



Torture and Ill-treatment in Kenya

- Anti-torture law, impunity and counter terrorism measures

Overview

Since the 2010 UPR of Kenya, there has been significant positive developments in law and policies in Kenya but very limited positive impact on the prevalence of torture and ill-treatment in the country. In general, there has been a trend of diminishing torture and ill-treatment with political motives but at the same time a significant increase in incidents related to crime fighting and counter-terrorism.

Today, torture and ill-treatment in Kenya takes place in a general context of multiple and inter-connected human rights violations primarily committed by the police and other security personnel. Between January 2011 and November 2014, IMLU has documented 562 cases involving 278 beatings, 123 fatal shooting, 76 shooting, 33 arbitrary arrests, 11 psychological torture, 8 burnings, 8 sexual violations i.e rape, sodomy, indecent assault, 8 deaths as a result of beating, 6 cuttings and stabbings, 5 enforced disappearances, 2 suffocations, 2 deaths in custody, 1 drowning and 1 sleep deprivation. Most of the documented cases occurred in Nairobi, Mombasa, Kiambu and Nakuru Counties and perpetrators were police(472), Forest Rangers(10), prison officers (51), chiefs (13), Kenya Wildlife Service Officers (15) and teacher in a public school (1).

The reasons for torture violations by public officers, particularly those involved in law enforcement and security, are to:- 1) procure confession or admissions of crime; 2) to intimidate the victim; 3) extort bribes from suspected criminals 4) get information from criminal suspects and 5) to find contraband during searches in penal institutions. The impact of torture on victims and their families includes loss of family income as a result of death or maiming of a bread winner, psychological trauma on the survivors and families of victims of torture, poor economic situation due to high costs of medical attention required by survivors of torture for long periods of time, social stigma especially where the torture was perpetrated to a person on suspicion of having committed an offence etc.

In recent years, IMLU has documented two distinct types of torture, which are not covered by the current prohibition due to the nature of the perpetrator. First, over the past three years IMLU has documented cases of torture and ill-treatment by County law enforcement officers against small traders in urban towns and cities such as Nairobi.

Second, IMLU carried out a study on the `State of Mental Health, Victimization and Torture among Persons with Mental and Psychosocial Disabilities in 2013. The study examined a sample of 226 persons mental and psychosocial disabilities and reveals that torture and ill-treatment against this group takes place in schools (68 per cent of respondents); police stations (38.9 per cent of respondents); prisons (58.5 per cent of respondents); and hospitals (38.9 per cent of respondents). Types of abuse includes canning, sexual abuse, deprivation of food and water, hard labour as treatment, assault by other patients, and assault by staff.

The following briefing note will outline three fundamental obstacles to the fight against torture and ill-treatment in Kenya and make targeted recommendations designed to remedy these.

1. The need to enact comprehensive anti-torture legislation in Kenya;
2. The need for accountability and reparation for torture and ill-treatment
3. The issue of counter terrorism and human rights

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Legal framework for the prohibition and prevention of torture

Previous UPR recommendations

During the first reporting cycle of the UPR (2010), Kenya received recommendations to ratify OPCAT and to introduce in its national legislation the definition of torture, reflecting that set out in article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. Kenya accepted these recommendations.

Overview

In parallel to the first UPR review, Kenya promulgated a new Constitution in August 2010, which has a progressive bill of rights that includes provisions prohibiting torture and ill-treatment (Article 29). In fact, the constitution goes further and declare freedom from torture, cruel, inhuman and degrading treatment as a non-derogable right in Article 25. However, Kenya is yet to enact a comprehensive law on the prevention and prohibition of torture though it has passed various legislation prohibiting torture though targeting specific law enforcement agencies i.e the National Police Service Act 2011, The Kenya Defence Forces Act 2012 and the National Intelligence Service Act 2011. Unfortunately, these laws only regulate a narrow scope of actors who are currently involved in torture and ill-treatment in Kenya. Among those not covered by current legislation are perpetrators of torture against persons with mental disabilities in education and hospital settings and county law enforcement officers.

The lack of a comprehensive law of torture hinders holding other public officers accountable for acts of torture, cruel, inhuman and degrading treatment and such acts are only addressed as assault and grievous harm under the Penal Code (Cap 63 of the Laws of Kenya). Furthermore, the absence of a comprehensive legislation also remains a key impediment to legal redress and rehabilitation of victims of torture.

These concerns can be addressed through the adoption of comprehensive legislation on the prevention and prohibition of torture. The Prevention of Torture Bill 2011, which was developed collaboratively with the Ministry of Justice (now the Office of the Attorney General and Department of Justice), the Kenya National Commission on Human Rights and other human rights organizations is currently in draft form. However, concerns remain that so far it has not been a priority legislation for the State.

Proposed questions

- 1 What steps is Kenya taking to ensure that the Prevention of Torture Bill is enacted into law?

Proposed recommendations

- 1 The State should ensure that a full reparations programme including holistic rehabilitation is funded and made available to victims of past and current acts of torture and ill-treatment and that victims can freely choose between State and non-State service providers as appropriate.
- 2 The State should ensure that relevant professional groups such as doctors, psychologists, social workers and lawyers are trained in providing rehabilitation to victims of torture and ill-treatment

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Accountability and reparation for torture and ill-treatment

Previous UPR recommendations

During the first reporting cycle of the UPR, Kenya received recommendations to take all steps available to eradicate the use of torture and ill treatment by public officials, and prosecute and punish those responsible. Kenya accepted these recommendation.

Overview

Accountability for state and public officers is one of the key pillars enshrined in Article 10(2) (b) of the Constitution of Kenya 2010. The establishment of the Independent Policing Oversight Authority (IPOA) in 2011 was a key step to enhance accountability particularly for abuses perpetrated by members of the National Police Service. Whereas this is a positive action, prosecution of police officers involved in acts of torture and ill-treatment are scarce and far between. In 2013 IPOA received 913 cases and investigations were launched in 23 of the cases and only one (1) case was referred to the Office of the Director of Public Prosecution for further action. In instances where it is other state agencies entrusted with law enforcement involved in acts of torture and ill-treatment it is very difficult to hold them into account primarily because unwillingness on the part of the police to investigate and charge the perpetrators. In the survey report by IMLU on Torture, Cruel, Inhuman and Degrading among Hawkers and Small Scale Business Operators in Nairobi County, 78.4% of the respondents indicated that no action was taken when they complained about abuses by the police and county council law enforcement officers. This only entrenches the culture of impunity amongst public officers since they know that no action will be taken against them.

The other key issue is that in instances where the families of victims and survivors of torture have been awarded damages by the Courts, little is done by the office of the Attorney General to execute the decisions of the court. In June 2014 the Cabinet Secretary in Charge of Interior Security acknowledged that the court had awarded about Kshs 250,000,000.00 (approximately 2.238.000 EUR) in damages for cases of torture and extra judicial killings however the recipients will have to wait longer as there was no budget to pay the compensation awards. This only affirms the reluctance by the state to deal with the menace of torture and ill-treatment in Kenya and puts the victims at a further disadvantage.

Proposed questions

- 1 What steps is Kenya taking to ensure that there is accountability and reparation for acts of torture and ill-treatment perpetrated by state/public officers?

Proposed recommendations

- 1 The State should ensure that all complaints of torture are promptly, effectively and impartially investigated in accordance with the Istanbul Protocol and that perpetrators are prosecuted and punished.
- 2 The State should fast track payment of damages already awarded to families of victims and survivors of torture and ill-treatment.

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Counter terrorism and human rights

Previous UPR recommendations

There was no recommendation made on issues of counter-terrorism, human rights and the rule of law in the first reporting cycle in 2010

Overview

Terrorism has continuously become a challenge not only for Kenya but is a global issue. The attacks in Kenya have become frequent since the Kenya Defence Forces went into Somalia in hot pursuit of Al Shabab a terrorist group believed to be responsible for the attacks on Kenyan soil. The Government has put in place various measures and strategies to counter terrorism. Some of the measures include the enactment of the Prevention of Terrorism Act of 2012, the establishment of the Anti- Terrorism Police Unit (ATPU) and conduct of security operations in Nairobi and the Coast. The Prevention of Terrorism Act 2012 provides a legal framework on how to deal with acts of terrorism. Section 32 (3) of the Act which provides that a police officer can re-arrest a terrorism suspect for purposes of further investigations has often been abused by security agencies to conduct arbitrary arrests.

The Anti-Terrorism Police Unit (ATPU) has been congratulated for thwarting terrorist attacks on several occasions. However, it has also been accused of human rights violations which include extra-judicial killings; enforced disappearances; arbitrary arrests; use of excessive force during raids in the homes of persons suspected to be terrorists; torture and ill treatment of suspects; detention of suspects beyond the prescribed 24 hours, renditions, etc. On 17th June 2013 officers attached to the Anti- Terrorism Police Unit raided the house of Salim Nyiro on suspicion that he was a terrorist. They began beating him, his young wife (Rahma) who was 21 years old at the time and her younger brother who was 16 years old at the time. The reason for the beating was that the ATPU officers wanted them to admit that they were the owners of the firearms that were in the custody of ATPU. They took him (Salim) to one room and his wife to another where they continued to beat them to get an admission. After a few minutes Rahma heard gunshots within her house. When she refused to admit the accusations against her, the ATPU took her to the room where they held her husband only to find his lifeless body.

The aforementioned actions are contrary to the Constitution and Section 95 of the National Police Service Act 2011 which prohibits torture. There has however been no accountability for the human rights abuses by the ATPU

In April 2014 the state carried out a security operation in Nairobi, Mombasa and Garissa dubbed Usalama Watch. The operation saw more than 4,000 people within Nairobi County rounded up and detained at the Kasarani Sports Centre. The persons were mainly of Somali origin and professing the Islamic faith. They were held in deplorable and inhuman conditions. Cases of human rights violations such as that of Fatima were documented. In her case police officers forced entry into her house and began beating her children with batons. She also fell victim of the beatings until stitches from a recent surgery tore and she began to bleed.

As illustrated with the examples above, measures taken under the Prevention of Terrorism Act are contrary to the provisions of the Constitution and fail the human rights test.

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Counter terrorism and human rights

Proposed questions

- 1 What measures is Kenya putting in place to ensure that counter terrorism measures are in line with the Constitution and human rights standards?

Proposed recommendations

- 1 The State should review Section 32 of the Prevention of Terrorism Act 2012 to align it with the Constitution and international human rights standards
- 2 The State should ensure that counter terrorism measures are in line with international human rights standard

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The International Rehabilitation Council for Torture Victims (IRCT) is an independent, international health-based human rights organisation, which promotes and supports the rehabilitation of torture victims, promotes access to justice and works for the prevention of torture worldwide. The vision of the IRCT is a world without torture.

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