms like the KNCHR, Visiting Justices to prisons, among others.

Part 1, Article 1-4 (general principles)

Objective (Prevention of torture)

-Creation of an International "Sub Committee on prevention" (IPM). This is the international prevention mechanism and is comprised of members who have signed the protocol.

-Creation of one or more National visitation bodies (NPM).

-Commitment on cooperation, access by state parties to both (IPM) International Prevention Mechanism and National Prevention Mechanism (NPM)

Kenya has already signed the CAT

Part 2, Article 5-10 (subcommittee on prevention)

- The Constitution of the IVM shall be 10 to increase to 25 members after the 15th ratification.

- Qualification of members.

- Composition, gender Geographic distribution etc.

- Independence of the Members

- State parties to nominate at most 2 individuals- even nationals of other countries

- Election by secret ballot by state parties- the sub- committee holds office for 3 years

- Subcommittee shall be in office 4 year term

Part 3, Article 11-16 (subcommittee on prevention)

- Visit places of confinement and make recommendations. The visits must be consensual and a member state can actually object to a visit but this should only be for a while.

- Advice, assists state parties where necessary in creation on NVM'S

- Capacity building to state parties

- Establishment of a program of regular visits.

-Publishing findings to the Committee against Torture

Part 4, Article 17- 23 (NPV)

- Creation of NPM within 1 year of ratification Art 17

- Guarantee of functional independence

- Measures of capacity, gender, expertise and adequate representation

- Power to examine treatment of persons deprived of liberty making recommendations for improvement
- Submit proposals and observations on legislation

Part 5, Article 24

- State parties may postpone by declaration the implementation of part 3 of part 4 upon ratification.
- Postponement valid for 3 years and subject to consultations may be extended for 2 more years.

In conclusion he highlighted the self monitoring aspect by state parties which presents an opportunity to improve conditions in places of confinement within a progressive realization context. The prevention of torture aspect of the protocol is a sustainable solution which feeds to various homegrown initiatives by state parties.

6.3 The need for legislation against Torture

Jeanette Mwangi, Attorney General's Office- Treaties and Agreements Department

She read out the speech that had been prepared by the Solicitor General, Mr. Wanjuki Muchemi on his behalf.

There is no question about it that torture is one of the gross violations of fundamental human rights as it destroys the dignity of human beings by degrading their bodies while causing injuries, some times irreparable injuries, to their minds and their spirits. These horrific consequences spread to the family of the victims and also to the entire society as a whole. Societal values are questioned and destroyed by this phenomenon. It is thus significant that the international community successfully negotiated and concluded the binding international legal instrument against torture in 1984. As you are aware, Kenya acceded to the convention against torture and other cruel, inhuman or degrading treatment or punishment on **February 21st 1997** and the convention entered into force for Kenya on **March 21st 1997**.

The prohibition against torture, cruel, inhuman and degrading treatment or punishment is also expressly prohibited by countless international conventions, both universal and regional such as the universal declaration of human rights of 1948, the international covenant on civil and political rights of 1966, the four (4) Geneva conventions on the protection of victims of armed conflict of 1949, the un convention on the rights of the child and the African charter on human and peoples' rights of 1981 to name a few, all of which conventions Kenya is a state party.

In addition, the prohibition against torture is now considered part of customary international law meaning there is consensus among countries from all the regions of the world on the absolute prohibition against the practice of torture, which prohibition cannot be derogated – or set aside – in time of peace or time of war, or under the pretext of imminent danger to national security. It is an absolute prohibition and an unconditional ban on torture regardless of whether a state has ratified any human rights instruments prohibiting it.

So, reiterating the statement by His Excellency the Vice President of Kenya, who opened the workshop yesterday, the government, in tandem with her international legal obligations, condones torture or other cruel, inhuman and degrading treatment and punishment.

The convention signifies an enormous progress by categorizing the practice of torture as an international crime and by creating the mechanisms to denounce it. This forum provides an invaluable opportunity for criminal justice agencies to reflect, evaluate and take stock of what progress has been made at the domestic level in Kenya to criminalize, denounce and punish the practice of torture since Kenya became a state party ten (10) years ago.

The convention defines torture as follows:

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

From this definition, some of the basic ingredients that define torture are:

- There must be infliction severe pain and/or suffering whether psychological/mental or physical;
- the infliction of the severe pain or suffering must be for a purpose e.g. obtaining from that third person information or a confession or for punishment or is an act of intimidation;
- Based on discrimination of any kind – gender, racial including ethnic discrimination, religious, social status, political opinion etc;
- more importantly, infliction by or at the instigation of or with the consent of a public official or a person acting in an official capacity – official or public - would mean with state or government authority such as prison officials, law enforcement agencies like the police, the administration police, security agencies including the military.

The constitution of Kenya prohibits torture explicitly by stating:

“(1) no person shall be subject to torture or to inhuman or degrading punishment or other treatment;

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on December 11th 1963.”

The exception to this constitutional provision brings in the debate we had yesterday on the abolition of the death penalty as a lawful punishment in Kenya for capital offences such as murder, attempted robbery with violence, robbery with violence and treason.

Despite torture being expressly prohibited in the constitution of Kenya, there is no definition of what is torture in the constitution. In addition and most unfortunately, there is no criminal offence known as “torture” in the penal code nor the criminal procedure code

which codes contain our criminal laws. There is thus a gap – a lacuna – that needs to be filled.

However, this notwithstanding, acts of torture can and have been prosecuted through other crimes such as common assault, assault occasioning actual bodily harm, assault occasioning grievous bodily harm, attempted murder, murder, rape to name but a few.

Some of the relevant provisions of the penal code that have been used for investigations and the prosecution of acts of torture are:

Section 250 – common assault

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

Section 251 – assault causing actual bodily harm

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years, with or without corporal punishment.”

Section 203 – murder

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

Section 220 – attempt to murder

“any person who-attempts unlawfully to cause the death of another; or with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.”

In addition, recent legal reforms in the criminal laws have seen a positive legislative trend in the prevention of torture, for example, the abolition of corporal punishment as a lawful punishment which today is universally considered as a degrading and inhuman punishment. Kenya has moved away from corporal punishment through the criminal law (amendment) act of 2003.

The criminal law (amendment) act, 2003 has had a positive impact in the prevention of torture and other cruel, inhuman or degrading treatment or punishment. Previously, the bulk of complaints of torture were made against law enforcement authorities such as the police relating to obtaining confessions from suspects. This act repealed various provisions of the evidence act and in particular the admitting in evidence of confessions made before the police. The provision now states that:

“no confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it is made in the immediate presence of -a magistrate; or police officer of or above the rank of, or a rank equivalent to, sub-inspector.”

This amendment ensures that only confessions made in court will be admissible. This amendment to the evidence act has gone a long way in reducing the instances of acts that constitute torture to procure confession by investigating authorities.

The criminal law (amendment) act, 2003 also provides that a criminal court may order that a person convicted of a criminal offence be ordered to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned. The possibility of the provision of compensation to an injured party for wrongful injuries that may have resulted from acts of torture is provided for.

Also, the community service order act which arguably has made an impact in the prevention of torture or other cruel, inhuman and degrading treatment or punishment in our prison and detention facilities. Convicted persons who would otherwise be serving custodial sentences in our overcrowded jails are now serving other non-custodial sentences pursuant to the provisions of this act.

Again in 1997, the government enacted the statute law (repeals and miscellaneous) amendment act which expressly prohibits torture by the police. This act amended the police act, cap 84 and provides that no police officer shall subject any person to torture or to cruel, inhuman or degrading treatment. Any police officer who contravenes this provision shall be guilty of a felony.

the extradition (contiguous and foreign countries) act, cap 76 and the extradition (commonwealth countries) act, cap 77 do not explicitly mention torture as an extraditable offence but the varying degrees of assault such as acts of injury to the person like malicious or willful wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm and other aggravated assaults are recognized as extraditable crimes.

In addition, acts of injury to the person such as the varying degrees of assault are contained as extradition offences in the published extradition treaties between Kenya and federal republic of Germany, kingdom of Greece, Poland, Liberia, Spain, and Finland.

The extradition acts also provide that a fugitive shall not be surrendered to another country if such surrender will prejudice him at trial, or cause him to be punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion. The act also provides the court to deny surrender if the fugitive will suffer a punishment too severe, unjust or oppressive.

in addition to these extradition laws, Kenya is a state party to the international conventions relating to refugees and as such in practice abides by the principle of *non-refoulement* in that Kenya does not extradite persons when there is a reasonable belief that they will suffer torture and other cruel, inhuman or degrading treatment or punishment in those countries.

It was mentioned here yesterday, that the Kenya national commission on human rights is empowered by the act of parliament creating it to conduct visits to prison and detention facilities. And this is also a positive legislative trend to prevent torture especially in our prison and detention facilities which are the most vulnerable to acts of torture.

Recommendations

This brief analysis reveals that although there is some mention of torture in the constitution, the law is inadequate to prevent torture as a crime.

Article 4 of the Convention against Torture states that:

“Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each state party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

There is no definition of torture in the constitution. Our recommendation is that torture as defined in the convention should be adopted in law reform initiatives.

In addition, all acts of torture should be made offences under the criminal law. the lack of an offence of ‘torture’ as defined in the convention in the penal code creates a gap in the law which may or can impede successful investigations and prosecutions for acts of torture. for example the lack of a provision in the law to deal with acts of torture that lead to mental or psychological pain or suffering and not just physical suffering needs to be specially addressed.

This brings about the whole question of the need to domesticate and incorporate the principles and provisions in the convention against torture and also other international and regional human rights instruments Kenya is a party to in the national context through effective legislative, administrative, judicial and other measures to prevent acts of torture at the domestic level.

Jane Mwangi- Commissioner, Kenya Law Reform Commission

Her presentation was essentially along the same lines as that from the office of the Solicitor General and she concurred with it.

Mbugua Mureithi, Advocate

There is definitely need for legislation on torture because in the colonial and post- colonial regime it had actually become institutionalized, for instance, through the Nyayo Torture Chambers.

To date, the provision under section 74 of the constitution, torture or the instances that may amount thereto are not mentioned. Through the IPPG parliament amended section 14A of the Police Act to declare torture an offence and a felony but still did not define it and it could have been a reactionary amendment.

In the same year there was an amendment to the Chief’s Act that in their work they would not torture anybody. In 2002 as a result of pressure from CSOs the Miscellaneous Criminal

Amendment Act did away with corporal punishment and other actions that were viewed to amount to torture.

There was no comprehensive and systematic legislation to address the problem of torture. Since we have signed the Convention against Torture, there certain normative imperatives that require us to legislate on torture as defined in Article 1 of the CAT read together with that article requiring state parties to criminalize torture. We must therefore not just throw and declare it in an amorphous way but define the offence as per section 77 of the constitution requiring persons to be charged under recognised legislation and offences thereto.

- The principle of absolute prohibition of torture. This should not be left to the interpretation of police officers but the standard should be definitive.
- Effective remedy. Under article 14, the CAT requires that victims of torture must have a definite claim for redress which includes compensation and rehabilitation
- Provision for prompt and impartial investigation and conclusion. This investigation is *suo moto* and the state does not have to wait for a complainant to come forward. The CAT provides for a competent authority to carry out the investigation. Who would this be in Kenya? The Police? The KNCHR?
- The question of international jurisdiction to extradite given to state parties under Articles 5-9. This needs to be definitively legislated
- The obligation by states to eradicate circumstances that facilitate torture concerning rules of interrogation, places of detention and requirement for visitation of detainees by doctors, lawyers, human rights monitors and their families
- Obligation that statements obtained through torture not be used in judicial proceeding and the statement used as evidence against the torturer. Although in 2003, the power to take confessions was removed from the police, there has been recent clamor to return those powers from some members of the judiciary and prosecution.
- The principle of prohibition of refoulement- forcible return of a person to a country where they claim they are most likely to be subjected to torture
- Permission by the convention to extend the definition of torture in order to make protection more relevant to domestic circumstances.

Beyond the normative imperatives on state parties to legislate, there is an express direction under article 2 of CAT for state parties to legislate. This is an obligation and not left to the discretion of state parties. The Human Rights Committee has termed this obligation as an express and immediate one upon the drying of the ink. Kenya is late by 10 years since it ratified the CAT.

Legislation alone will not be enough. We need public education on the rights of the citizen, budgetary allocation, improve the conditions of service for the police, military and the prison services, remove superfluous institutions that engage in torture, for instance the Provincial Administration.

Plenary Session

Baseley Walker, KNCHR

I don't believe the KNCHR should deal with torture as their mandate is already very wide. We need a civilian oversight body for the police as these are some of the mechanisms that may be helpful. *Response:* their mandate may be wide but as the national focal point on

protection of human rights they still have a mandate as they can access a wide range of resources and question myriad institutions other than the police.

The KNCHR is centralized and yet torture occurs all over the country. For practical purposes we need a different unit with geographical reach to investigate instances of torture and this is not necessarily the police who may be viewed as perpetrators

The mandate to examine human rights given to the KNCHR is just too wide. They are supposed to deal with issues ranging from discrimination, informal settlement, employment etc. There is need for a specialized oversight body.

Gerry Gitonga, Advocate Mombasa

There is need for state parties to eradicate circumstances that facilitate torture through the establishment of specific standards indicating that persons arrested must be arraigned in court within a specified period and it would be good for the judiciary to actively enforce this. In addition we need to specify a period within which cases must be concluded as per section 205 of the Criminal Procedure Code. *Response:* As stated before, legislation alone is not adequate. As a country we still have certain logistical problems, for instance in large districts like Marsabit and Turkana you find only 1 court or a mobile court that comes from Kitale respectively. There is however circumstance that can be helped and these should not form the basis for unnecessary delays. The international trend at the moment is to go on progressive realisation of rights and it is therefore difficult to force state parties to immediately implement certain intervention

Dr. Ling Kituyi, IMLU

How will we prevent a situation similar to that of the KNCHR which theoretically has rights but in actuality can be denied access to areas where human rights are violated such as the places of confinement? *Response:* The National Visitation Mechanism as envisioned in the protocol is for purpose of giving recommendations. There are no sanctions whatsoever. The international committee undertook the strategy of visiting at irregular hours but still within the dates that permission had been granted. The OPCAT is ratified and implemented at the will of the State party.

The Law Reform Commission is telling us all the things that should happen but aren't they the people to do it. *Response:* the Kenya Law Reform Commission is a unit within the State Law Office and so any legislation that comes for the Attorney General's Office is actually done through combined efforts.

What is the fate of terror suspect who are prosecuted in the US after the bombing in Kenya. *Response:* The international relations position is that the suspect must stand trial in the best place. In this specific case, the United States Embassy was regarded United States soil.

Hon Justice Milton Makhandia

I have a problem with judicial officers taking confessions. What would happen if a suspect recanted their confession? Doesn't this make the judicial officer a part of the investigation? *Response:* are we contending that the amendment allowing the magistrate to take confessions unconstitutional in light of the concerns raised? Yes, the minute we removed confessions

from the police and put them in the courts, they became part of judicial proceedings and not a manner of prosecution.

Hon Wachira, Magistrate

The new rules regarding Magistrates taking confessions is not working as it converts judicial officers to witnesses and in a worse scenario to the role of investigators.

Dr. Monique Mucheru, Psychiatrist

I am concerned about the issue of forced sterilization and forced medication for persons suffering from mental health issues. What does the law say? What about chaining of mental health patients? Is the KLR considering mental retardation as a disability considering that the Disability Act leaves them out? We should have a torture hotline. *Response:* these are very salient issues. The Mental Health proceeds on the basis of persons being sane or insane. The persons suffering from mental disability do not fall within this category. The Disability Act does not recognize them. The judiciary also considers an accused person either sane or insane with no grey areas in between. The Persons with Disability Act 2003 says nothing about persons with mental disabilities but is comprehensive on physical disability. We have sent a Memorandum to Honourable Maina Kamanda so the issues are under review and the Act is up for review and should be completed by 30th June. The prohibition against torture is blanket and protects even persons with mental disability. There is a new international instrument on Persons with Disability which is being discusses

Harun Ndubi, Vice Chairman Shelter Forum

Whose war is the war against terror? What governs the law on extraditions? *Response:* the war on terror is not a notional one like the war on corruption or the war on HIV/AIDS since we have the American administration that believes they are in a conflict with persons who they feel should not be accorded human rights. Extraditions are governed by extradition acts and treaties.

The Law Reform Commission is a statutory body and as such it should be independent. It is a matter of concern that they consider themselves a department of the Attorney General and even worse the Ministry of Justice and Constitutional Affairs and this impacted on the Political Parties Bill. *Response:* we are trying to get the Law Reform Commission to become a distinct agency that is funded individually to enhance our work. We are trying to amend the Law Reform Commission Act. I don't want to be engaged on the Political Parties Bill.

Who is the greatest beneficiary of torture? This will inform the oversight mechanism envisioned in the CAT. *Response:* the secret lies in legislation and this is what other countries have done.

Ann Muthoni, ICJ

I feel you need to institutionalise public hearings to get views on legislation and policies. *Response:* funding is presently a problem but we will consider your recommendations.

What is the position on non- state actors and torture? The legislation must take into account even torture that occurs in homes and schools

Hon. Wachira, Magistrate

Although the Chief Justice's rules exist governing the institution and management of Constitutional Reference cases, I believe that even the lower courts should have the jurisdiction to deal with human rights issues as many cases originate there and this should not be the purview of the High Court only. *Response:* we would be very willing to undertake this as long as the rules are amended as this would enhance the expedient dispensation of cases.

Hon. Justice Milton Makhandia

The constitution and rules would have to be amended first.

Dr Andrew Gachie, Forensic Pathologist

The KNCHR is not doing enough to investigate cases and as pathologists we are still expected to rely on the police to carry out investigations even in cases of police shootings. They also need to be decentralised. *Response:* the KNCHR is fairly young, has a huge mandate, they have established an office in Wajir and there are plans to open another office in Kapenguria but they face problems in terms of resources as well as political tags of war between the Commission and those they ought to be reporting to.

On conducting post mortems in cases of torture by the police, the police station nearest where the torture occurred are the ones to conduct the investigation. Can the police investigate themselves? *Response:* it is obvious that the police close ranks when one of them is accused and so they should not be investigating allegations against them.

Hon Miolo, Magistrate

We need to be careful not to keep generating more and more institutions but we should strengthen the ones that exist. I believe the judiciary could house this institution. What about the Ombudsman to deal with torture? Has our time come? *Response:* I agree that we need to have men and women of goodwill to breath life into institutions in order to avoid duplication of different organs. This applies to the Ombudsman as well.

Hon Catherine Mwangi, Magistrate

I have been a victim of taking confessions in matters before me. What happened is that I got to a point where at Kibera the magistrates were taking confessions and could finally not sit on the bench as they were all witnesses in different matters.

Vincent Kodongo, IMLU

In spite of having a mandate, I feel that the KNCHR cannot intervene on violations of human rights especially in matters before the court. What the police do is wait until the State feels that the Commission is closing in then rush the matter to court and the case aborts. At other times the police on "orders from above" can deny the Commission access to places of confinement. What are other jurisdictions doing to combat this problem? What do we do in the absence of political will. *Response:* this problem is being replicated at different levels in African states where lack of political will is hampering the work of National Human Rights Institutions.

Pravin Bowry, Senior Advocate, Board Member IMLU

We are obviously having limitations such as lack of resources, poor policy and legislative structure, poor political will. It is a shame that for Africans to get a redress they have to go to an English Act of the 17th Century. Is there really and political will?

7. THE WAR ON TERROR: AN EMERGING CHALLENGE TO THE ANTI-TORTURE CRUSADE

Since 9/11 there have been an upsurge of allegations of torture in the dealings with terror suspects.

7.1 Torture of terror suspects: is there any justification?

Ranganath Manthripragada, Resident Legal Advisor Department of Justice Office, US Embassy

He began by stating that in answer to the question- Should terror be used in the war on terror to get information? The logical answer is no and torture should not be used under any circumstances. There has been debate on the rule of law and the use of torture in enforcing the rule of law in last 1000 years or so. This is not a simple issue as there are moral ethical and legal aspects involved.

Using history as a guide, there is ample proof that the use of torture does not help but instead makes the situation worse.

United Kingdom in Northern Ireland

The army introduced tactics that were regarded as formal but are regarded as torture and these included flooding, loud noises deprivation of food and water as well as the deprivation of sleep. This gave rise to an inquiry that found that these tactics emboldened soldier to use their discretion to enhance the methods of torture to get information faster.

In December 1979 *Rep of Ireland vs. UK* a case was filed and the government compelled to defend itself. It said that it was not denying the use of the tactic and the effective use of the tactics at that but they said that they were successful inn generating intelligence and they were able to arrest 700 terrorist they would not otherwise have. The court found these tactics to be cruel and inhuman and they haven't been used since then.

The French in Algeria

Trying to contain the insurgency and they used brutal torture as interrogation tactics and this was termed as pacification. There was a spike in violence going hand in hand with the implementation of these tactics.

Ironically in both cases, violence increased in tandem with the use of these tactics.

In recent times there have been arguments for the use of torture as a last resort in gathering intelligence. It has been proven that in wars that are waged by committed insurgents the information given even under harsh conditions of interrogation may not be reliable.

He concluded by stating that the answer lies in the rule of law and all individual must be able to access the Due Process of the Law. We need to raise the conscience of people to know what their government and other agencies are doing even in an endeavor to protect their citizens. Nationals need to be able to agree on what price they are willing to pay for security.

Harun Ndubi, Vice Chairperson, Shelter Forum

What is the war on terror? Who are the combatants? The Geneva Convention provides ingredients that would justify a declaration that an altercation is a war

There appears to be consistent acts of aggression against America but does this amount to an act of war? The importance of defining whether an act amounted to war is that this defines the actions that can be taken in retaliation or as interventions.

Torture occurs most frequently in the course of investigations when information is being sought by the authorities.

7.2 Terror suspects: Have Muslims been victimized?

Hussein Khalid, Programme Coordinator - MUHURI

Although Mr. Hussein Khalid was unable to attend the workshop, he sent his presentation on the discussion and the same was issued to all the participants. He is currently at the Human Rights Law Centre, University of Nottingham in the United Kingdom (UK).

Introduction

I have been asked to prepare this paper in the context of Kenya. However, since terrorism is a global phenomenon, it would be impossible to discuss the subject in Kenya without referring to what is happening at the international level. Nevertheless, I will try to keep the international context to the minimal and use it only where necessary to clarify or explain a point.

Definitions

Let us begin by defining the three key terms used in the title of this paper. These are Victim, Terrorism and Muslim.

Definition of 'Victim'

A victim is defined as

“A person who has been attacked, injured or killed as the result of a crime, a disease, an accident, etc”¹

Closely related to the word victim is victimize. Victimize is defined as

“To make somebody suffer unfairly because you do not like them, their opinions or something that they have done”²

Definition of 'Terrorism'

It is common knowledge that there is no universally accepted definition of 'terrorism'. A study undertaken in 1998 by the US Army “discovered 109 definitions of terrorism that

¹ *Oxford Advanced Lerner's Dictionary* 7th Edition

² *Ibid*

covered a total of 22 different definitional elements”³ The definition varies from country to country and region to region. To show the different ways people view terrorism, I will look at Kenya’s attempts to define the word, the definitions given by the United State, United Kingdom and the United Nation’s efforts in defining terrorism.

Kenya has yet to give an official definition to the word ‘terrorism’. This is because it has not yet passed laws in relation to terrorism. So far, two draft Bills (Suppression of Terrorism Bill and Anti Terrorism Bill) have been in circulation for discussion but both drafts have been rejected by stakeholders. The latest Draft Bill (Anti-Terrorism Bill) defined “terrorist act” and “terrorism” as

“An act ... in or outside Kenya which constitutes an offence within the scope of a counter terrorism convention”⁴

The United States of America (USA) defines terrorism as

“Premeditated, politically motivated violence perpetrated against noncombatant by sub national groups or clandestine agents usually intended to influence an audience”⁵

The United Kingdom defines terrorism as

“The use or threat of action ... designed to influence the government or to intimidate the public or a section of the public, and for the purpose of advancing a political, religious or ideological cause.”⁶

You will notice from the above definitions the different perceptions of the word ‘terrorism’. Each country defines the word as it suits the political regime of the day.

There is no one, good definition of terrorism. In fact, it might be impossible to define because it is intangible and fluctuates according to historical and geographical contexts. Some forms of it are indistinguishable from crime, revolution, and war. Other forms of it are easily distinguishable. Each and every person knows that they would in some way, some day, under some back-against-the-wall condition, support some form of terrorism (as a tactic of last resort) in the name of some deeply cherished cause or value. You may already be a supporter of terrorism, or you may live under a government that practices terrorism, and not know it. There is no universally accepted definition of terrorism (Long 1990)⁷.

The UN to date has also failed to come up with a common agreed definition of terrorism despite the strategies and resolutions that it has passed on the act. In analyzing the consequences of the UN’s failure to find a common definition of terrorism, Javier Ruperez⁸ argues...

³ Dr Jeffery Record *Bounding the Global War on Terrorism* Strategic Studies Institute of the US Army War College, 1998

⁴ Draft Anti Terrorism Bill, 2006

⁵ The US Code, Title 22, Section 2656d(f)

⁶ The UK Terrorism Act, 2000

⁷ *The Criminology of Terrorism: History, Law, Definitions, Typology*

<http://faculty.newc.edu/toconnor/429/429lect01.htm> - 15th February 2007

⁸ Executive Director of Counter-Terrorism Executive Directorate

“Obviously there are also those who, in the absence of a definition, and making the most of the elasticity of the concept, are tempted to classify everything that moves against them as a terrorist agent, above all anything that can be deemed to be contrary to the government in office, in order to capitalize on the wave of terror produced by the phenomenon, while at the same time taking advantage of the circumstances to ignore the human rights and basic liberties of dissidents, opponents or critics.”⁹

At the UN, ironically, there is common agreement on how to handle terrorism though there is no common agreement on what terrorism is. Sheikha Haya Rashed Al Khalifa¹⁰ stated during the launching of the UN Global Counter-Terrorism Strategy on 19th September 2006...

“The passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated.”¹¹

Despite the attention terrorism has managed to attract around the world, its definition remains elusive and its nature ever varying.

“The nature of terrorism is always changing. What is called terrorism one year may be called something else next year. Terrorism is an emotionally charged word that is frequently used to politically and socially denigrate one's opponents. It seems, if you sympathize or side with the perpetrator, then it is not terrorism, but if you sympathize or side with the victim, then it is terrorism.”¹²

Definition of ‘Muslim’

A Muslim is a person who professes Islam as a religion. The word ‘Islam’ is an Arabic word that comes from the same root as the word ‘salaam’ which means ‘peace’. According to Islam the believers are instructed to preach peace and understanding. The Holy Qur’an, the holy book of Islam and the first source of Islamic *sharia* (law), condemns those who propagate war in the name of religion and god.

“And make not Allah’s (name) an excuse in your oaths against doing good, or acting rightly, or making peace between persons; for Allah is One Who heareth and knoweth all things”¹³

“Twice will they be given their reward, for that they have persevered, that they avert Evil with Good, and that they spend (in charity) out of what we have given them. And when they hear vain talk, they turn away there from and say: "To us our deeds and to you yours; peace be to you: we seek not the ignorant”¹⁴

⁹ Javier Rupérez, *The UN’s Fight Against Terrorism: Five Years After 9/11*, ARI 83/2006 (Translated from Spanish) – Analysis 6 September 2006

¹⁰ President of the 61st Session of the General Assembly

¹¹ <http://www.un.org/terrorism/> - 15th February 2007

¹² *The Criminology of Terrorism: History, Law, Definitions, Typology*
<http://faculty.nwc.edu/toconnor/429/429lect01.htm> - 15th February 2007

¹³ The Holy Qur’an 1:224

¹⁴ The Holy Qur’an 28:54-55

Terrorism: Kenyan Context

The first time when the word terrorism was used in Kenya was in the 1950s when “colonial era legislation outlawed the Mau Mau and branded them “terrorists”, accusing them of involvement in secret oaths, to kill white settlers and their African supporters”¹⁵

The Mau Mau were also at times called insurgents. One of the many propaganda leaflets that were produced by the British government, said in part ...

“(7) 1281 Mau Mau insurgents have already been killed and 625 have already been captured...”¹⁶

While to Kenyans the Mau Mau were and still are heroes, to the British and the Queen, they were nothing but terrorists and insurgents who were bent on undermining the interests of Great Britain. Indeed, one man’s terrorist, is another man’s hero!

The next time the word resurfaced was in the aftermath of Nairobi’s Norfolk Hotel bombing of 1980 where 15 people lost their lives, most of them Kenyans.

In 1998, Kenya again was attacked and this time it was the US Embassy that was the target. In this attack, 213 People lost their lives mostly Kenyans but also including 12 Americans.

Another attack took place in 2002 this time in the outskirts of Kenya’s second city - Mombasa. 15 people lost their lives being 12 Kenyans and 3 Israelis.

In August 2003, a 22 year old man detonated a grenade near Mombasa’s Central Police Station after he was apprehended by police officers. Apart from the 22 year old man, a policeman also died when the grenade exploded.

No other country in sub-Saharan Africa has been a victim of direct terrorist attacks more than Kenya. To some, Kenya is a target because of the role the country plays in hosting international missions, bodies and investments. These include the only United Nations offices in a developing country. Others feel it is because Kenya is a strategic ally of US politically while to others it is just lack of proper and adequate measures to guard the Kenyan borders and to stop terrorists from penetrating into the country. While no one can say for certain what the main reason is, it is clear that Kenyan Muslims have been at the forefront in condemning the attacks and working with the government to fight terrorism. In fact, a number of Islamic based organisations have initiated projects that are geared towards promoting peace and understanding. One such example is the Council of Imams and Preachers of Kenya (CIPK) which is currently implementing the Peace and Security for Development project at the Coast province of Kenya.

Terrorism: International Context

“Terrorism has been around as a major nuisance to governments as long as recorded history... ...*Regicide*, or the killing of kings by rivals, and the brutal suppression of

¹⁵ <http://www.cnn.com/2003/WORLD/africa/11/11/kenya.maumau.reut/index.html> - 8th January 2007

¹⁶ Icuji 12 Cia Ma (12 Facts that are True) Printed by Government Printers, Nairobi in the 1950s

loyalists afterwards, has been an established pattern of political ascent since Julius Caesar (44 B.C.). The *Zealots* in Israel (100 A.D.) fought Roman occupation with hit-and-run tactics in public places. The *Assassins* in Iraq (1100 A.D.) fought the Christian Crusaders with suicide tactics. The *Thuggees* in India (1300 A.D.) kidnapped travelers for sacrifice to their Goddess of Terror, Kali. The *Spanish Inquisition* (1469-1600) dealt with Heretics by systematized torture, and the whole medieval era was based on terrorizing countryside. The *Luddites* (1811-1816) destroyed machinery and any symbol of modern technology. A Serb terrorist (1914) started World War I. Hitler's rise to power (1932) involved plans for genocide. Nations like Ireland, Cyprus, Algeria, Tunisia, and Israel probably would have never become republics if not for revolutionary terrorism, and more than a few people would say the United States was founded on terrorism. However defined, it is clear that terrorism has helped shape world history in a variety of ways, and it has long meant different things to different people.¹⁷

Internationally, modern day terrorist attacks have been recorded for decades. Until the ceasefire in 1997, the Irish Republican Army (IRA) was the most sought terrorist group by the United Kingdom. In Sri Lanka, the Tamil Tigers have been at war with the government since the 1970s. The Tamil Tigers have been declared a Terrorist organisation by the Sri Lankan government and over 32 other countries including the US, UK and Canada. The September 11 attacks of the twin towers in New York, USA brought the world to a standstill and the subsequent wars in Afghanistan and Iraq. The September 11 attack is widely believed to have been orchestrated by Al Qaida. Other isolated attacks on installations and planes have also been ongoing for decades. A good example of this is the Lockerbie bombing¹⁸.

So from the 'terrorist' groups mentioned above – IRA, Tamil Tigers and Al Qaida - one certain like term is that they have been called on several occasions and are considered by many to be 'terrorist organisations'. One unlike term is that all the groups belong to or profess different religions. The IRA is Christian, Tamil Tigers are Hindus and Al Qaida is Muslim. However, terrorism today is associated mainly with one religion – Islam - despite the fact that as seen above, a terrorist group (however defined) can belong to any religious belief. One then questions why is the case? We can find this answer by looking at what image of Islam is portrayed to the world by the media.

Islam and the Media

In Uganda, there is a group which, in the name of fighting for liberation, kills fellow Ugandans in the Northern part of the country. Whenever the media reports about these barbaric acts, they call the group the 'Lord's Resistance Army (LRA)'. However, in the same context, there is a group in Algeria, also in the name of fighting for liberation, kills fellow Algerians but when reporting about this group, the media calls it a 'radical Islamic group'. In Kashmir, Muslims in the region have been fighting the Indian government for years wanting to be declared an independent state. Those who fight in this cause are called by the media Muslim militants. However, in Southern Sudan, for decades there was a war fought by the Christians in the southern part of the country in the same cause of wanting to form an own

¹⁷ *The Criminology of Terrorism: History, Law, Definitions, Typology*,
<http://faculty.nwc.edu/toconnor/429/429lect01.htm> - 15th February 2007

¹⁸ The 1988 bombing of Pan Am Flight 103 from London to New York where 270 people from 21 different nationalities were killed.

state who were called ‘Sudanese Liberation Movement/Army (SPLM/SPLA)’. Over the years, there has been a systematic attempt and/or propaganda to associate Islam and Muslims with violence, radicalism and militancy. In the above two examples, the question is why is LRA not called a ‘radical Christian group’ as their counterparts in Algeria or why aren’t SPLM/SPLA soldiers called ‘Christian militants’ as those in Kashmir? Or why aren’t Tamil Tigers called ‘Hindu Militants’ for that matter? This shows the psychological war that has been and continues to be waged against Muslims and Islam to present the religion as combatant and militant.

The demonising of Islam continues to date and even within the borders of Kenya by our very own media houses which have been programmed into this negative tagging of Islam and Muslims. The Somalia crisis with the Islamic Courts Union (ICU) is a testimony to this fact. In the beginning, the ICU retained its name when it was being praised for restoring calm in Somalia and bringing some order in the country. However, this did not go down well with some forces and so the tarnishing of the name began. By the end of the saga when foreign Ethiopian and US forces intervened to drive away this home made force, the ICU had turned to being called ‘Muslim militia’. It was inconceivable that Islam should be mentioned in the same breath with Courts because to the propagandists, Courts are places where justice prevails and Islam to them should not and cannot be associated with justice.

Demonising of Islam: Coincidence or Conspiracy?

But who exactly has the resources and capabilities of waging a smear and war like campaign of such magnitude and for what purpose would they be doing this? According to Professor Ali Mazrui¹⁹,

“Furthermore, because of the very logic of maintaining the status of “the most powerful”, the USA has long been in the business of manufacturing enemies – real and imagined. According to John Woods, the esteemed professor of Middle Eastern Studies at Chicago University, for example, “Almost immediately after the collapse of Communism, Islam emerged as the new evil force” in the imagination of the American government (New York Times, August 28, 1995). This led to a trend of demonizing Islam and Muslims in the American media, a subject that has been discussed extensively by the late Edward Said among other scholars. Because the Muslim world appeared most resistant to American cultural infusion, it was singled out for a political and, sometimes, military offensive.”²⁰

That the US has forced the world into war is testified by statements made from Washington soon after the September 11th bomb attacks. In declaring the war against terrorism on 6th November 2001, the US President George W. Bush made the infamous statement “... you are either with us or against us in the fight against terror.” In other words everyone and every state was in the war whether they liked it or not. The only choice they had was to choose to fight with or against the US.

Terrorism and Human Rights

¹⁹ Professor with Ohio State University, USA

²⁰ Professor Ali Mazrui, *Why Kenyan’s Must Reject the Anti-Terrorism Bill – the Global Context*, 2006

The foundation of human rights is human dignity. This means for one to value self and to be valued by society, their human dignity must be upheld by allowing them to exercise the full enjoyment of their rights. Part of the international community's efforts to promote and protect the enjoyment of human rights by all is the adoption of a number of conventions geared towards giving life to the Universal Declaration of Human Rights (UDHR) which to date is believed to be the bedrock of human rights. The seven key conventions that have been adopted by the international community and which Kenya is signatory to are:

- The International Convention on Civil and Political Rights (ICCPR);
- The International Convention on Economic and Socio Cultural Rights (ICESCR);
- The Convention against Torture (CAT);
- The Convention against Racism (CAR);
- The Convention on the Rights of the Child (CRC);
- The Convention on the Elimination of all forms of Discrimination against Women (CEDAW); and
- The Convention on the Protection of Migrant Workers.

These seven conventions put together are to safeguard in general all the rights of persons irrespective of their religion, race, gender, age, status, nationality or colour. States parties are monitored on their implementation of these conventions and any abuse of any article in any convention attracts the condemnation of the aggrieved state.

Besides these seven key human rights conventions, specific to terrorism, there are 13 other conventions and protocols that have been passed under the auspices of the United Nations and Kenya is a signatory to all of them. Realising the potential the fight against terrorism has in negating the promotion and protection of human rights, the General Assembly also passed resolution 60/158 of 16 December 2005 which provides the fundamental framework for the "Protection of human rights and fundamental freedoms while countering terrorism". This resolution stresses the imperativeness of States to promote and protect human rights in the fight against terrorism. For example, Section 7 of the resolution reads in part

“7. ...it is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism...”²¹

Victimization of Muslims in Kenya

In Kenya, Muslims continue to bear the brunt of the fight against terrorism in different ways. Muslims have been pushed into a corner where as a community, they live in an environment of fear and fret because the religion they profess has so wrongly been demonised that their every action is watched with a microscopic eye. On several occasions, Muslim leaders and organisations are forced to justify even basic acts of worship as if they did not enjoy equal freedom of worship as other religions.

Discrimination - Hijab (headscarf)

The first form of victimization they suffer is discrimination. The case of the *hijab* (headscarf) in Kenya is a good example of this. On several occasions Muslim female students have been

²¹ United Nations General Assembly, *Resolution 60/158: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 28th February 2006 A/60/509/Add. 2 (Part II)

forced not to wear the *hijab* in schools. While this is happening to Muslim women, the Akorino women who also according to their belief must wear headscarves do not undergo the same treatment.

Immigration Matters

Many Muslims have time and again complained about the difficulty in acquiring national identity cards and travel documents such as passports. There are reported cases where to prove Kenyan nationality, a Muslim is asked by the immigration department to produce absurd and unnecessary documents such as:

- Great grandmothers/fathers birth certificates;
- A 50 year old Muslim being asked to bring a person who saw his (applicant) grandfather being born;
- In some cases even Title deeds are demanded.

Kadhi Courts

The fight against terror which to some encapsulates within it the demonisation of Islam has also very much contributed to the Kadhi courts debate in Kenya. The courts are set up to arbitrate on Muslim personal laws on marriage, divorce and inheritance and only where both parties profess Islam. However, because of this demonisation of Islam, there are those who now believe that Islam is unjust and unfair. That allowing courts to practice this 'unjust' laws would be tantamount to allowing certain rights and guarantees to be taken away from a section of the population thus their opposition to the existence of the courts.

Closure of Muslim Organisations

Muslim charity organisations have in the recent past suffered closure of their offices and activities. Several of them have been closed in the pretext of being associated/linked with terrorist groups. Not even once has the government come out openly to show proof of these allegations. The result of these closures is lack of much needed aid and breakdown of development activities in Muslim dominated areas.

Illegal Arrests and Torture

Illegal arrests and torture in the name of fighting terrorism is the worst form of victimization Muslims continue to suffer in Kenya. Over the years and up to date, Muslims are arbitrarily arrested, tortured, held *incommunicado* and condemned on mere suspicions by the authorities. These acts do not happen in isolation but have become the *modus operandi* of the now notorious local and foreign anti-terror police forces in the country. The torture in most cases is severe as was the case of one Mohamed Surur who before his ordeal was a normal person of good health but after 4 days of torture in the hands of both local and foreign agents, he now can no longer stay focused and has perennial headaches besides disability. Amongst the forms of torture Mr. Surur suffered was electric shock to the head. During one of the days of his ordeal, Mr. Surur underwent the following as reported by Amnesty International.

“He was brought to a small room where he remained until 12pm, Saturday 31 May. He was taken into the board room again, where he saw the same men. One of them removed some documents from an envelope and asked him to sign the printed papers but he refused. Somebody left the room and returned with a metallic chair that had cables protruding from beneath. His handcuffs were removed and he was asked to sit on the chair. The chair had been placed next to the computer and connections made

thereon. His hands, legs and upper torso were held in place, using belts and metallic brackets attached to the seat. A round metallic headpiece with cables attached was placed on his head and white stickers pasted all over his head, with wires connected to the computer.

At this point, one of the men placed some papers before him and wanted to know whether he was willing to sign them so that they could remove him from the chair. He declined. The foreigner at the computer tapped on the keyboard. Surur felt a strong current running all over his body into the head thereby causing him extreme pain. They attempted to make him sign the papers again but he refused. The device was activated again. He lost consciousness.”²²

Mr. Surur was abducted in Mombasa on Friday 30th May 2003 as he was returning home from the mosque and was held for 4 days before being dumped in a deserted street in Nairobi, weak of strength and with no money. No charges were brought against him either.

Such acts continue to happen with impunity. Police refuse to acknowledge these illegal arrests and there is no evidence of them investigating either. There are reported cases of victims of such illegal arrests being chased away from police stations when they go to report the matters. These ordeals extend to even families of suspected persons. As recently as January 2007, it was reported²³ that a four year old girl was being held at the Inland Depot Station, Nairobi together with her mother contrary to the Children’s Act and the Convention on the Right of the Child which Kenya is signatory to. The explanation the police gave for holding them is that they are helping (the police) with investigations.

In a recent statement by the Kenya National Commission on Human Rights (KNCHR) and the Kenya Human Rights Network (K-HURINET), the two bodies condemned “the arbitrary arrest and on-going illegal detention of over 70 Kenyans and non-Kenyans ... most of them Muslims”²⁴. The statement went further to state that the people are “being held without charge ... incommunicado having been denied contact with relatives, legal representatives or human rights organisations”²⁵ and that “relatives and friends of alleged suspects are being rounded up and locked in police cells on the pretext of assisting the police with investigations, having been apparently declared guilty by association.”²⁶

In my hometown of Mombasa, the situation is so bad that people are more and more becoming afraid of venturing outside their homes. With the increased number of illegal arrests, every time a man steps out of the house, especially in the evenings, his absence becomes worrying moments for their families left at home. Mosques used to record the highest turn out during the last two prayers (usually held between 6.30 pm and 8pm) but nowadays the number of those going to the mosques during this time is fast reducing due to

²² Amnesty International Kenya: *The Impact of “Anti-Terrorism” Operations on Human Rights*, AI Index AFR 32/002/2005, 23 March 2005

²³ Kenya National Commission on Human Rights (KNCHR) and Kenya Human Rights Network (K-HURINET), *Arbitrary Arrests and Illegal Detention by the Police of Alleged Terror Suspects*, Press Release, 31 January 2007.

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

fear of being abducted on the way to or from the mosque. The privacy of our homes is no longer guaranteed as we know day by day most of us are being watched by the security forces that are looking for the slightest excuse to jump into our lives and destroy them. The reason for this suffering is being a Muslim.

From the foregoing, it is my humble submission that in Kenya today, in total disregard to the rights as enshrined in the Kenya constitution and international human rights instruments, Muslims are being persecuted by local and foreign security agencies in the name of fighting terrorism, with the full knowledge of the police and with the government turning a blind eye to these unlawful acts. In Kenya, you are innocent until proven guilty unless you are a Muslim. If you're a Muslim, then you are guilty until you prove yourself innocent while in police custody, undergoing both physical and mental torture and with members of your family held allegedly to help the police with their investigations of confirming that indeed you are guilty.

Way Forward in Kenya: Key Recommendations

Already there exists a huge gap between persons from the Coast and the interior - the *wabara* (people from the interior) and *wapwani* (people from the Coast) phenomenon. It is not unusual to hear a Coastal who when traveling to Nairobi or other parts of the interior saying that they are going to 'Kenya'.

Since independence, through the northern frontier district laws, there has also been a gap between the interior and north eastern regions. For decades, the north eastern province has remained underdeveloped. This has not only made them lose their sense of belonging to Kenya, but also find ways of surviving without the direct need of the government of the day. Many are times when serious issues in these areas are decided between clan chiefs and other alternative dispute resolution mechanisms even when there was access to government bodies.

The continued persecution of Muslims in Kenya is not helping the situation in these two predominantly Muslim provinces but aggravating it as it drives Muslims further and further away from mainstream Kenya. In addition, the blatant violation of the rights including torture and illegal arrests of family members of alleged terrorist suspects is breeding hatred and resentment in the hearts of many which could easily result into violence if effective preventive and remedial measures are not put in place. Undoubtedly, something ought to be done immediately to end this unfair and cruel treatment of Muslims.

My recommendations of addressing this problem fall into three categories: short-term, medium-term and long-term.

Short-term Recommendations

1. The immediate end of these illegal arrests of alleged suspects. All arrests should be done as per the law;
2. The release of all illegally held alleged terrorist suspects especially of families of alleged suspects who are being held in the pretext of helping the police with investigations;
3. Immediate setting up of a commission of inquiry to investigate these hijackings and kidnappings and to confirm the person(s)/authority behind these blatant violation of human rights;

Mid-term Recommendations

4. Institution of legal proceedings against individuals and authorities responsible for the hijackings, kidnappings and illegal arrests;
5. Reparation and/or compensation for the pain and suffering of the victims of these cruel acts;
6. Establishment of an Anti-Terrorism Commission to supervise and lead the fight against terrorism in Kenya

Long-term Recommendations

7. Initiation of nationhood programmes by the government (such as the Government's spokesperson's 'Proud to be Kenyan') and the civil society that will seek to present Kenyans from all corners as one people of one nation; and
8. Initiation of community development projects such as the establishment of learning institutions, revival of industries and improvement of infrastructure in Muslim dominated areas; and
9. Establishment of a Truth, Justice and Reconciliation Commission (IJRC) to lead the healing process and give an opportunity to Kenyans to listen to and forgive each other.

Plenary Session

Baseley Walker, KNCHR

The people at Guantanamo bay are said to be illegal combatants. However I agree that definitions are important and I am also curious about the international complexion of the war whereby the war on terrorism is fought for instance o Kenyan soil even though it arises in other jurisdiction. Even in a situation of terrorism, the rules on protection against discrimination must still apply

Pravin Bowry, Senior Advocate, Board Member IMLU

Torture should not be justified in any circumstances. America has even refused to join the International Criminal Court and gets non- citizens, takes them to other jurisdictions where they do not even afford them fair trial. *Response:* the answer is that torture is not advocated for under any circumstances. The examples I gave you were to reinforce the fact that even historically the use of force has not been successful.

Justus Kivindyo

The Suppression of Terrorism Act has not been drafted in a helpful way to Kenyans. Is the problem the fact that it was transposed from the United States?

Jane Mwangi, Law Reform Commission

Do the victims of the August 1998 bombing in Nairobi entitled to compensation. *Response:* 47,000,000 US Dollars has been used on the victims in terms of medical care and rehabilitation, school fees and other costs to the survivors and their families. The paradigm has now shifted to prevention and is no longer merely reactionary.

Dr. Gachie

You went into great lengths to define war and the combatants. We are actually at war and even though it is an ideological war, there is an enemy that has to be fought, whether

tangible or intangible and trying to define war in the traditional sense is merely splitting hairs as the terrorism has surpassed the traditional boundaries of war.

Mbugua Mureithi, Advocate

What is the official position of the US government at war and if it is, it is willing to accept the international principles that govern the conduct of war. *Response:* Yes, we are at war. We will not however condone torture under any circumstances; we will not transfer any suspects to 3rd locations for interrogations nor engage in detentions without trials. All those found contravening military rules and mistreating suspects have been prosecuted and the statistics are available. This is the first time in history when we have had so many non state actors involved in transnational act of terrorism and so the protocols and rules do not necessarily encompass that and the terrorists are operating within that gap. It is very important to separate the politics from the reality on the ground. The reason I can stand here and say what I am regardless of what any other person in my country may believe is that in America anybody can hold an opinion and at the end of the day it is the rule of law and due process that will make a determination.

7.2 Legislation against terrorism: The Kenyan Context

George Kegoro, Executive Director ICJ

Mr. George Kegoro took the opportunity to read out a paper prepared by Mr. Ken Nyaundi, a council member of the International Commission of Jurists- Kenya Chapter.

Introduction

Terrorism, it is agreed, is a threat to international peace and security. Experts recognize that international terrorism is likely to increase and become bloodier.²⁷ While the dangers posed by terrorism have been the constant concern of the international community, the events of September 11 in the United States introduced a new sense of urgency in global efforts to detect and prevent terrorism.

Conceptual Problems; Terrorism in the Context of International Law

In spite of frequent debates, references and writings on the subject there is as yet no universally agreed definition of terrorism. There are 12 UN core conventions on terrorism, each with a different definition of terrorism and only agreeing that terrorism is a serious offence to be severely punished. Present heated debates and campaigns to outlaw terrorism have obscured the complexity of the problem and drawn away efforts to obtain an agreed definition. Most of the existing anti-terrorism conventions are governed by the principle to either prosecute or extradite alleged terrorists (*aut dedere aut judicare*) Emanating out of this principle is the primary subjection of terrorist suspects to domestic law. This being so, it is important that state criminal law and practice do embody international human rights guarantees.

There are concerns that state efforts to counter terrorism are exploiting popular fears among the populations to extend the permissible hand of arrest and interrogation into personal rights and fundamental freedoms. Human rights have become the unfortunate victims of

²⁷ John Murphy, *The control of International Terrorism*,” in Moore, Tipson & Turner’s *National Security Law*, at pg 445.

counter-terrorism measures. Just as terrorism targets innocent civilians, so too are innocent civilians becoming casualties in the international campaign against terrorism.

The Human Rights framework is not soft on terrorism.²⁸ There are instances in which exceptional measures may be taken to maintain the security of the public. Even in those exceptional circumstances, there are certain rights that cannot be derogated or suspended.²⁹ The right to life, the right to freedom from torture and all forms of cruel, inhuman or degrading treatment and the right to freedom of thought, conscience and religion are sacrosanct.

The International Covenant on Civil and Political Rights establishes that restrictions to fundamental rights must be exceptional and temporary in nature; limited only to the extent strictly required by the exigencies of the situation; non-discriminatory solely on the ground of race, color, sex, language, religion or social origin and consistent with the state party's other obligations under international law, particularly of international humanitarian law.

In the face of clear caveats, an appalling image of state abuse of human rights colors most state actions. Many Governments have enacted security laws that violate basic rights and freedoms and/or have denied terrorist suspects due process and the protection of the law. In some countries, anti-terror laws have been employed to stifle political dissent and alternative thought. Asylum seekers and non-citizens have been punished in violation of the principle of non-refoulement. It must be remembered that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment³⁰ lays down a strict prohibition against torture holding that [N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.³¹

In the wake of September 11 many countries have adopted legislation and practices that permit thinly veiled discrimination based on race and religion. Racial profiling and stereotype apprehensions have led to the arrests and confinements of Muslims and Arabs leading to inter-racial hatred.

The Evolution of Kenya's Anti-terrorism Law

In the recent past, Kenya has had three major terrorist attacks. The Norfolk bomb attack of 31st December 1980, the U.S.A Embassy attack of 7th August 1998 and the November 28th 2002 attack on the Paradise Hotel, Kikambala, Mombasa, are still fresh in the minds of many persons. These, together with several similar incidents in the international arena have

²⁸ See, *In the Name of Counter-Terrorism: Human rights Abuses Worldwide*. A Human rights watch Briefing paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003 Accessible at: www.hrw.org.

²⁹ Article 14 of the International Convention on Civil and Political Rights.

³⁰ Adopted and opened for signature, ratification and accession by the General Assembly, Resolution 39/46 of December 10th 1984; entered into force 26th June 1987 in accordance with article 27(1).

³¹ See also article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights both of which provide that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment and the Declaration on the Protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Assembly on 9th December 1975.

exposed the lacuna in our domestic penal law with respect to counter terrorism. Attempts to apply the penal code provisions on murder, arson, destruction of property and aiding and abetting the commission of a crime have proved inadequate in prosecutions of terrorism suspects. The offence of terrorism is peculiar and unique and requires special legislation to convict offenders. And so it is that beyond the state obligation to comply with international covenants and resolutions to legislate an anti-terrorism law, there is a domestic need for the legislation.

U.N Security Council

In the aftermath of September 11, the UN Security Council used its powers under Chapter VII of the UN Charter to mandate member states to adopt specific measures to combat terrorism. The Security Council unanimously passed Resolution 1373 of September 28th 2001 in which it sought, amongst other measures, state establishment of terrorist acts as serious criminal offences in domestic laws and regulations with commensurably serious punishment.

The OAU Convention on the Prevention and Combating of Terrorism³² affirms the serious nature of the offence of terrorism and recognizes that terrorism is a violation of human rights and in particular the right to physical integrity, life, freedom and security and impedes socio-economic development through destabilization of states. The convention obliges state parties to review their laws and criminalize acts of terror. In helping with the international obligations under the UN and other OAU Charters Kenya has attempted to come up with an acceptable anti-terrorism law.

Several options have been considered. It has been said that a promulgation of secondary legislation under existing statutes may fill the void; yet alternative thinking argues for amendments to the existing statutes. In this debate, it appears that a new and comprehensive piece of anti-terrorism legislation may better fit the bill.

In 2003, the government published the Suppression of Terrorism Bill. This Bill was informed by the Commonwealth Secretariat 'model' legislative provisions and measures to combat terrorism. The 2003 Bill drew quick and sharp negative reactions from a cross-section of the population. This for good reason.

The Bill was overtly un-constitutional, allowing wide discretionary powers to the Minister for Internal Security and the police to declare an organization terrorist and to seize and freeze private property without recourse to the judicial process. All that was required under the Suppression of Terrorism Bill was the Minister's belief that an organization is terrorist. Pre-trial asset forfeiture is a draconian measure that violates constitutional protection to private property and cannot be entertained in a civilized democracy. Extended police powers of seizure and arrest, as provided for in the 2003 Bill, permitted the police to enjoy this privilege in three circumstances; when a person or institution fails to heed a court order compelling a Bank or financial institution to reveal the account details of a client, if search and seizure have been expressly allowed by a court on application or if such an application

³² Adopted on 14th July 1999 in Algiers, Algeria and came into force on 6th December 2002.

would cause delay prejudicial to public safety and public order. Two separate and contradictory clauses provided for a different regime of retention of seized properties³³.

Outside the arena of Criminal prosecution, the Suppression of Terrorism Bill empowered the Minister to issue exclusion orders against non-nationals suspected of terrorist involvement. This exclusion order could be made also, against a national if he holds a dual nationality.

To clothe execution action against suit for abuse and violation of individual rights and liberties, the Bill threw a cover of immunity against suit for all members of the executive who act against suspected terrorists. The immunity covered damage to property and the injury or even death of the victim.

The rejection of the Suppression of Terrorism Bill, 2003, has been acknowledged as an affirmation of stakeholder power over the legislature. Several reasons may be advanced for this success. Firstly, it was feared that the Bill was foreign-influenced and driven and did not recognize the peculiarities attending the Kenyan politico-social landscape. Whilst it touched on core aspects of the religious and social lifestyles of the people of Kenya, the Bill was drafted without sufficient consultations and legislative alacrity leading to obvious legal anomalies. A broad and vague, all encompassing definition of terrorism criminalized all forms of dissent directed at government, outraging our sense of justice.

Specific terrorist offences created in the Bill included weapons training, directing a terrorist organization, weapons possession and assisting terrorist organization. The Bill did not make it clear whether the constitutive elements of act and motive were required for the commission of an offence and it appeared that it created strict liability offences where an innocent explanation would discharge the accusation. In a flat, it shifted the burden of proof to an accused person and required the prosecution to only allege and rest while the accused struggles to show himself innocent. The right of an accused person to counsel and family were negated; allowing the police to hold suspects incommunicado for long periods without charge.

The Suppression of Terrorism Bill, 2003 lapsed without parliamentary approval. Due to the reactions that the government received on the Bill, a new and improved version of anti-terror draft was published in the name of the Anti-Terrorism Bill, 2006. This Bill followed the broad outlines in the Suppression of Terrorism Bill but addressed most of the concerns raised during the debate. The definition of terrorism still presents a problem and the offences involving terrorist activities require further scrutiny. The powers granted to the Minister to outlaw terrorist organizations need to be curtailed and restricted to the exigencies of the moment and made subject to legislative approval within the shortest possible time. Within the Anti-Terrorism Bill, the focus of power to curb terrorism still remains in the executive. There is a need to shift this centrality to the judiciary where adjudication powers reside. Provisions relating to Boarder controls, obtaining of financed information for

³³ Clause 40(4) of the Bill provided that property seized under suspicion of terrorist connections may be retained as long as necessary whilst clause 21 provided for a 90-day renewable court order for retention of the property until an inter-parties hearing of the matter.

terrorist investigation and for purposes of exclusion orders need to be made subject to oversight control.

The Bill has not yet adequately addressed concerns over the holding of suspects for long periods. Incommunicado detention has been the breeding ground for violation of fundamental rights. Established constitutional law makes certain legal provisions for all persons in police detention and there is no justification whatsoever in denying terrorist detainees the same rights.

The language of the Bill does not abide with the fundamental rights guaranteed in the constitution. There are several incidents of potential danger to individual rights of privacy, liberty, assembly, religion and worship that the Anti Terrorism Bill glosses over. Communication between counsel and client or between the suspect and his or her family is curtailed by the legal and practical impediments placed by the restrictions over the suspects. For this Bill to receive the support of the Civil Society, it must make guarantees on due process and a respect for human rights.

The fight against terrorism must not be a reason to pull back the gains we have made in the rule of law, democracy and human rights. Adoption of restrictive laws, arrest, detention, censorship, bans, surveillance and extra judicial executions must not find a place in our statutes as a panacea for the fear we have over terrorism. The worst offender amongst us must still obtain civil treatment in our judicial system. The struggle to bring justice to terrorists will be long and drawn out but we must not allow the law to serve political ends. The law must serve the citizens.

Plenary Session

Mbugua Mureithi, Advocate

Kenya has suffered 2 serious acts of terrorism on its soil and we have attempted to come up with the Anti- terrorism bill, where do you think we are lacking the consensus? **Response:** the US government may be deemed not to have acted irresponsibly in its management of global politics and that could be the reason people are resisting the Bill. Some of these acts may be the ones that have resulted in terrorism in the first place. Smaller states may be registering their displeasure by refusing to enact Anti- Terrorism legislation.

Harun Ndubi, Vice Chairman Shelter Forum

Although the acts of terrorism occurred in Kenya, she was not the target. The lack of consensus could be a result of being forced to bow to external pressure in defining the legislature to encourage extra- legal solutions that derogate from human rights. My problem is what is the agenda and why? We are collateral damage and yet we are being force to act as combatants.

Dr Gachie, Psychiatrist

As much as the agenda is being pushed by somebody else directly or indirectly, we must be concerned having been victims previously. I am not supporting the derogatory provisions but I believe we need something.

Ranganath Manthripragada, US Department of Defense

I believe that the question should be whether Kenya does or does not need governance and legislation on the issue of terrorism. Kenya has also signed international convention that obligates it to pass domestic legislation.

Harun Ndubi, Vice Chairman Shelter Forum

Has the war against terrorism killed more people than the terrorists or vice versa? *Response:* I believe the war against terrorism has killed more people and a case in point is Iraq.

George Kegoro, Executive Director ICJ

Kenya needs legislation. Whether we were collateral damage or not, the fact that the acts occurred on our soil mean that we need a protective mechanism. Terrorism tends most often than not, not to be a localized occurrence. There is therefore the need for a framework upon which national and international cooperation in combating terrorism.

8. RECOMMENDATIONS AND WAY FORWARD

Sam Muhochi, Executive Director IMLU

Mr. Muhochi led the participants in compiling all the recommendations that had arisen in the course of discussions. He emphasised the need for the interventions to be preventive as opposed to merely being reactionary.

A. Eradicating victimization of Kenyans as Terrorist Suspects

- a) The immediate end of illegal arrests of alleged suspects. All arrests should be done as per the law;
- b) The release of all illegally held alleged terrorist suspects especially family members of alleged suspects who are being held in the pretext of helping the police with investigations;
- c) Immediate establishment of a commission of inquiry to investigate all hijackings and kidnappings and to confirm the person(s)/authority behind these blatant violations of human rights;
- d) Institution of legal proceedings against individuals and authorities responsible for the hijackings, kidnappings and illegal arrests;
- e) Reparation and/or compensation for the pain and suffering of the victims of these cruel acts by government agencies;
- f) Establishment of an Anti-Terrorism Commission to supervise and lead the fight against terrorism in Kenya
- g) Initiation of nationhood campaigns by the government (such as the Government's spokesperson's 'Proud to be Kenyan') and strengthening of the civil society that will be responsible for representing Kenyans from all corners as one people of one nation;
- h) Initiation of community development projects such as the establishment of learning institutions, revival of industries and improvement of infrastructure in Muslim dominated areas;
- i) Establishment of a Truth, Justice and Reconciliation Commission (TJRC) to lead the healing process and give an opportunity to Kenyans to listen to and forgive each other.

B. Prison reform

- a) Deal with the issue of overcrowding through the enhanced enforcement of non- custodial sentences;

- b) Increased budgetary allocation to prisons authority to enable them move the penal institutions to the 21st century. This will involve the government and other investors changing their perception of prisons as “negative investment opportunities”;
- c) Build the capacity of prison personnel to be able to cope with the peculiar needs of inmates. It was pointed out that although at the institution of prison reforms some personnel were take out of the country for high level capacity building, they are not in charge of penal institutions and it is therefore difficult to monitor and evaluate their use of acquired skills;
- d) Carry out education and awareness campaigns so as to change the negative perception that the public has of prisons. This might entail changing the name of the institutions from “prisons” to “correctional facilities” so as to underscore the aspect of rehabilitation;
- e) Creation of a scheme of service for personnel working in penal institutions;
- f) Enhance the coordination and management of criminal justice agencies such as the penal institutions, the judiciary, probation offices, and civil society organisations working in prisons, among others;
- g) Transform the current Prison Health Care service to one that answers to the peculiar needs of inmates. A critical example would be the provision of VCT services that respond to the homosexual lifestyle of inmates, ensuring that procedures required to access medical care and referrals do not occasion unnecessary delays.
- h) Inmates should be enrolled as members of the National Health Insurance Fund scheme.
- i) Hastened prosecution of cases especially in light of the fact that approximately 48% of all inmates are usually remandees whose cases are still pending in the courts;
- j) Formulation of a Sentencing policy;
- k) Diversify the mobilisation and management of financial and technical resources. An example was given of the private sector that spends millions on activities such as golf tournaments while the prisons lack basic amenities such as water.
- l) Amendment of the Prison Act in order to get rid of archaic provisions such as the low compensation paid to inmates for work done, the actualization of the visiting justices provision among others.
- m) Institutionalisation of the current “open door policy” which at present is at the discretion of the individual in charge and not at all part of the administrative structure;

C. Police reform

- a) Enhance independent external control by enhancing the capacities of organisations such as the Human Rights Commissions, public complaints agents to oversee and limit police abuse of power.
- b) Implement internal control within the police organisation such as disciplinary systems linked to a public complaints system, training, mentoring and supervision and systems for recording performance or crime data
- c) Improve social control whereby the police are publicly held accountable by the media and community groups (such as victims of crime),
- d) Improve the terms of service for police officers so as to improve morale and decrease instances of corruption.

D. Enhanced Investigation and Prosecution of Torture

- a) Amend form 23A and adopt the Istanbul protocol so as to enhance data collection in cases where torture is alleged;
- b) Build the capacities of all stakeholders to detect, report and preserve evidence of torture;

- c) Establishment of a modernized Forensic laboratory with infrastructure such as the ultra violet lights that are more effective in detecting bruises and other injuries on darker skin.
- d) Separate the powers of the police as investigators, jailers, prosecutors and witnesses so as to ensure that justice is realised.
- e) Set up a specific unit to investigate allegations of torture especially where the police are involved and can therefore not be objective.
- f) Enhance the quality of government prosecutor by paying attention to police methods of investigation, whilst assessing evidence. Ensuring that there is quality defense representation for victims of torture may limit police misbehavior in investigation and prosecution of cases.

E. State law office

- a) State parties need to eradicate circumstances that facilitate torture through the establishment of specific standards indicating that persons arrested must be arraigned in court within a specified period and it would be good for the judiciary to actively enforce this. In addition we need to specify a period within which cases must be concluded as per section 205 of the Criminal Procedure Code;
- b) Amend the Kenya Law Reform Commission Act so as to make it a distinct entity from the Attorney General's office in order to facilitate its work;
- c) Adoption of the definition of torture as defined in the convention in all law reform initiatives.
- d) Make all acts of torture offences under the criminal law in order to fill the gap in the law which may or can impede successful investigations and prosecutions for acts of torture. For example the lack of a provision in the law to deal with acts of torture that lead to mental or psychological pain or suffering and not just physical suffering needs to be specially addressed.
- e) Domesticate and incorporate the principles and provisions in the OPCAT against torture and also other international and regional human rights instruments Kenya is a party to in the national context through effective legislative, administrative, judicial and other measures to prevent acts of torture at the domestic level.

E. Strengthening Community Policing

- a) Enhancing wider participation by non-Government Actors particularly civil society organizations concerned with administration of justice, human rights and community development.
- b) Develop a policy on Community Policing since it would appear that efforts over the past couple of years to develop a policy on community policing seem to have floundered. It is unclear how far the process has gone. Wider consultation is required to develop a sound policy that will take into account the diversity of peoples and environment.
- c) Mobilizing citizens for community policing should go beyond merely raising the awareness of citizens to building their capacity to participate more effectively. Both Government and civil society should play a role in mobilization; the Government as facilitator and CSOs as skills providers and motivators. Community leaders involved in successful initiatives are ideal "talking heads" as they will authoritatively speak on benefits, challenges, threats – based on their experiences.
- d) Establish Community Policing Forums through the involvement of law enforcement agencies, local authorities and civil society (residents). Representation of the community should reflect the profile of that particular community (inclusive). Community leaders must

be elected by their “constituency” and not appointed, otherwise the Forum will be perceived as an appendage of law enforcement agencies.

e) Enhance the understanding by all stakeholders of the concept of community policing as opposed to vigilantism. Community policing offers a way in eliminating vigilantism as it empowers residents to organize themselves and work more effectively with law enforcement agencies in combating crime and social disorder.

9. CLOSING REMARKS

Dr Lorenz Barth, Embassy of the Federal Republic of Germany

Our embassy was happy to support this workshop and after following the discussion, I would say that it was a success. All the issues discussed were very relevant.

We are currently having discussion of Turkish born German citizen arrested and held in Afghanistan and some feel that the US government should have upon arrest taken him back to Germany where he was a resident and citizen.

10. ANNESTURES

10.1 Workshop Programme

Thursday 22nd February

Official Opening

(Moderator: *Dr Ling Kituyi, Chairperson, IMLU*)

8:30 – 9:00am

Arrival and registration

9:00- 9:10am

Opening remarks

(*Sam Mohochi, Executive Director, IMLU*)

9:10 – 9:25am

Speech by German Ambassador

(*H.E. Walter Johannes Lindner*)

9:25 – 10:00am

Keynote address and Official Opening

(*Hon. Dr Moody Awori*)

(*The Vice President, Republic of Kenya*)

10:00 – 10:30am

TEA BREAK

10:30 – 12:30pm

Prison Reforms

Moderator: *Dr Abdallah Kibwana, Vice Chairperson, Kenya Medical Association*

1. The reform programme: Where are we?

- *John Odongo, Deputy Commissioner of Prisons*
- *Henry Maina, Program Co-coordinator, LRF*

2. Community Service Order: Does it work?

- *Lylyte Okwara, Assistant National Co-coordinator – Community Service Programme*

3. Prison Health Services

- *Dr John Kibosia, Director Prison Medical Services*

12:30 – 1:00pm Plenary discussion

1:00 – 2:00pm LUNCH BREAK

2:00 – 4:00pm

Police reforms

Moderator: *Wanjiku Miano, Advocate*

1. The Police Strategic Plan: Where are we?
 - *Gideon Kibunja, Police Spokesperson*
2. Police Accountability: A civilian oversight mechanism
 - *Steve Ouma, Deputy Director - KHRC*
3. Community Policing
 - (a) How effective is it?
 - (b) the emergence of non-state actors: a challenge to human rights
 - *Kinuthia Mbugua, AP Commandant*
 - *Richard Lumbe, Secretary - Community Policing Foundation*
4. Extrajudicial/encounter killings:
 - (a) Facts
 - *Maina Kamanda, Senior Human Rights Officer - KNCHR*
 - (b) Forensic investigation of deaths
 - *Dr Emily Rogena, KMA Human Rights Committee*

4:00 – 4:30pm Plenary discussion

4:30pm TEA BREAK

Friday 23rd February

8: 45 – 9:00am Recap

9:00 – 9:45am

Prevention of Torture: Law reform

Moderator: Pravin Bowry, Board Member, IMLU

1. Ratification of International Human Rights Instruments: The Kenya experience (Successes & Challenges)
 - *Hon. Sylvester Bifwoli & Hon. Njoki Ndung'u, Parliamentary Committee on the Administration of Justice & Legal Affairs*
 - *Ann Muthoni, Programme Officer, ICJ*

9:45 – 10:00am	Plenary session
10:00 – 10:30am	TEA BREAK
10:30 – 12:30am	<p>Prevention of Torture: Law reform (Continued)</p> <p>2. Ratification of Optional Protocol to the Convention against Torture</p> <ul style="list-style-type: none"> • <i>Sam Mobochi, Executive Director - IMLU</i> <p>3. The need for legislation against torture</p> <ul style="list-style-type: none"> • <i>Wanjuki Muchemi, Solicitor - General</i> • <i>Nancy Barasa, Vice Chairperson, Kenya Law Reform Commission</i> • <i>Mbugua Mureithi, Advocate</i>
12:30 – 1:00pm	Plenary discussion
1:00 - 2:00pm	LUNCH BREAK
2:00 - 3:30pm	<p>The War on Terror: An emerging challenge in the anti-torture crusade</p> <p>Moderator: Judy Thongori, Advocate</p> <p>1. Torture of terror suspects: Is there any justification?</p> <ul style="list-style-type: none"> • <i>Ranganath Manthripragada, Department of Justice Officer, US Embassy</i> • <i>Harun Ndubi, Vice Chairperson – Shelter Forum</i> • <i>Miriam Kabiga, Amnesty International</i> <p>2. Terror suspects: Have Muslims been victimized?</p> <ul style="list-style-type: none"> • <i>Ahmed Farid, Ag. Programme Co-coordinator - MUHURI</i> <p>3. Legislation against Terrorism: The Kenyan Context</p> <ul style="list-style-type: none"> • <i>Ken Nyaundi, Advocate, Board Member - ICJ</i>
3:30 – 4:00pm	Plenary Discussion
4:00 – 4:30pm	<p>Official Closure</p> <p><i>Hon. Danson Mungatana, Assistant Minister for Justice & Constitutional Affairs</i></p>
4:30 – 4:45pm	<p>Vote of thanks</p> <p><i>Moses Chege, Board Member, IMLU</i></p>

10.2 List of Participants

	<u>NAME</u>	<u>PROFESSION/INSTITUTION</u>
1.	Hon. Dr. Moody Awori	Vice President

- | | | |
|-----|--------------------------|----------------------------------|
| 2. | H.E Walter Lindler | German Ambassador |
| 3. | Hon. Wokoli Bifwoli | Member of Parliament |
| 4. | Hon. Milton Makhandia J. | Judge/Judiciary |
| 5. | M.W Wachira | Magistrate/Judiciary |
| 6. | Catherine Mwangi | Magistrate/Judiciary |
| 7. | C.W Meoli | Magistrate/Judiciary |
| 8. | Rita Kijala Shako | Advocate/Rapporteur |
| 9. | Pravin Bowry | Advocate/IMLU |
| 10. | Pherozee Nowrojee | Advocate/IMLU |
| 11. | Sam Mohochi | Advocate/IMLU |
| 12. | Vincent Kodongo | Advocate/IMLU |
| 13. | Lydia Chui | Lawyer/IMLU |
| 14. | Jeanette Mwangi | Advocate/State Law Office |
| 15. | Jane Mwangi | Advocate/KLRC |
| 16. | Ann Muthoni Ndungu | Advocate/ICJ |
| 17. | Millicent Ligare | Advocate/CLEAR |
| 18. | George Kegoro | Advocate/ICJ |
| 19. | Dan Juma | Advocate/KHRC |
| 20. | Gerry G. Gitonga | Advocate/CLEAR |
| 21. | Mumbi Ngugi | Advocate/The Lawyer Magazine |
| 22. | Harun N. Ndubi | Advocate/Shelter Forum |
| 23. | Etole Francis | Advocate |
| 24. | Michael Kasera | Advocate |
| 25. | Judy Thongori | Advocate |
| 26. | Jenniffer Wanjiku Miano | Advocate |
| 27. | James Nderi | Advocate |
| 28. | Okelo Opolo | Advocate |
| 29. | Mbugua Mureithi | Advocate |
| 30. | Justus Kivindiyo | Lawyer |
| 31. | Ken Nyaundi | Advocate |
| 32. | Dr. Lorenz Barth | German Embassy |
| 33. | Alina Nords | German Embassy |
| 34. | Uandichilie | German Embassy |
| 35. | Ranganath Manthripragada | Attorney, U.S Embassy |
| 36. | Melissa Sween | U.S Embassy |
| 37. | Viraj LeBailly | U.S Embassy |
| 38. | James Keya | U.S Embassy |
| 39. | Amanda Rose | British High Commission |
| 40. | S.W Mutinda | MJ&CA |
| 41. | Maticha Oenga | Ministry of Home Affairs |
| 42. | Rose Komu | Prisons Department |
| 43. | Silas M'tambu | Prisons Department |
| 44. | Aggrey O. Onyango | Prisons Department |
| 45. | Dr. John Kibosia | Director Prisons Health Services |
| 46. | Kiprono | Police Officer |
| 47. | Kinuthia Mbugua | Administration Police Commandant |
| 48. | Dr. J. Wasike Simiyu | Doctor |
| 49. | Dr. Monique Mucheru | Psychiatrist |

- | | | |
|-----|---------------------|---------------------------------------|
| 50. | Dr. Abdalla Kibwana | Doctor/KMA |
| 51. | Dr. Misbah | Doctor/KMA |
| 52. | Dr. Andrew K Gachii | Doctor |
| 53. | Ling Kituyi | Doctor/IMLU |
| 54. | Moses Chege | Accountant/Board member - IMLU |
| 55. | Daniel Macharia | Chairman Community Policy Foundation |
| 56. | Richard Lumbe | Secretary Community Policy Foundation |
| 57. | Guyo Abduba | Bakalcha Barii Support Program |
| 58. | Ben Baseley Walker | KNCHR |
| 59. | Kamanda Mucheke | KNCHR |
| 60. | Kamau Kingara | Oscar Foundation |
| 61. | Daniel Mutai | O O I |
| 62. | Mbugua Kaba | PAT |
| 63. | Lilian Kasina | Nairobi Women's Hospital |
| 64. | Henry O. Maina | Journalist/Legal Resources Foundation |
| 65. | Lenny Taabu | Journalist/IMLU |
| 66. | Timothy Kirui | Journalist |
| 67. | Susan Wanjiku | Journalist |
| 68. | Davis Ojiambo | Journalist |
| 69. | Gachiri | Journalist |
| 70. | Maina M | Journalist |
| 71. | Maureen Obiyo | Journalist |
| 72. | Maxwell A. | Journalist |
| 73. | Allan Kisia | Journalist |
| 74. | Dominic | Journalist |
| 75. | Samwel Moraga | Journalist |
| 76. | Francis Howaga | Journalist |
| 77. | Grace Njoki | Law Student |
| 78. | Rita Amwayi | Law Student |
| 79. | Kennedy Kinuthia | Program Assistant, IMLU |