

# **QUEST FOR JUSTICE**

**A journey with torture survivors and  
families of victims to access justice in Kenya**

**1999 to February 2008**

**A publication by Independent Medico-Legal Unit (IMLU)**

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# A CKNOWLEDGEMENT

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This narrative is dedicated to the courage of over 2000 survivors and victims of torture, and their families, whose experiences and resilience to seek justice at all costs, and against unwarranted barriers, inspired this work.

The Independent Medico-Legal Unit is indebted to and deeply appreciative of the victims, survivors of torture, their families and witnesses all over Kenya, who, over the last two decades have trusted us with the information on which this report is based. All of them together with their close families and relatives, human rights defenders and witnesses have continuously taken the great step of faith, often at great personal risk in their pursuit for justice.

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The report is based on a review of IMLU case files since its inception. For this we sincerely thank IMLU staff, past and present, for embracing the value of documentation.

IMLU is determined to walk the extra mile with the survivors and victims to seek justice, inspired by the words of Dedan Kimathi Wachiuri, renowned Kenya Freedom Fighter and leader of Mau Mau:

*It is better to die on our feet than to live on our knees!*



# INDEPENDENT MEDICO-LEGAL UNIT

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Implemented by:



## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b>	<b>2</b>
<b>TABLE OF CONTENTS</b> .....	<b>4</b>
<b>SELECTED ABBREVIATIONS</b> .....	<b>6</b>
<b>INDEX OF TABLES</b> .....	<b>7</b>
<b>GLOSSARY OF SPECIALISED TERMS</b> .....	<b>8</b>
<b>FORWARD</b> .....	<b>11</b>
<b>1 ABSTRACT</b> .....	<b>13</b>
<b>2 INTRODUCTION</b> .....	<b>14</b>
<b>2.1. The Context of the Study.</b> .....	<b>14</b>
<b>2.2. The Standards Applicable</b> .....	<b>15</b>
<b>2.3. Summary of Findings</b> .....	<b>16</b>
<b>3 LITERATURE REVIEW</b> .....	<b>17</b>
<b>3.1. International Human Rights Law Regime</b> .....	<b>17</b>
<b>3.2. National legal framework</b> .....	<b>18</b>
<b>4 METHODOLOGY</b> .....	<b>19</b>
<b>5 RESULTS AND KEY FINDINGS</b> .....	<b>21</b>
<b>5.1. Profiles of the Survivors and Victims</b> .....	<b>21</b>
<b>Reporting on torture</b> .....	<b>22</b>
<b>Demographic analysis</b> .....	<b>23</b>
<b>Socio-economic profile</b> .....	<b>24</b>
<b>Geographical spread</b> .....	<b>25</b>
<b>Incident mapping</b> .....	<b>26</b>
<b>5.2. Nature of Violations</b> .....	<b>28</b>
<b>Extra-judicial killings, summary executions and enforced disappearance</b> .....	<b>31</b>
<b>Torture and Cruel, Inhuman or Degrading Treatment or Punishment</b> .....	<b>33</b>
<b>5.3 Alleged Perpetrators</b> .....	<b>33</b>
<b>5.4. Systemic and Mass Incidents of TCID</b> .....	<b>34</b>

**Victims of torture – Military officers associated with 1<sup>st</sup> August 1982 Coup attempt... 34**  
**Torture survivors – Nyayo House Torture chambers ..... 34**  
**Police operations – Mathare “Kosovo”..... 36**  
**Police operations – Kawangware..... 37**  
**Operations to reign in Mungiki ..... 37**

**5.5. Forms of torture ..... 39**

**5.6. Duty to Grant Redress and Compesate Victims ..... 42**  
**5.5.1. Criminal accountability ..... 42**  
**5.5.2. Civil and constitutional reparations ..... 43**

**6 KEY OBSERVATIONS ..... 44**

**7 CONCLUSION ..... 47**

**8 RECOMMENDATIONS ..... 49**

**BIBLIOGRAPHY ..... 54**

## **ABBREVIATIONS**

<b>AG</b>	Attorney General
<b>AP</b>	Administration Police
<b>CAT</b>	Committee against Torture
<b>EJK</b>	Extra Judicial Killing
<b>FERA</b>	February 18th Revolutionary Army
<b>GIZ</b>	Deutsche Gesellschaft für Internationale Zusammenarbeit
<b>GSU</b>	General Service Unit
<b>HCC</b>	High Court Case
<b>IMLU</b>	Independent Medico-Legal Unit
<b>IRCT</b>	International Rehabilitation Council for Torture Survivors
<b>LIFAT</b>	Litigation Fund Against Torture
<b>NGO</b>	Non-governmental organisation
<b>OMCT</b>	World Organizations against Torture
<b>OHCHR</b>	Office of the UN High Commissioner for Human Rights
<b>SCPU</b>	Special Crimes Prevention Unit
<b>SRP</b>	Special Rapporteur on Prisons and Conditions of Detention in Africa
<b>TCID</b>	Torture, Cruel, Inhumane, and Degrading Treatment
<b>TJRC</b>	Truth, Justice and Reconciliation Commission
<b>UN</b>	United Nations
<b>UNCHR</b>	UN Commission on Human Rights
<b>UNSRT</b>	United Nations Special Rapporteur on Torture
<b>UNSRSEJK</b>	United Nations Special Rapporteur on Summary Executions and Extra-judicial Killings

## INDEX OF TABLES

### FIGURES:

<i>Figure 1: Gender Distribution .....</i>	<i>22</i>
<i>Figure 2: Age of Victims and Survivors .....</i>	<i>24</i>
<i>Figure 3: Distribution of Victims and Survivors per province .....</i>	<i>26</i>
<i>Figure 4: Region vs Nature of Violations .....</i>	<i>27</i>
<i>Figure 5: Harm Suffered .....</i>	<i>28</i>
<i>Figure 6: Number of Gun Related Cases .....</i>	<i>33</i>

### TABLES:

<i>Table 1: Age of victims and survivors .....</i>	<i>24</i>
<i>Table 2: Where the Violations took place .....</i>	<i>26</i>
<i>Table 3: Region vs Nature of Violations .....</i>	<i>27</i>
<i>Table 4: Perpetrators vs Nature of Violations .....</i>	<i>29</i>
<i>Table 5: Violations Occasioned by Various Police Units .....</i>	<i>30</i>
<i>Table 6: Summary of Monetary Awards .....</i>	<i>43</i>

### CASE STUDIES:

<i>Case Study 1: .....</i>	<i>23</i>
<i>Case Study 2 .....</i>	<i>30</i>
<i>Case Study 3 .....</i>	<i>32</i>
<i>Case Study 4: .....</i>	<i>34</i>
<i>Case Study 5: .....</i>	<i>35</i>
<i>Case Study 6: .....</i>	<i>36</i>
<i>Case Study 7: .....</i>	<i>39</i>
<i>Case Study 8: .....</i>	<i>46</i>

## GLOSSARY OF SPECIALISED TERMS

<b>Admissibility</b>	The stage of an individual complaint procedure at which the judicial or quasi-judicial body decides if the right conditions are present for it to be able to examine a complaint. If a complaint is inadmissible, it cannot be examined any further.
<b>Allegation (of torture)</b>	A claim (as yet neither proved nor disproved) that an incident of torture has occurred.
<b>Amicus curiae brief</b>	A submission by a non-party to judicial proceedings which is designed to inform the judicial body about a specific matter relating to the proceedings.
<b>Applicant</b>	Person making an application under an individual complaint procedure.
<b>Application</b>	Letter or other form of submission asking a judicial body to consider a case under an individual complaint procedure.
<b>Arrest</b>	The act of apprehending a person for the alleged commission of an offence or by the action of an authority.
<b>Breach (of obligations)</b>	See VIOLATION
<b>Charter</b>	See TREATY
<b>Communication</b>	Letter or other form of submission transmitting information to an international body. The term is often used within the UN to refer to applications under an individual complaint procedure. The person who writes a communication is often referred to as the author of the communication.
<b>Competence</b>	See JURISDICTION (of a judicial body)
<b>Complainant</b>	Person making a complaint before municipal forums such as police stations or under an individual complaint procedure.
<b>Consultative status</b>	NGOs can apply to the UN for consultative status - this means that they are officially registered as an organisation which the UN can consult. NGOs with consultative status have certain privileges over other NGOs, such as being allowed to attend sessions of the UN Commission on Human Rights.
<b>Convention</b>	See TREATY
<b>Crimes Against Humanity</b>	Serious acts, such as torture, committed as part of a widespread or systematic attack against a civilian population, whether or not they are committed in the course of an armed conflict.
<b>Criminal Charge</b>	Official notification given to an individual by the competent authorities that he or she has committed a criminal offence.
<b>Corroboration</b>	Evidence which supports or confirms the truth of an allegation.
<b>Court judgment</b>	Legally-binding decision in which a court expresses its conclusions in a case.
<b>Covenant</b>	See TREATY
<b>Declaration</b>	International law document which is not legally-binding, but sets out standards which states undertake to respect.
<b>Deportation</b>	Expulsion from a country.
<b>Derogate</b>	To temporarily suspend or limit.
<b>Domestic law or legal system</b>	National law or legal system; law or legal system which is specific to a particular country.
<b>Enforcement (of obligations)</b>	Making the obligations effective; ensuring that they are respected.
<b>Entry into force (of a treaty)</b>	The moment at which treaty obligations begin to apply.
<b>Extra-judicial (e.g. execution)</b>	Not imposed by a judge or following a legal process.
<b>Fact-finding</b>	Carrying out an investigation to discover facts.

<b>Gross violations of human rights</b>	Particularly serious violations of human rights, such as torture or extra-judicial killing.
<b>Implementation (of obligations)</b>	The way in which obligations are carried out or respected, or measures aimed at achieving this.
<b>Impunity</b>	Being able to avoid punishment for illegal or undesirable behaviour.
<b>Incommunicado detention</b>	Being held by the authorities without being allowed any contact with the outside world, and/or without the detention being acknowledged.
<b>Individual complaint</b>	A complaint relating to a specific set of facts affecting an individual or individuals.
<b>Instrument</b>	A general term to refer to international law documents, whether legally binding or not.
<b>Inter-governmental body</b>	A body or organisation composed of the governmental representatives of more than one country.
<b>Judicial procedure</b>	A procedure before a judicial body.
<b>Jurisdiction (of a state)</b>	Area or persons over which a state exercises its authority.
<b>Jurisdiction (of a judicial body)</b>	Matters which fall within the jurisdiction of a judicial or quasi-judicial body are those which it has the power to examine. This may also be referred to as being competent to examine a matter.
<b>Leave (e.g. seeking leave to submit an amicus curiae brief)</b>	Permission.
<b>Legally-binding</b>	If something is legally-binding on a state, this means that the state is obliged to act in accordance with it, and there may be legal consequences if it does not do so, e.g. the state can be brought before an international court and ordered to pay compensation to a victim.
<b>Litigation</b>	The process of bringing and conducting a case before a court.
<b>Lodging a complaint</b>	Registering a complaint.
<b>Mandate</b>	The source of the powers of a mechanism - the document which explains what the mechanism is authorised to do.
<b>Merits</b>	The stage of an individual complaint procedure at which the judicial body examines the facts of a case and decides if a violation has occurred.
<b>Monitoring</b>	Seeking and receiving information for the purpose of reporting on a subject or situation.
<b>Non-governmental actors</b>	Private persons acting independently of the authorities.
<b>Observations</b>	Comments, assessment.
<b>Perpetrator</b>	The person who has carried out an act.
<b>Petition</b>	Request for action, e.g. request for a matter to be investigated.
<b>Provisional measures</b>	Temporary measures which can be requested by a judicial or quasi-judicial body before having completed its consideration of a case, in order to avoid irreparable damage.
<b>Quasi-judicial procedure</b>	A procedure before a body which considers cases in a similar way to a judicial body, but which is not composed of judges and the decisions of which are not legally-binding.
<b>Ratification</b>	The process through which a state agrees to be bound by a treaty.
<b>Recommendation</b>	A suggested course of action. Recommendations are not legally-binding.
<b>Reparation</b>	Measure to repair damage caused.
<b>Reservation</b>	At the time of agreeing to be bound by a treaty, a state can register a reservation: a statement which modifies its obligations under the treaty in some way.
<b>Resolution</b>	Official decision of an international body, often adopted through a vote. It is usually a

	recommendation and therefore not legally binding.
<b>Rules of procedure</b>	The detailed rules which a judicial or quasi-judicial body adopts, setting out the way in which proceedings before it should be carried out.
<b>Sanction</b>	A penalty imposed for a state's failure to respect its legal obligations.
<b>State responsibility</b>	Holding a state accountable under international law.
<b>State Party (to a treaty)</b>	State which has agreed to be bound by a treaty.
<b>Submission</b>	See COMMUNICATION/APPLICATION
<b>Supervisory body</b>	A body set up to supervise the ways in which states implement their obligations under a treaty.
<b>Third party intervention</b>	See AMICUS CURIAE BRIEF
<b>Transmission (of an allegation)</b>	Sending the allegation, e.g. to the state concerned.
<b>Treaty</b>	International law document which sets out legally-binding obligations for states.
<b>Treaty article</b>	The term used to refer to individual sections of a treaty.
<b>Treaty body</b>	A body set up by a treaty.
<b>Violation (of obligations)</b>	Failure by a state to respect its obligations under international law.

*“You can chain me, you can torture me, you can even destroy this body, but you will never imprison my mind.”<sup>1</sup>*

## FORWARD

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In mid-2008, following the post 2007-2008 election violence in Kenya, leaders of the two major political groups reached an agreement dubbed the National Dialogue and Reconciliation Accord which proposed measures to achieve lasting peace. These measures that are referred to as Agenda Four agreements consisted of immediate steps to end the deadly violence and address long term underlying factors that fueled the violence.

The founding of the Truth, Justice and Reconciliation Commission (TJRC) was intended to revisit and confront head on historical issues that had progressively sowed seeds of hatred, fanned inequality, bred intolerance and undermined national unity. The Commission's mandate included establishing an accurate, complete and historical record of violations and abuses of human rights, committed between 12 December 1963 and 28 February 2008, such as abductions, disappearances, detentions, torture, murders, and massacres. Its task therefore included to identify and specify the victims of the gross violations of human rights.

The joint project by IMLU and GIZ to review IMLU client files of survivors and victims of torture, cruel, inhuman degrading treatment or punishment is intended to give the accurate nature and magnitude of the violations suffered, identify perpetrators and the hurdles in access to justice during the period from 1999 to 2008, with appropriate recommendations for intervention.

During the relatively short period, 9 years, under review, IMLU, the leading but not the only organization dealing with issues of torture, cruel, inhuman and degrading treatment in Kenya received and documented over 2000 cases of state-perpetrated torture and related violations which highlight the widespread and systematic use of torture in Kenya, impunity by state perpetrators, high cost of legal fees and a weak legal framework that have affected victims' ability to access justice.

At its inception, the TJRC was seen as an avenue through which victims of torture and related violations whose cases had gone unaddressed would access

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<sup>1</sup> Mahatma Gandhi (Indian Philosopher, 1869-1948) internationally esteemed for his doctrine of non-violent protest.

justice. This report seeks to strengthen the quest of justice in line with the TJRC mandate.

The findings in this report point to the need for a serious and concerted effort to map the victims of torture and related violations in Kenya, with a view to facilitate their access to justice and hold perpetrators to account, and fast track the implementation of legislative, administrative and other measures to address the practice of torture, cruel, inhuman and degrading treatment.

It is noteworthy to state that IMLU's motivation in this assignment is furtherance of Agenda Item 4 of the National Dialogue and Reconciliation Agreement and the effective implementation of Article 25 and Article 29 of the Constitution on the absolute prohibition of torture, as well as Article 48, which guarantees access to justice for all.

# 1 ABSTRACT

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1. The advancement in combating torture in Kenya can be traced to the country's commitment at the international level through signing and ratifying of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>2</sup> and other human rights treaties. These instruments are complemented by specific national legislations including the Constitutional framework – both previous<sup>3</sup> and current constitutions, relevant penal laws and subsidiary legislations.
2. Over the years, the documentation of torture has focussed on individual complaints, conduct of “specialised police units” and specific security operations where allegations of massive torture were made by affected citizens. IMLU is the only specialized non-governmental organization in existence since 1996 dedicated to the documentation and rehabilitation of torture, cruel, inhuman or degrading treatment or punishment (TCID). This documentation was instrumental in dispelling the Government's public denial of the subsistence of torture and existence of torture dungeons, particularly in the 1990s.
3. The research reveals the systemic nature of the use of torture as a method of extracting confessions from criminal suspects with a paradigm shift being experienced in the new millennium following legislative changes resulting in cases of summary executions and extra-judicial killings by state officials while allegedly combating crime. A recent phenomenal result is the increase in enforced disappearances.<sup>4</sup>

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<sup>2</sup>. UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment : resolution / adopted by the General Assembly*, 10 December 1984, A/RES/39/46. Signed and ratified by Kenya on the 27th February 1997.

<sup>3</sup>. See Section 74 of the 1963 Constitution of Kenya.

<sup>4</sup>. During his visit to Kenya from 16-25 January 2009, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, documented widespread extrajudicial killings by the police, lack of accountability for killings that occurred during the 2007 post-election violence, killings that occurred at Mt. Elgon and intimidation of human rights defenders who cooperated with the Special Rapporteur. (A/HRC/11/2/Add.6).

4. What has been lacking is any concerted effort in consolidating documentation of TCID in Kenya despite various efforts by non-governmental organizations to highlight the on-going practice of torture and its impact on the survivors and families of victims based on individualistic case files, specific security operations, investigative reports and annual reports, revealing systemic practice of TCID in Kenya.
5. This review thus seeks to consolidate and examine information relating to survivors and families of victims, their predicament in attempting to bring the perpetrators to account while seeking justice, and highlight the consequences.

## **2** INTRODUCTION

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### **2.1. THE CONTEXT OF THE STUDY**

6. This study was originated by IMLU, in partnership with GIZ, to consolidate the rehabilitation and documentation of torture, cruel, inhuman or degrading treatment or punishment of survivors and families of victims in Kenya between 1999 and February 2008. Specifically, it was meant to achieve the five objectives stated below:
7. Firstly, the physical perusal and review of individual case files reported and acted upon by IMLU between 1999 and the end of February 2008 and the review of published reports, books and treaty body reports, followed by the consolidation of a report that would showcase the accurate nature and magnitude of the violations suffered, the perpetrators responsible and the hurdles in access to justice for the said period;
8. Secondly, to contribute in an evidence-based manner to the ongoing transitional justice process in Kenya for unveiling the truth regarding historical injustices. This is intended to facilitate access to justice to the thousands of survivors and families of victims of TCID;

9. Thirdly seeking clarification of the facts, individual and State responsibility for victims and their families and survivors, identification of measures needed to prevent recurrence and facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicted by the investigation as being responsible and demonstrate the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation;
10. Finally, authoritatively exhibiting and showcasing the full extent of the vice of torture in Kenya as a way of truth telling and identifying the national demographic distribution of the survivors and families of victims, and the injuries and effects occasioned on the survivors. The findings are desegregated based on gender, age, and socio-economic strata of the survivors and victims to adequately inform on the vulnerabilities of persons most prone to torture and provide concrete recommendations to realise the absolute prohibition of torture in Kenya.

## 2.2. THE STANDARDS APPLICABLE

11. The research has been conducted in the context of relevant international human rights law regimes that include the meanings and various terminologies,<sup>5</sup> basic standards such as those for investigating cases of torture, cruel inhuman or degrading treatment or punishment,<sup>6</sup> documentation of cases of death in custody or deaths occasioned by state officials<sup>7</sup> and relevant professional principles relating to practice and ethics<sup>8</sup>.
12. The period of study is from 1999, when IMLU started actively documenting TCID, to February 2008. This period further falls within the mandate of the TJRC and hence the findings positively contribute to ongoing efforts to uncover injustices and facilitate access to justice by the thousands of survivors and families of victims. This has a potential positive impact for the many more

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<sup>5</sup>. Supral above

<sup>6</sup>. UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, **HR/P/PT/8/Rev.1**.

<sup>7</sup>. *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. Doc. **E/ST/CSDHA/12 (1991)**.

<sup>8</sup>. *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)* and UN General Assembly, *Principles of Medical Ethics*, 16 December 1983, **A/RES/38/118**

## 2.3. SUMMARY OF FINDINGS

13. While all age categories were targeted for TCID, over 65% of victims and survivors of TCID and related violations fall within the age bracket of 4 months – 35 years, while 10% of the victims and survivors were below the age of majority.
14. Most of the survivors and victims were young men from predominantly low income areas in Nairobi or rural areas, the majority of whom were working in the informal sector like performing manual duties in the construction industry, farming, hawking, touting, small scale business operatives, and domestic workers. 49.5% of the survivors were reported as working in the formal sector, mainly in agriculture and small businesses. A significant proportion was unemployed.
15. There were unique findings of police officers subjecting to torture fellow police officers or military officers subjecting fellow military officers to torture.
16. Over 60% of the cases were emanating within 150 kilometer radius of the IMLU Center. In areas away from the IMLU office, documentation of torture was facilitated by a network of human rights defenders, NGOs and the media operating in the area.
17. 41.9% of the violations took place in custody or places of confinement while 45.3% took place in public places. This fact likely explains how the public perceives the role of law-enforcement agencies and the attitude by law enforcement officials towards the populace.
18. Beatings were the most common form of violation reported, in 52.3% or 1097 cases.
19. 45.6% of TCID survivors had blunt object injuries, severe soft tissue injuries, moderate severe tissue injuries and minor soft tissue injuries while others had gunshot related injuries.
20. Gunshot related violations constituted 21.38% or 438 cases of which 258 cases or 12.63% resulted in deaths, while the remainder of 180 of the cases or 8.75% resulted in other forms of firearm injuries.
21. Beatings, including beatings to death, prolonged detention without trial and harassment comprised of 10.25% or 211 of all cases.

# 3

## LITERATURE REVIEW

22. Following the review and perusal of over 2000 individual case files which formed the primary source of the study, a review of various secondary literature, both domestic and international, on the subject of torture in Kenya was undertaken. This review was categorised into two broad clusters, namely the International Human Rights Law regime and the National Legal Framework.

### 3.1. INTERNATIONAL HUMAN RIGHTS LAW REGIME

23. A review of international publications and reports on the subject in specific relation to Kenya was undertaken including but not limited to: Examining Treaty body concluding observations<sup>9</sup> and follow-up reports;<sup>10</sup> Special procedure mechanism reports<sup>11</sup> and relevant alternative reports;<sup>12</sup> Protocols on investigations, documentation and treatment of survivors and victims;<sup>13</sup> Fact-

<sup>9</sup> UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Kenya*, 29 April 2005, **CCPR/CO/83/KEN** and UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Kenya*, 19 January 2009, **CAT/C/KEN/CO/1**,

<sup>10</sup> UNSRT Report to the seventh session of the HRC. *Follow-up to the recommendations made by the Special Rapporteur. A/HRC/7/3/Add.2*. 8 February 2008 and UNSRT Report to the thirteenth session of the HRC. *Follow-up to the recommendations made by the Special Rapporteur. A/HRC/13/39/Add.6*. 26th February 2010

<sup>11</sup> UNSRT Report to the Fourth session of the HRC. **A/HRC/4/33/Add.2**. 15 March 2007. And UNSRT Report to Commission on HRC. *Visit of the Special Rapporteur to Kenya. E/CN.4/2000/9/Add.4*. 9 March 2000

<sup>12</sup> HRW *Submission to 41st Session of the United Nations Committee against Torture on Kenya*. 2008, World Organisation Against Torture, *Report on Implementing OMCT's Project Preventing torture and other forms of violence by acting on their economic, social and cultural root causes*, 7 July 2010, Report ESCR project 2007 - 2010 (09 07 10) and IMLU, *"Torture and related violations in Kenya- An Alternative report to CAT, "* November 2008

<sup>13</sup> United Nations *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, **U.N. Doc. E/ST/CSDHA/12 (1991)**., UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, **HR/P/PT/8/Rev.1**, and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (**General Assembly resolution 60/147** of 16 December 2005)

finding mission reports of the UNOHCHR to Kenya;<sup>14</sup> Government reports to the UN;<sup>15</sup> select INGO relevant reports on Kenya; and analysing specific investigatory reports and findings.<sup>16</sup>

24. A review of this literature reveals that while positive strides have been made by Kenya in the fulfilment of its obligations, including ratification of treaties and their domestication,<sup>17</sup> such gains have been inconsistent and dotted with unfulfilled promises, and a lack of effective investigations, documentation and ultimate prosecution of perpetrators. For example, there exists no rehabilitation or reparation policy and no programme for survivors and families of victims of TCID violations, who are thus expected to seek reparations by either filing civil action or constitutional

### 3.2. NATIONAL LEGAL FRAMEWORK

25. Laws of Kenya,<sup>18</sup> National jurisprudence: Judicial precedents on torture and related violations in Kenya,<sup>19</sup> Relevant reports by NGO's, report by the National Human Rights Commission<sup>20</sup> and reports by IMLU<sup>21</sup> that were examined reveal a number of issues. Firstly, while Kenya was amongst the pioneer states in the international community to acknowledge torture as an abhorrent violation and specifically provided the freedom there from without exception in the 1963 constitution, serious incidences have and continue to occur where the constitutional guarantees have wantonly been disregarded by the State.
26. Secondly, there exist no rehabilitation and/or redress programmes by the State in line with its international legal obligations. Victims

<sup>14</sup> UNSRT Report to HRC. *Visit of the Special Rapporteur to Kenya*. E/CN.4/2000/9/Add.4. 9 March 2000, OHCHR *Fact-finding Mission to Kenya Report*, 6-28 February 2008 and UNSREJK Report to HRC by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston - Addendum - Mission to Kenya A/HRC/11/2/Add.6

<sup>15</sup> GOK Initial Report by Kenya to CAT. 2008. CAT/C/KEN/1 and GOK second periodic report to CCPR. 27<sup>th</sup> September 2004 CCPR/C/KEN/2004/2

<sup>16</sup> HRW, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, 17 March 2008, Volume 20, No. 1 (A), "All the Men Have Gone" War Crimes in Kenya's Mt. Elgon Conflict, July 2008, and Redress, Reparations for Torture: A Survey of Law and Practice in Thirty Selected Countries. May 2003.

<sup>17</sup> Constitution of Kenya 2010: International laws ratified by Kenya is part of Kenya law

<sup>18</sup> Constitution of Kenya 1963, Chief's Authority Act CAP 128, Police Act Cap 84(repealed) and Children's Act no 8 of 2008

<sup>19</sup> See Relevant Court decisions in the Bibliography

<sup>20</sup> KNCHR, *Report on Post-2007 Election Violence in Kenya 'On the Brink of the Precipice': A Human Rights Account of Kenya's Post 2007*.

<sup>21</sup> IMLU, "Double Jeopardy: Mount Elgon Torture Report". August 2008; "Forensic Investigation into the Post Election-Violence violence Related Deaths: An Investigative Report" and "Meru Prison Killings Report" 2005

of torture and ill-treatment should be provided with full and effective reparation, including restitution, compensation, rehabilitation, satisfaction and a guarantee of non-repetition. Financial compensation should be provided for economically assessable damages. Satisfaction can include a variety of measures, such as an official declaration to restore the dignity of the victim, a public apology or a commemoration and tribute to victims.<sup>22</sup>

27. Thirdly, in instances where survivors and families of victims are successful in criminally holding the perpetrators to account, the charges preferred have been drawn from common criminal provisions<sup>23</sup> that fail to appreciate the gravity of the crime.
28. Finally, where survivors and families of TCID and related violations have sought reparations, the judicial system has failed to appreciate the uniqueness of the harm suffered and proceeded to adopt a quantification jurisprudence applied in tort which treats injuries deliberately inflicted as accident related injuries. And where there are clearly identifiable perpetrators, the Attorney General has failed and/or refused<sup>24</sup> to prosecute as provided for by law.

## 4 METHODOLOGY

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29. The survey consisted of a review of IMLU files and the mapping of torture survivors, victims and families of victims who have sought assistance or intervention by IMLU from 1999 to the end of February 2008. The review was carried out in a sequential manner in order to capture relevant data, highlight patterns of violations, perpetrators, the geographical spread of the vice and places of violations. It also captured gender, age, nature of injury and loss, reparations if any and pending legal suits.

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<sup>22</sup> Cingranelli, David L. and David L. Richards, "Respect for Human Rights after the End of the Cold War." *Journal of Peace Research*, Volume 36, No. 5 (1999), 511-534

<sup>23</sup> Ibid [Para 8]

<sup>24</sup> Redress, Reparations for Torture: *A Survey of Law and Practice in Thirty Selected Countries*. May 2003, Pg 45. Available at:

<http://www.redress.org/downloads/publications/AuditReportText.pdf> [accessed on 24th December 2011]

30. While IMLU has been in existence since 1992, in its formative years program work was restricted to medical intervention with survivors of TCID who were attended to privately by volunteer doctors. As such, client information from inception to the end of 1998 was largely privately handled. In 1999, organizational structures were put in place, albeit slowly including documentation processes. To date, IMLU has adopted both the Istanbul Protocol on documentation of torture and the Minnesota Protocol on documentation of death.
31. This study was conducted in five phases. The first one entailed a physical scrutiny of over 2000 files to determine their compliance with both the Istanbul Protocol on documentation of torture and Minnesota Protocol on documentation of death, personal data of all survivors, victims and families of victims including name, age, gender, residence, occupation, place of incident and injury suffered; facts of each case including nature of violation(s), place of incident, circumstances, alleged perpetrator(s), reason for the violation if any and availability of witnesses and any evidence gathered in relation to that case; interventions availed, that is legal, medical and psychological, petitions, press releases and visits to places of confinement; and outcome of the case including determination of liabilities through public inquest, civil claims for compensations, prosecution of perpetrators and awards of reparations if any.
32. The second phase entailed compiling the individual data and keying in the information into the database, while identifying any missing information, counter-checking and merging of scattered information and making relevant recommendations to IMLU.
33. The third phase consisted of reviewing the database to identify and establish emerging trends, and recurring themes on each parameter analysed. An attempt was made at highlighting outstanding cases, for example on challenges in seeking justice and securing reparation for survivors and families of victims, as well as individual success stories in relation to reparations, showcasing outcomes in the long and winding road of seeking justice.
34. The fourth phase consisted of a literature review, examining reports and concluding observations made by the international treaty bodies in relation to Kenya, reports on country visits by UN special procedure mandate holders and recommendations, reports by the Government of Kenya to treaty bodies, judgements, rulings and other decisions by relevant judicial and quasi-judicial organs and NGO reports with a particular focus on those published over the period.

35. A final phase included generation of tables, charts, and figures reflecting the findings, writing the final report and making key recommendations.
36. Consultative meetings to review progress were undertaken jointly by the consultant, IMLU and GIZ representatives.

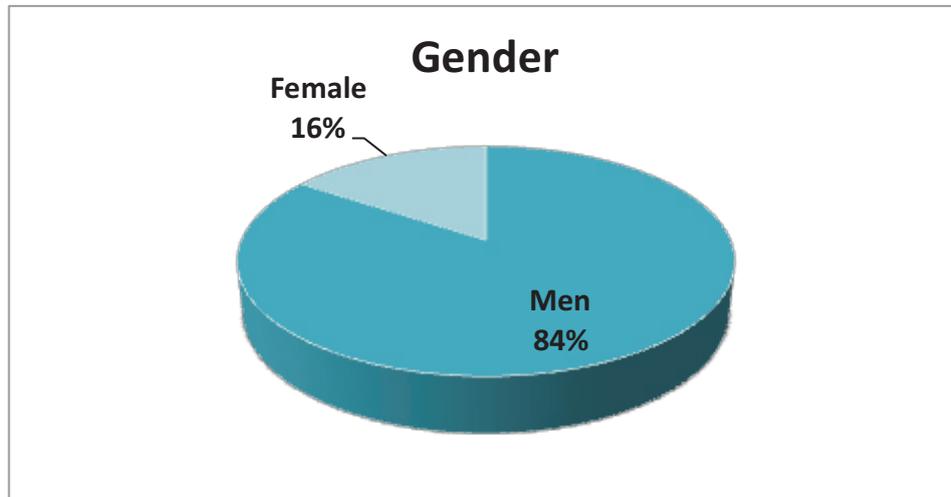
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## Results and key findings

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37. A forensic evaluation was carried out on slightly over 2000 files of survivors of torture and victims during the period 1999 to the end of February 2008. These consisted of clients who sought IMLU's assistance in the provision of medical support, in conducting forensic evaluation where death had occurred during interaction with law enforcement agencies and to seek legal related assistance - to raise bail money or to receive legal advice and intervention in criminal and civil matters on behalf of survivors and family of victims of TCID.

### 5.1. PROFILES OF THE SURVIVORS AND VICTIMS

38. The Study reveals that the majority of survivors and victims of TCID comprised of men. There were 1731 men, constituting 84.2% of the cases, with women numbering 321 and constituting 15.6%.

**FIGURE 1: GENDER DISTRIBUTION****Reporting on torture**

39. The above finding of a higher number of TCID cases reported by men than women suggests that men are more likely to be subjected to TCID by law enforcers than their female counterparts. This points to prevailing assumptions among law enforcement agents that young males are likely to commit crimes. Indeed, KNCHR reported on the targeting for TCID and extortion of young male Kikuyu living in urban slums who were labeled Mungiki.<sup>25</sup> Young men were similarly targeted for TCID by the army in its operations in Mt. Elgon in 1998.<sup>26</sup> However, this may also point to the willingness of male victims to speak out and report on their experiences, as opposed to female victims. It is possible that some female survivors of TCID may have preferred to keep quiet about the violations suffered either because of the societal stigma associated with them or fear of reprisals by the perpetrators.
40. Threats of dire consequences on the survivors of TCID by the perpetrators were another reason why some survivors were unwilling to talk about the violations. Other explanations for gender disparity in reporting torture include women not being aware of their rights or of the avenues to access justice in TCID cases.
41. All in all, although the proportion of female survivors was significantly lower, women still underwent some of the most

<sup>25</sup> *The Cry of Blood: Report on Extra-Judicial Killings and Disappearances*, KNCHR, September 2008

<sup>26</sup> *All the Men Have Gone: War Crimes in Kenya's Mt. Elgon Conflict*, Human Rights Watch July 2008

horrifying and gruesome kinds of torture. The following case is illustrative.

### CASE STUDY 1<sup>27</sup>

*The High Court in Embu heard the experience of torture by Ms. Liza. The torture survivor was arrested on allegations of obtaining money by false pretence and was held in custody at various police stations for a period of 13 days before she was arraigned in court for the said allegations. During her incarceration in police custody she underwent unspeakable torture that included insertion of bottles into her sexual organs, occasioning serious injuries. A civil suit was instituted seeking compensation for the torture experiences. The High Court sitting at Embu concluded that flying squad officers were not just wrong. It was abnormal, crude and even demonic, obnoxious acts which go against all rules of common decency and that the act of inserting a bottle into the vagina amounted to rape. Survivor was awarded by the court 7,122,915 KES considering special, general and aggravated damages. The Court considered such acts to amount to gang rape*

### **Demographic analysis**

42. The survey revealed that the youngest survivor was four months old while the oldest survivor was 87 years old, both female.
43. A majority of victims and survivors of TCID and related violations fall within the age bracket of 4 months – 35 years (65%) with the other proportion falling over 36 years. Among the people in the first age category are students, 10% of whom are below the age of majority, and school leavers - people who have completed school and looking for gainful employment and hence struggling to fit in a highly competitive socio-economic environment.
44. The demographic profile further revealed that most survivors and victims of TCID fall within the youth category (19-35 years) at about 60%. This group similarly reported either being unemployed or working in the informal sector. This point to likely awareness by potential perpetrators that people in this age category lack the resources to navigate a very expensive justice system to complain and pursue justice where law enforcement officials were at fault.

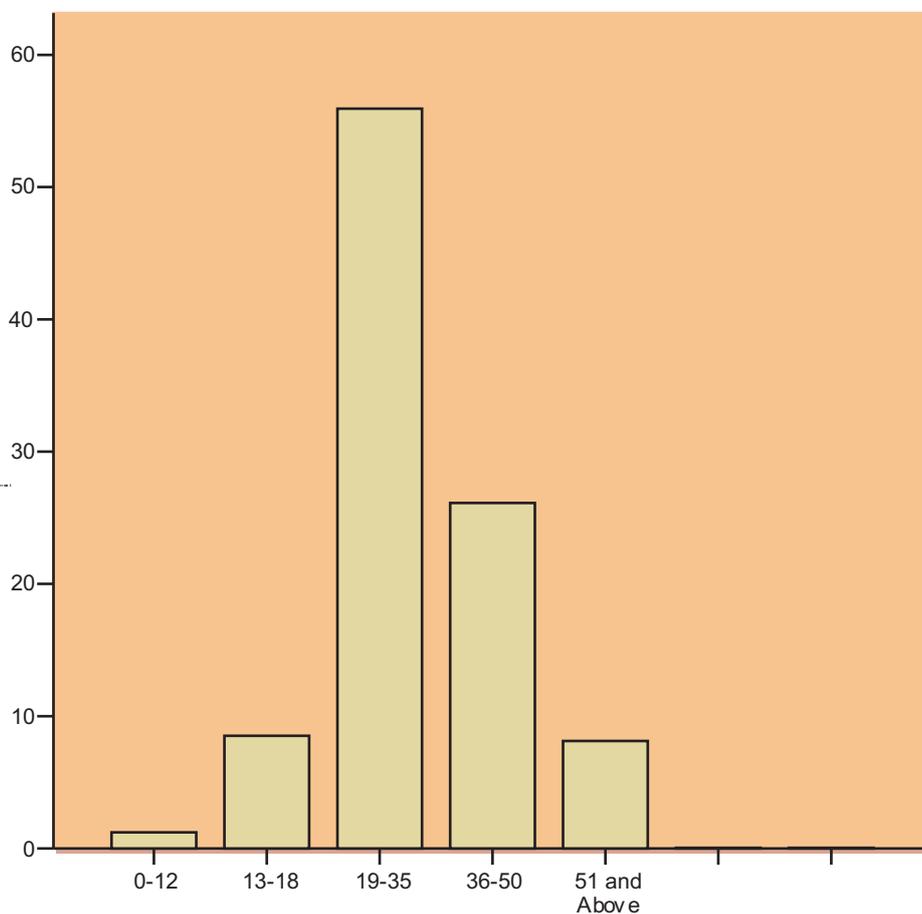
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<sup>27</sup> High Court at Embu, HCC No. 31 04 2007 Liza Catherine W. Mwangi Vs The A.G [2010] eKLR

**TABLE 1: AGE OF VICTIMS AND SURVIVORS**

	Nos	Percentage
0-12	25	1.2%
13-18	175	8.5%
19-35	1150	55.9%
36-50	537	26.1%
51 and above	169	8.2%
Valid	<b>2056</b>	<b>100.0%</b>

**FIGURE 2: AGE OF VICTIMS AND SURVIVORS**



**Socio-economic profile**

45. A review of the occupations of the victims and survivors of TCID was conducted. It was observed that a significant record of over 991 case files or 48.2% did not indicate the occupation of the respondent. This is either indicative of the lack of training in any profession for the majority of the victims and high levels of unemployment or pointing to the prevailing

documentation standards in IMLU at particular periods where such information was not considered pertinent in documenting TCID.

46. The survey reveals that a significant proportion of the survivors and victims of TCID and related violations were from the lower income earning strata, working either in informal economic sectors like hawking, matatu<sup>28</sup> industry, and agriculture.
47. Among the key observations concerning this category of persons is the tendency by perpetrators to stereotype victims with regard to general physical appearance or the occupation of the victim. In the first instance, persons who wore dreadlocks for example were assumed to be criminals, *ad initio*. In the second scenario, most survivors of TCID stated that they faced the violation as they conducted lawful daily undertakings like touting, driving or hawking. Nevertheless, their occupations were regular targets for extortion and human rights abuses particularly when they failed to bribe if they lacked trade licenses and appropriate work uniforms.
48. Slightly over 12% indicated that they were in professions: lawyers, accountants, army and former air force personnel, policemen, lecturers and human rights defenders.
49. The most notable victims of TCID among these professional groups were the army personnel members of the Kenya Air Force suspected of having participated in a coup attempt on 1 August 1982, and political activists and human rights defenders accused of engaging in subversion or targeted for speaking out on behalf of victims of human rights violations. Lawyers were also victimised – threatened or physically assaulted when they defended clients who were unpopular with the State or members of the security forces, particularly in cases where the clients were victims of repression by state agents.

### **Geographical Spread**

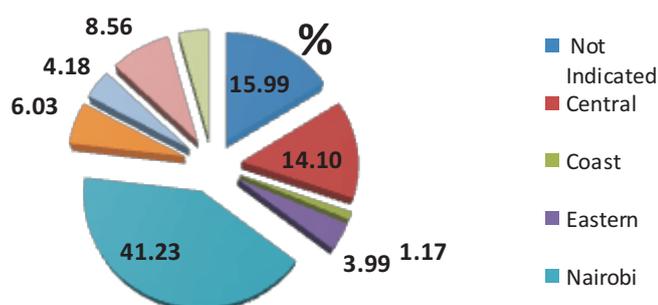
50. The findings reveal that the victims of TCID who reported to IMLU during the period between 1999 and the end of February 2008 were from all over the country. Nevertheless, the majority of the cases reported were from Nairobi, Central and Rift Valley provinces. These regions, from which 63.8% of the cases were drawn, are within a hundred and fifty kilometres radius from the IMLU office in Nairobi.

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<sup>28</sup> Public taxi

51. IMLU also documented cases from other regions of the country, most notably Kisii, Nyeri, Kisumu and Eldoret. While relatively far from the IMLU office in Nairobi, the presence of human rights institutions, community based human rights defender networks and vibrant media facilitated connections between the survivors and families of victims of TCID and IMLU. In Kisumu and Eldoret, most of the cases reported related to human rights violations committed by mobs and the police during the 2007-2008 post-election violence.
52. Equally noteworthy is that over 16% of the cases did not reveal the geographic location of the survivor or family of victims. Again, this could be attributed to lack of a structured documentation protocol and available staff dedicated to conducting intakes and documentation during IMLU's formative years.

**FIGURE 3: DISTRIBUTION OF VICTIMS AND SURVIVORS PER PROVINCE**



### Incident Mapping

53. As noted above, cases of TCID reported to IMLU originated from all parts of the country, although the Nairobi area had the majority of cases. TCID took place either in public or in custody, although in some of the cases human rights violations were committed both during arrest in public and in lawful custody. The following two tables show 1) where violations took place – whether in public, in custody or both, and 2) forms of violations and regions where the violations took place.

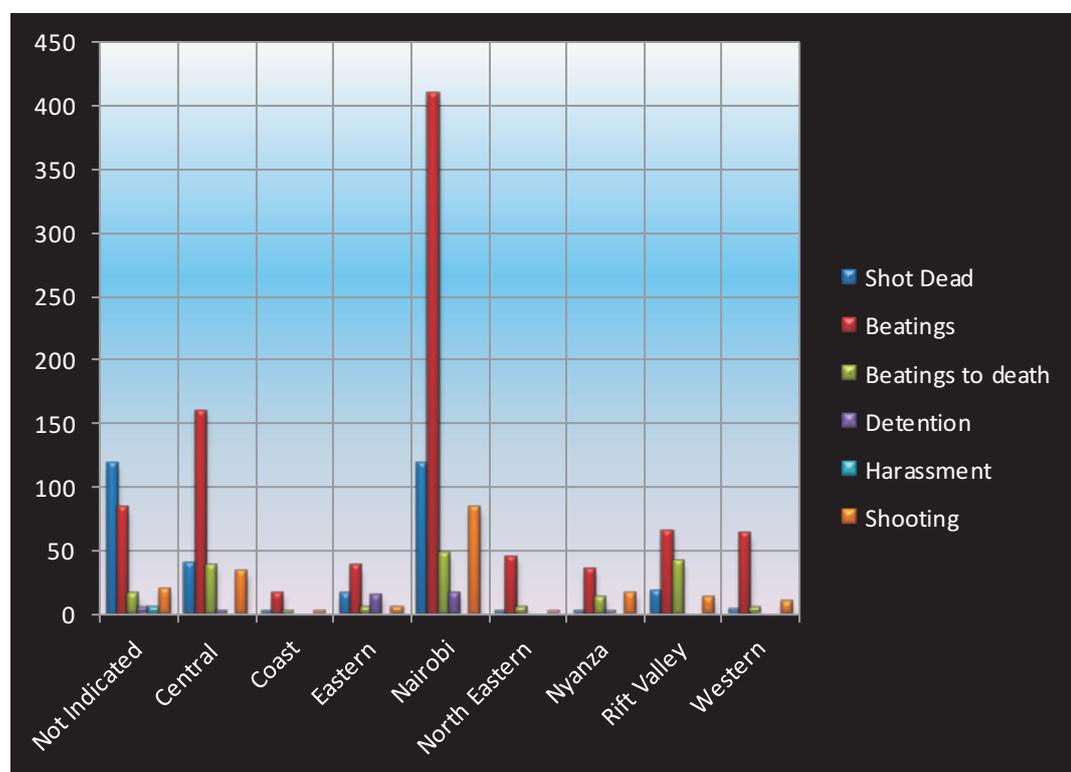
**TABLE 2: WHERE THE VIOLATIONS TOOK PLACE**

	Number of cases	Percentage
Not Indicated	1169	8.3%
In custody	862	41.9%
Public	932	45.3%
Public and in custody	92	4.5%
Valid	2056	100.0%

**TABLE 3: REGION VERSUS NATURE OF VIOLATIONS**

	Shot Dead	Beating	Beating to death	Detention	Harassment	Shooting
Not Indicated	27	165	15	4	5	19
Central	32	166	37	2	0	33
Coast	2	17	2	0	0	2
Eastern	7	40	5	14	0	5
Nairobi	130	474	47	16	0	83
North Eastern	2	48	5	0	0	1
Nyanza	20	38	13	1	0	16
Rift Valley	29	83	41	0	0	12
Western	9	66	4	0	0	9
<b>Total</b>	<b>258</b>	<b>1097</b>	<b>169</b>	<b>37</b>	<b>5</b>	<b>180</b>

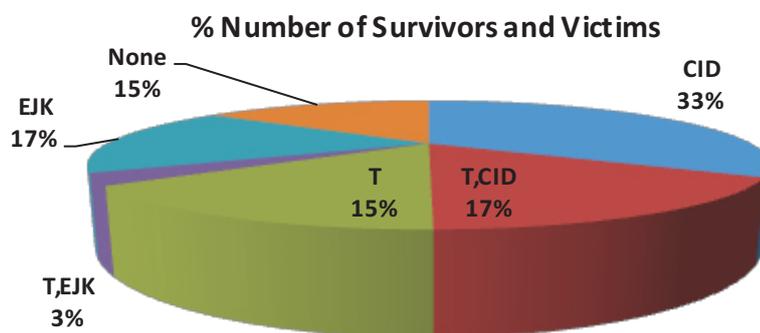
**FIGURE 4: REGION VERSUS NATURE OF VIOLATIONS**



## 5.2. NATURE OF VIOLATIONS

54. The leading type of violations reported can be categorized as cruel, inhumane and degrading treatment (33%). This was sometimes combined with acts of torture and hence people who experienced both torture and cruel, inhuman and degrading treatment comprised 17% of all cases. 15% reported torture while another 17% were cases of extra-judicial killings, with a further three percent (3%) undergoing gruesome torture before being killed or succumbing to injuries inflicted during torture.

**FIGURE 5: HARM SUFFERED**



### Key

*CID: Cruel, Inhuman and Degrading Treatment*

*EJK: Extra Judicial Killings*

*T, CID: Combined incidents of Torture and Cruel, Inhuman and Degrading Treatment*

*T: Torture*

*T, EJK: Torture followed by Extra Judicial Killing*

*None: Violation not stated*

55. 45.6% or 940 of TCID survivors had blunt object injuries, severe soft tissue injuries, moderate severe tissue injuries, and minor soft tissue injuries emanating from the following, amongst others:

- Whip marks
- Bite marks
- Sharp object cuts
- Bruises
- Gunshot wounds
- Eye injuries

56. It is noteworthy that most injuries were observed on the following parts of the body:

- backs
- thighs
- chest wounds

- knees
- wrists
- swollen genitals
- buttocks
- elbows
- shoulders
- Waist and the head

**TABLE 4: PERPETRATORS VERSUS NATURE OF VIOLATIONS**

	Beating	Beating to death	Detention	Harassment	Shooting	Shot Dead
Not stated	88	20	3	0	9	14
Administration police	77	7	1	0	13	17
Anti-stock theft police officers	2	0	0	0	1	0
Anti-terrorism police	1	0	1	0	0	0
Chief	15	5	0	0	0	0
Chief and Administrative police	6	0	0	0	1	0
Council Askari	43	2	0	0	0	1
Flying squad	12	1	0	0	4	5
Forest guard	3	0	0	0	0	1
Game Warder	0	0	0	0	0	1
GSU officers	22	0	0	0	0	0
Kenya Intelligence agents	1	0	0	0	0	0
Kwe kwe Squad	1	0	0	0	0	0
KWS Warder	3	1	0	0	2	0
Military officers	134	0	1	0	1	0
Police Officers	571	109	29	5	140	212
Police and others	28	4	0	0	5	2
Police Reservist	1	0	0	0	2	4
Prison warders	67	19	2	0	2	1
State Vigilantes	2	1	0	0	0	0
<b>TOTALS</b>	<b>1097</b>	<b>169</b>	<b>37</b>	<b>5</b>	<b>180</b>	<b>258</b>

57. Beatings were the most reported form of violations and constituted 52.3% or 1097 cases, often leading to blunt object trauma and soft tissue injuries with life changing or fatal consequences. These were carried out mainly by the various units of the police. 67% or 737 of these cases of beatings were attributed to various police units while prison officers were responsible for 15.4% or 169 of the cases.

58. Gunshot related violations constituted 21.38% or 438 of the cases, resulting in death in 258 of the cases or 12.63%, while the remainder 180 cases or 8.75% resulted in various forms of injuries including fractures and, in certain instances, permanent paralysis and other forms of permanent disabilities. Various police units were responsible for 92.7% or 406 of the gunshot related cases.
59. The other reported human rights violations were harassment, arbitrary arrests and detentions and malicious prosecution.
60. Table 5 below illustrates the violations and the various units of the Kenya police that these were attributed to:

**TABLE 5: VIOLATIONS OCCASIONED BY VARIOUS POLICE UNITS**

Police Unit	Beatings	Beatings to death	Detention	Harassment	Shooting	Shot dead
Regular police	571	109	29	5	140	212
Regular police with other units	28	4	0	0	5	2
General Service Unit	22	0	0	0	0	0
Flying Squad	12	1	0	0	4	5
Anti-Stock theft	2	0	0	0	1	0
Anti Terrorism	1	0	1	0	0	0
Intelligence Agents	1	0	0	0	0	0
Kwekwe	1	0	0	0	0	0
Police Reservist	1	0	0	0	2	4
Administration police <sup>29</sup>	77	7	1	0	13	17
Administration police and chief	21	5	0	0	1	0
<b>Total documented violations</b>	<b>737</b>	<b>126</b>	<b>27</b>	<b>5</b>	<b>166</b>	<b>240</b>

61. The following case study is illustrative:

**CASE STUDY 2:**

Two girls were walking home in the evening on New Year's Eve, 2001. They were near their gate which is close to a police station in Thika district. They met a man who demanded that they greet him. When they refused, he became aggressive and identified himself as a police officer. He held one of the girls, and attempted to rape her. The girl managed to escape but she dislocated her arm in the process. The girls fled home and informed their parents who escorted them to the police station to report the incident. The drunk police officer arrived at the report office desk while they were relating the incident to the duty officer. The officer frustrated their efforts to record a statement. He chased them away. The following day, upon intervention of the officer commanding the station, she was issued with a P3 form and asked to seek treatment.

<sup>29</sup> Following establishment of the Kenya Police Services the Administration Police are now part of the KPS. Section 243 of Constitution of Kenya 2010.

and have a medical officer fill in the form. When the family went to the station to present the signed P3 form they were shocked to learn that the officer had filed a complaint of assault against the girl. She was advised that the officer was willing to drop the charges if she withdrew her complaint against the officer. When she refused, she was arraigned in court and charged with assaulting the officer. The matter was concluded several years later. She was found guilty of the offence by the Thika Court and sentenced to 1 year in prison or a Kshs 20,000 fine. IMLU, who had provided a lawyer for the criminal matter, wanted to appeal but she preferred to pay the fine since the matter would take years to conclude. There were no sanctions on the police officer (IMLU case file No. 2028 - EMN).

### **Extra-judicial killings, summary executions and enforced disappearances**

62. The findings revealed that death as a result of various violations including shootings and beatings comprised 20.75% or 427 of the cases.
63. Findings further revealed that extra-judicial killings occurred in four distinct forms:
  - a) Encounter killings in what was described as death resulting from shoot-out between law enforcement officers and suspected criminals. It was alleged that suspects were executed in cold blood having either been captured or having surrendered to their executioners;
  - b) Enforced disappearances where allegations of arrests by law enforcement officers were made with the deceased's bodies being discovered in public mortuaries having being shot dead or bludgeoned to death;
  - c) Cases where victims were tortured in the police cells during interrogations and died due to the injuries sustained;
  - d) Cases where innocent members of the public were hit by stray bullets shot by the police while allegedly pursuing thugs.

Examples of such cases are provided in Case Study 3:

CASE STUDY 3

⇒· HMS, a 47 year old lorry driver, was allegedly arrested on 18 August 2003 in Rongo for claims of having stolen KShs.300,000. He was taken to Migori police station and allegedly into the DCIO office where he was tortured during interrogation. It is alleged that after the interrogation the victim was returned to the cell and the officers who booked him back to the cell claimed that he appeared weak and unstable and was unable to support himself on the wall. The victim was found in the cells the following morning dead. The post-mortem report by IMLU's pathologist indicated that inflicted pain resulted to shock that led to cardiopulmonary arrest and death of the victim.

⇒· 48 year old Charity Njoki Waweru was shot dead at Huruma Estate on 15 January 2001 by a police officer who was in pursuit of a suspect. The officer did not even stop to check on the victim after the said shooting took place. No action was taken despite the matter being published in the media and the Attorney General promising action on the matter (IMLU 3009)

⇒· James Wagiku Ndungu was shot dead on 3 August 2003. Police claimed that the deceased was allegedly participating in a robbery in Eastleigh, Nairobi. A post-mortem that was conducted on 12 August 2003 by IMLU's pathologists attributed the cause of death to haemorrhage due to gunshot wounds to the head, chest and upper limbs (shot at short range). There was no response to the 17 August 2003 letter of protest to the Commissioner of Police regarding the extra judicial killing (IMLU 1673)

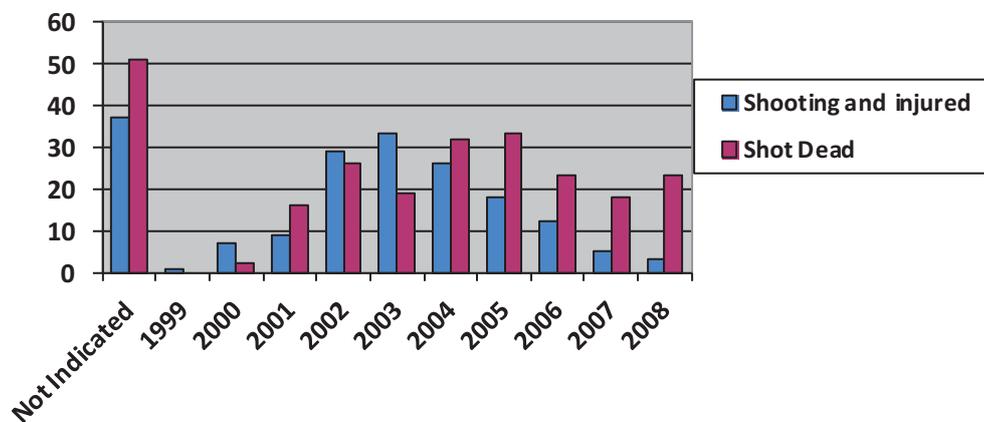
⇒· SNK was allegedly arrested by the police from Eldoret police station. His body was later retrieved from Sosiani River. The post-mortem showed that he sustained several head injuries occasioned by a blunt object.

64. A unique finding on gun related violations that included extrajudicial killings and shootings resulting in injuries is the gradual increase from 1999 to 2008 with the 1st quarter of 2008 - the only period under review in the year - yielding almost a similar number of casualties as the whole of 2006 (see Figure 6). This can be attributed to the gradual increase in the levels of impunity and the enactment of the Criminal Law Amendment Act of July 2003<sup>30</sup> that prohibited the reliance on confessions obtained by police officers as evidence, which created an environment where police resorted to use of firearms on criminal suspects, including instances of summary executions.

65. Additionally, during the first two months of 2008, IMLU documented many deaths occasioned by gunshots and blunt object injuries during the post-election violence.

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<sup>30</sup>The law of evidence requiring confessions to be recorded before magistrates was subsequently amended in 2005 to enable senior police officers record the confessions.

**FIGURE 6: NUMBER OF GUN RELATED CASES**

### **Torture, Cruel Inhuman or Degrading Treatment or Punishment**

66. TCID in custody and in public places emerged as the single largest form of violations, constituting 33% of all the cases considered. Among the survivors who sought assistance from IMLU are those who suffered gruesome torture at Nyayo House because of suspected political dissent, former military officers suspected of engaging in a military coup attempt on 1 August 1982, and survivors of police operations particularly in the urban poor slums of Mathare, Ngomongo and Kawangware.
67. Human rights defenders and political activists were also not spared human rights violations by law enforcement officers when they exercised their freedom of assembly and suspected Mungiki adherents when they conducted public prayer meetings.
68. While a distinction was made between torture and other related violations, the study reveals the very close nexus or interrelated nature between the violations coupled by weak redress mechanisms within the justice system that act to catalyse the violations.

### **5.3. ALLEGED PERPETRATORS**

69. The survey reveals that the leading perpetrators remain police officers, with over 52% or 1097 cases whereas most of the cases were exclusively perpetrated by police officers while in other cases brutality was carried out by the police jointly with other actors like state officials and civilian groups including vigilante groups (see tables 4 and 5 above).

70. Other agencies implicated include the Administration police, the Specialised Police Units like flying squad, GSU and Kwekwe squad, the Council askaris, chiefs, District Officers, Anti Terrorism police and Prison Warders.

#### 5.4. SYSTEMIC AND MASS INCIDENTS OF TCID

##### **Victims of torture – Military officers associated with 1st August 1982 Coup attempt**

71. Most of the army cases were in the category related to torture inflicted during interrogation for their alleged roles in the coup attempt in 1982. On Sunday, 1 August 1982, a group of soldiers from the Kenya Air Force took over the radio station Voice of Kenya and announced that they had overthrown the government. The attempt was quickly suppressed by loyalist forces but with a lot of civilian casualties. After the coup attempt, the entire Kenya Air Force was disbanded. Twelve people, including its leader senior private Hezekiah Ochuka, were sentenced to death, and over 900 were jailed.
72. Those suspected of taking part in the plot to overthrow President Moi's government were arrested and tortured. They described enduring torture by the military police and prison warders while in custody. This consisted of beatings, being detained in flooded cells, stripped naked in front of others, and forced to sign a confession.
73. One victim described his tribulations as follows:

##### CASE STUDY 4

“I was stationed at 50 ACB Embakasi Garrison. I had returned from a joint exercise at Lodwar. I was arrested upon return and accused of participating in the failed coup attempted by the Air Force yet I was a Kenya army officer from 50ACB, a flying unit within the Kenya army. I was taken to Langata barracks and later to Industrial Area, Kamiti and Naivasha. While in custody I was beaten, detained in flooded cells, stripped naked in front of other people and forced to sign a confession.”<sup>31</sup>

##### **Torture survivors – Nyayo House Torture chambers**

74. The experiences of political dissidents during President Moi's era are illustrative of Kenya's history with grave human rights abuses. Some of these heinous crimes were committed at the basement of a government building known as Nyayo House that is located in

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<sup>31</sup>Personal account of a Torture Survivor – IMLU records

the heart of Nairobi city. The experiences of survivors of TCID are highlighted in *We Lived to Tell – The Nyayo House Stories*. Below are some of the excerpts posted at PoliticalArticles.net:<sup>32</sup>

### CASE STUDY 5

“Cornels Akello Onyango was dazed when a beautiful young brown woman menacingly approached him brandishing a razor blade. “Get ready to be circumcised,” she barked as she walked towards him. For him, the fact that the threat was coming from a woman was a shock in itself. The look on her face left no doubt that she was capable of carrying out the threat. Onyango, stark naked, frightened and his mind in a turmoil, was in front of a group of about 10 stone-faced men. The looks on their faces left no doubt in his mind that at some stages the encounter would develop into a violent and vicious confrontation.

Onyango's experience illustrates a fraction of the suffering, denigration, humiliation, physical and mental abuse of the victims and survivors of the Nyayo House torture chambers and other places of detention during the Moi regime.

Author and historian Maina wa Kinyatti describes the scenario thus: “I was ordered to strip naked and sit down on a chair. My hands were chained to the chair and I could not move at all. From the moment the brutal interrogation started, everything in the room changed and the language of coercion and violence was introduced.”

75. Nyayo house torture survivors who contacted IMLU following their ordeals sought medical attention, counselling and litigation assistance. They described beatings, being denied food, stripped naked and prolonged detention in water soaked cells at Nyayo House. Medical examinations of the victims confirmed torture allegations and their request to access justice through civil litigation was supported through Litigation Fund Against Torture (LIFAT). In some of the matters recently concluded in court, cash awards were given to the victims.
76. In one of the cases highlighted in the East African Standard Newspaper of 9 December 2011, George Kihara, a Nyayo House torture survivor was awarded Ksh 5 million as compensation over the torture and the economic ruin he suffered during the crackdown on alleged Mwakenya dissidents 24 years ago. Payment of damages as compensation for the violations and contraventions of the fundamental rights and freedoms was also awarded by the High Court in Nairobi in the matter of Harun

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<sup>32</sup> Excerpts from the book, *We Lived to Tell: The Nyayo House Stories*. Friedrich Ebert Stiftung (FES), Accessed online at <http://www.politicalarticles.net/blog/2009/08/24/the-evil-and-dark-legacy-kenyas-former-president-daniel-toroitich-arap-moi/>

Thungu Wakaba v. Attorney General (Miscellaneous Application 1411 of 2004).<sup>33</sup>

**Police operations – Mathare "Kosovo"**

77. On the morning of 6 July 2007, Mathare Kosovo slum was surrounded by a contingent of police officers from the Administration Police Unit, General Service Unit and Regular Police. The operation was allegedly intended to flush out members of a suspected criminal gang called Mungiki and retrieve illegal firearms. This followed alleged killings of police officers in the area by suspected members of the criminal gang. During the dawn raid, police broke into homes, beating people senseless and ransacked houses as they searched for weapons. Residents claimed that they were forcibly dragged into an open field, some were stripped naked and were beaten during arrest using batons, whips and rungas. They were further forced to lie on the ground under scorching sun all day during which they were stepped on, beaten and dogs were unleashed on them. Some people were shot dead when they attempted to flee, and there were accounts of shootings of unarmed individuals at close range.

78. Those injured were not allowed to seek medical attention. Like other residents, they were kept in the open on forced positions for a whole day without food or water. Men, who were the particular target group, were separated from women. They were further screened and tortured to reveal whether they were members of the Mungiki and if they possessed weapons. This degrading exercise of screening was mainly targeted at Kikuyu men who were perceived to be Mungiki. They were forced to strip naked to check if they wore underwear with the reasoning that Mungiki did not wear under garments. Some were shot dead during the operation. One survivor of torture during the operation described her experience:

CASE STUDY 6

*I was in my house when the police came in, beat me and dragged me out. They said I produce Mungiki and guns. I was forced to lie down outside. The police then proceeded to whip me and also beat me with their rungas (baton). They did this repeatedly until about 5 in the morning. I am experiencing pain on the shoulders and buttocks and I am unable to sit well.*

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<sup>33</sup>High Court at Nairobi Harun Thungu Wakaba v Attorney General {2010}Eklr: Kenya Law Reports at [www.kenyalaw.org](http://www.kenyalaw.org)

79. The 2008, the US State Department report on the State of Human Rights in Kenya highlighted these incidents in Mathare Kosovo and noted that there were no developments in the investigation of the July 2007 police killings of 27 persons. In addition, there were no developments in the investigation of the June 2007 police raids in Nairobi's Mathare slum, where police admitted to killing 18 persons in response to the murder of two police officers.<sup>34</sup>
80. The youngest victim of this operation was a six month old baby that was tear-gassed and succumbed to her injuries.

#### **Police operations – Kawangware**

81. Another incident involved residents of Kawangware. In the morning of 25 October 2003 at 2.30 am, police surrounded a residential complex consisting of about 35 houses. Unaware of the police raid, the caretaker refused to open the gate because the alleged police officers had refused to identify themselves. A combined force of regular and administration police officers forcibly opened the gate and attacked the lone caretaker. He sustained injuries on the face, lost his lower right premolar, had a loose upper left premolar. He was also beaten with blunt objects on the shoulder and the lower limb. The officers proceeded on to force open each of the thirty five houses. They were allegedly searching for unknown items.
82. Residents described physical and psychological torture following this brutal encounter. They were beaten with all manner of weapons – guns, whips and batons – or were kicked. People were also forced out in the cold, while semi-dressed. Since the exercise was conducted by a combined force, it was impossible for them to identify individual perpetrators.

#### **Operations to reign in Mungiki**

83. IMLU received complaints of TCID from members of the Mungiki. This is probably the most publicised vigilante group in Kenya whose existence, although outlawed, is never in doubt. This group is said to engage in activities ranging from sheer criminal activities to providing state-like social services for a fee.
84. IMLU documented various incidents in which meetings of suspected Mungiki members were violently broken, participants brutalised and shot at while survivors were detained at police stations without access to medical assistance. In one of the incidents that took place on 3 October 2002, police descended on the gathering of over 120 members meeting at a private home in Sabasaba, Muranga. A number of people sustained injuries after

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<sup>34</sup> Human Rights Report on Kenya – 2008 Country Reports on Human Rights Practices – US Department of State Report <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm>

being shot at while others sustained blunt object injuries and fractures on the lower and upper limbs.

85. It is worth to note that in some of the cases reported to IMLU, police covered their transgression on innocent civilians by branding them as Mungiki. Such was the fate of a 28 year old man in Kianjoya, Nakuru, a victim of misuse of firearm by police officers. He was shot and injured by the police for no apparent reason. Rather than being taken to a hospital, the survivor, who was shot in the left upper limb causing injury to his nerves, was dragged to Nakuru police station on allegations of belonging to Mungiki. He suffered paralysis. IMLU took up the matter to seek justice.
86. On 1 June 2007 President Mwai Kibaki warned Mungiki "not to expect any mercy" and three days later an operation in Muranga led to the arrest of at least 300 suspects and the killing of at least 20. The security agencies argued that the group was "undertaking an illegal oath ceremony."<sup>35</sup>
87. Mungiki, which has a strong presence in the slums of Nairobi, is said to have endeared itself to people living in informal settlements through provision of basic services like electricity, water and sanitation for a fee, although their modus operandi is characterised by extortion and violence, as citizens who are unable or unwilling to pay risk being kidnapped, tortured or even killed.<sup>36</sup>
88. In July 2007, the Kenyan police established a special police unit, called kwekwe, to carry out a crackdown on Mungiki members, following several brutal murders attributed to the Mungiki in the Central Province. This police unit has functioned as a death squad that carried out mass executions of Mungiki members and suspected adherents.<sup>37</sup> KNCHR condemned the activities of Kwekwe, noting that although KNCHR does not condone atrocities committed by Mungiki, extra-judicial executions and other brutal acts of extreme cruelty have been perpetrated by the Police against so-called Mungiki adherents and that these acts may have been committed pursuant to official policy sanctioned

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<sup>35</sup>. IMLU, "Torture and related violations in Kenya- An Alternative report to CAT, " November 2008 Available at <http://www2.ohchr.org/> [Accessed on 27th December 2011]

<sup>36</sup>. *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, Human Rights Watch, 17 March 2008, Volume 20, No. 1 (A), available at: <http://www.unhcr.org/refworld/docid/47de7bd22.html> [accessed 20th December 2011]

<sup>37</sup>. See Kenya: Mungiki – Abuser or Abused. A Landinfo – Country of Origin Information Centre (Norway). 29 January 2010. Accessed online at [http://www.landinfo.no/asset/1123/1/1123\\_1.pdf](http://www.landinfo.no/asset/1123/1/1123_1.pdf)

by the political leadership, the Police Commissioner and top police commanders.<sup>38</sup>

89. The Survey revealed 3 cases of enforced disappearances occasioned by the infamous "Kwekwe squad" against alleged Mungiki:

#### CASE STUDY 7

*Kimani Ruo was a co-accused to Maina Njenga in the charges of illegal fire arm possession and being found with a narcotic drug. Upon conclusion of the case and consequent acquittal on 21 June 2007, Mr. Kimani was allegedly abducted outside the Nairobi law court and his body has not been found to date.*

*Benard Kiriinya, a whistle blower who was a former member of the said police unit, was gunned down shortly after giving a sworn affidavit to NGOs and the media on 25 June 2008 admitting to being involved in the kidnapping and witnessing the brutal murder by colleagues that was carried out in the outskirts of Nairobi.*

*A habeas corpus application in court is yet to be concluded.*

### 5.5. FORMS OF TORTURE

90. Various known forms of torture were documented during the period under review. These were both physical and psychological in nature, and included:

- a. Blunt trauma, such as a punch, kick, slap, whipping, a beating with wires or truncheons or falling down;
- b. Positional torture, using suspension, stretching limbs apart, prolonged constraint of movement, forced positioning;
- c. Burns with cigarettes, heated instruments, scalding liquid or a caustic substance;
- d. Electric shocks;
- e. Asphyxiation, such as wet and dry methods, drowning, smothering, choking or use of chemicals;
- f. Crush injuries, such as smashing fingers or using a heavy roller to injure the thighs or back;

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<sup>38</sup> The Cry of Blood: Report on Extra-Judicial Killings and Disappearances, KNCHR September 2008

- g. Penetrating injuries, such as stab and gunshot wounds, wires under the nails;
  - h. Chemical exposure to salt, chili peppers, gasoline, etc., in wounds or body cavities);
  - i. Sexual violence to genitals, molestation, instrumentation, rape;
  - j. Conditions of detention, such as a small or overcrowded cell, solitary confinement, unhygienic conditions, no access to toilet facilities, irregular or contaminated food and water, exposure to extremes of temperature, denial of privacy and forced nakedness;
  - k. Deprivation of normal sensory stimulation, such as sound, light, sense of time, isolation, manipulation of brightness of the cell, abuse of physiological needs, restriction of sleep, food, water, toilet facilities, bathing, motor activities, medical care, social contacts, isolation within prison, loss of contact with the outside world (victims are often kept in isolation in order to prevent bonding and mutual identification and to encourage traumatic bonding with the torturer);
  - l. Humiliation, such as verbal abuse, performance of humiliating acts;
  - m. Threats of death, harm to family, further torture, imprisonment, mock executions;
  - n. Threats of attack by animals, such as dogs, cats, rats or scorpions; and
  - o. Psychological techniques to break down the individual, including forced betrayals, accentuating feelings of helplessness, exposure to ambiguous situations or contradictory messages.<sup>39</sup>
91. Those who suffered physical torture described being hit with gun butts, whips and batons while others were leg and hand cuffed for long hours.
92. During interrogations, survivors of torture talked of being suspended between two tables with a wooden rod put across both, tied below the knees and beaten with sticks, burnt with cigarettes,

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<sup>39</sup>. UN Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, pp 37 available at: <http://www.unhcr.org/refworld/docid/4638aca62.html> [accessed 2 January 2012]

kicked with boots and slapped. On occasions, victims were forced to drink dirty water or urine. These forms of violations were regularly mentioned by victims of TCID at Nyayo House. Individuals like Paul Njoroge Kamau suffered similar degrading treatment before being tortured in custody into signing a confession.<sup>40</sup>

93. There were also cases where survivors were stripped naked, immersed in cold water or locked in waterlogged rooms as were the case with Air Force 1982 coup suspects and the Nyayo House victims. Francis, a torture survivor from Molo, was for example threatened with drowning. He was immersed in a tank full of water by police from Molo police station.
94. In other instances, all torture, cruel, inhuman or degrading treatment and punishment was meted. One survivor described how she was not only beaten, but her clothes were torn and she was left almost fully naked in the presence of her children. This incident took place when police conducted a house search arbitrarily on allegation that her husband had committed a robbery. During the search, money was allegedly stolen, food was poured on the ground and she was forced to identify her husband at gun point. The husband was released after being held in custody for 14 days at Karuri Police station where he was allegedly tortured.
95. Unlike the above case where no charges were preferred, in other cases, victims were tortured and malicious prosecutions ensued. A good example is that of a female teacher at Etago Primary School, who described her torture experience at a symposium to mark the UN International Day of Torture. The survivor of torture was arrested on the 23 June 2003 in Etago village in Kisii and was seriously beaten during arrest. She was hit with gun butts, kicks and blows and was later charged with a fabricated charge of incitement (reported in the East African Standard on 28 June 2003).
96. In addition to incidents perpetrated by police officers during and following arrests, TCID occurred at prison facilities. In Nyahururu T-falls remand, for example, remandees were allegedly assaulted by the prison warders. During IMLU visits to the facility, the victims appeared afraid and could not freely narrate their ordeals in the presence of the warders.

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<sup>40</sup> Beaten, thirsty and exhausted, PN Kamau was forced to drink dirty water that had pooled on a side walk when he was dragged to Kabete police station by arresting officers. At the station he was severely tortured to make a confession regarding engaging in criminal activities. Refer High Court Case (HCCC No. 667 of 2005). IMLU 3150.

97. Dog bites and human bites have also been used on the victims of torture. This was noted during a prison visit at Embu prison where IMLU met with many individuals with injuries occasioned by human bites. Some survivors were also bitten by dogs when the assailants allegedly unleashed their dogs on them.

## **5.6. DUTY BY THE STATE TO GRANT REDRESS AND COMPENSATE VICTIMS**

### **5.5.1. Criminal accountability**

98. The survey reveals that the majority of the perpetrators were never held to account, a fact that could rightly be attributable to systemic infrastructure that fails to hold perpetrators to account for their actions.
99. This further point to the fact that existing systems of investigating acts of torture as well as prosecuting and punishing the perpetrators are seriously flawed.<sup>41</sup> Firstly, there is the lack of definition of torture within the Laws of Kenya and the investigations of such allegations still vests on the same institutions implicated. This includes in instances of extrajudicial killings, summary executions or custodial deaths where families of the victims are still at the mercy of the same institutions adversely mentioned to trigger and institute public inquests<sup>42</sup>.
100. Secondly, in the rare instances where public inquests have been held and the courts have ruled implicating certain perpetrators, the Attorney General (as he was then) has failed and/or refused to prosecute.
101. What is more, where recommendations of the court were that police officers be held accountable following inquests, there was a clear failure by the police to expedite the process. The prosecuting arm which was staffed by police officers often employed delaying tactics, failing to produce in court key witnesses or exhibits.<sup>43</sup> This was successfully used to frustrate justice.

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<sup>41</sup>Redress, Reparations for Torture: A Survey of Law and Practice in Thirty Selected Countries. May 2003. Pg 57 Available at <http://www.redress.org/downloads/publications/AuditReportText.pdf> [accessed on 24th December 2012]

<sup>42</sup>Section 356 of the Criminal Procedure code mandates the officer commanding a police station with the responsibility of availing an inquiry file to the nearest magistrate for the institution of an inquest.

<sup>43</sup>Constitution of Kenya 2010 has created the Office of Director of Public Prosecution responsible for dealing with prosecutions.

### 5.5.2. Civil and Constitutional Reparations

102. The study reveals that TCID survivors continue questing for justice, with a few survivors successfully suing the State and receiving reparations.
103. Prohibitive legal costs, lack of awareness and enormous delays were some of the challenges that survivors and victims of TCID highlighted in their quest to seek reparations. The long delays to conclude cases and prohibitive legal costs were similarly experienced by organizations like IMLU that facilitated some of its clients to seek justice by providing legal services and costs for filing civil cases.
104. One of the cases reviewed was filed as far back as 2001 but was yet to be concluded. In such cases, the judicial process posed the risk of re-traumatizing survivors and families of victims.
105. In the matters that were concluded by court giving various awards, another challenge faced by the victims was receiving the awards. It is unclear how much of the financial awards granted by the courts have actually been paid out.
106. There are cases where Courts have been complicit to torture by failing to act as required by law when presented with apparent cases of torture,<sup>44</sup> and also failing to appreciate the gravity of the harm occasioned when quantifying the awards and rather adopting the law of torts as a basis of the quantification. The Table below shows

**TABLE 6: SUMMARY OF MONETARY AWARDS**

<b>Case Citation</b>	<b>Compensation</b>
Liza Catherine W. Mwangi Vs The A.G, High Court at Embu HCC No. 31 04 2007 [2010] eKLR	<b>7,122,000</b>
Cyrus Gitari Muraguri Vs The A.G, High Court of Kenya at Nairobi Misc Case No 1185 of 2003 [2011] Eklr.	<b>7,900,000</b>
Phillip Kimani Ngugi Vs Attorney General	<b>5,000,000</b>
Moses Tengeya Omweno Vs Commissioner of Police & AG, High Court of Kenya at Nairobi JR Application No. 265 of 2001[Un reported]	<b>7,000,000</b>
Harun Thungu Wakaba & 21 others v Attorney General , High Court at Nairobi Misc Case no.1411of 2004 {2010} Eklr:	<b>39,300,000</b>
Peter Makori Vs Commissioner of police (2006)	<b>5,053,671</b>
<b>Total</b>	<b>83,375,671</b>

<sup>44</sup> Paul Mwangi Muringa Vs Republic, Court of Appeal of Kenya at Nakuru Cri. Appeal No 35 of 2006

# 6

## KEY OBSERVATIONS

107. The review of IMLU cases during the period from 1999 to the end of February 2008 confirms that TCID not only exists in Kenya but is widespread. It is practiced by various state groups, although the various units established within the Kenya police are the leading perpetrators of the violations.
108. The Survey reveals that 84.2% of the survivors and victims were men while 15.6% were women. While the latter group had significantly lower numbers of reported cases, they suffered some of the most horrifying forms of sexual violations but were not encouraged by society to report the violations without the risk of stigmatization.
109. The survey confirms that at particular periods in Kenya's history TCID was systemic and that since 2003 there has been a paradigm shift with the drivers of TCID moving from political dissent to criminalisation of poverty. The trends of violations have equally witnessed a paradigm shift with more gun related violations, with extrajudicial killings and excessive use of fire arms becoming the hallmark of policing work.
110. TCID was routinely used as a tool of repression and policing in Kenya. The practice took place throughout the country with the leading perpetrators being the regular police, particularly units set-up to deal with crime and crowd control such as Kwekwe, GSU, Flying Squad and Criminal Investigation and Crime Prevention Units. The Administration Police and Council Askaris, who had regular contacts with civilians and other security agents like the army and Kenya Wildlife Services rangers were equally responsible for deaths, physical injuries and psychological trauma inflicted on civilians.
111. It is equally noteworthy that while thousands of citizens have fallen victim to these violations there exists no institutional or legislative framework to hold to account perpetrators and avail justice to the victims and survivors. This research reveals that Kenya has continued to turn a blind eye on instances of TCID without taking necessary appropriate measures in line with its international obligations.

112. Among the most affected persons were those in the age category of 18-35 years, mostly men. The low level of female victims can be attributed to assumptions made regarding crime – with young men considered crime suspects and therefore target of police brutality and also societal attitude that generally accepted violence against women. The lack of an enabling environment for female victims to freely report human rights violations – particularly the gruesome sexual violations related to torture - also likely explains low level reporting by female victims.
113. Most survivors and victims of torture were living in poor urban neighbourhoods and rural areas. This is indicative of a pattern where socio-economic set-back exposed residents to violations by officers in authority since they lived in areas considered prone to crime or hideout for criminals. Security officers invaded such areas in search of suspected criminals, illegal firearms, and members of illegal groups, drug traffickers, and manufacturers of illicit brew, among others. In Nairobi, most victims were from such areas as Kariobangi (South and North), Ngomongo in Ruaraka, Kayole, Soweto Kawangware, Dandora- Kariadudu, Mukuru Kayaba, Huruma, Mathare- Kosovo-Mathare 4A & 4B, Kijiji Chawa, Kibera, Githurai( Kimbo), Majengo, Pumwani as well as the River Road section of the city. Outside of Nairobi, rampant torture and other violations of human rights were reported in Kiambu, Thika and Ruiru as well as Nyeri and Ogembo, and Nyaribari-Chache areas of Kisii County.
114. Survivors and families of victims sought support from IMLU in the form of medical, rehabilitation, psychological and legal assistance.
115. Justice has been elusive, particularly since the mostly affected by TCID were from extremely low income earning social strata, and as the perpetrators were well aware, were unable to afford the prohibitive costs associated with seeking quality health care and justice in Kenya. In some cases, attempts at seeking justice were met with unending stumbling blocks including: threats by perpetrators against witnesses and individuals who attempted to seek justice; cover up by the police who were responsible for investigating their own colleagues; cover up and delaying tactics to frustrate justice by the prosecuting office, which is manned by police officers, whenever inquests and criminal proceedings were brought in court against officers; arbitrary arrests and malicious criminal charges preferred on innocent people who attempted to pursue justice; long delays to conclude a criminal or civil matter; and prohibitive costs in accessing courts and legal fees for representation.

116. Although in a significantly lower proportion compared to people working in the informal sector, people in the formal sector were not immune to TCID. Lawyers and human rights defenders were targeted for violations when they condemned perpetrators or when they sought justice for the victims. Members of the armed forces were also occasional victims of gruesome violations by their colleagues, as was the case with suspected masterminds of the coup d'état in 1982. They were part of the victims of cruel, inhumane and degrading treatment (33%) and torture (15%) that was documented by IMLU. Other violations suffered included extra-judicial killings that comprised of 17% of the cases with a further 3% undergoing gruesome torture before being killed or succumbing to injuries inflicted during torture.

CASE STUDY 8:

*On 31 December 2001, a group of about 20 youth were riding in a pickup truck when they pulled over at Elf Petrol station along Ngong Road to refuel. The driver had a brief exchange of words with the attendant and as they quarrelled, the attendant pressed the security alarm bell to call the police and the security company. The police arrived soon after and shot at the pickup truck. Some passengers were injured by bullets while the driver was shot dead. Following intense media coverage, advocacy by civil society groups and relentless search for justice by the mother of two of the survivors who worked at the office of the Attorney General, among others, ensured that some police officers were arrested. However various hurdles were employed along the way of seeking justice including wanting investigations by the police, delays at arraigning suspects in court, failure to produce witnesses and exhibits in court, and failure to institute charges against some of the suspected perpetrators. At some point the AG intervened to demand serious charges be preferred on the suspects. These tactics to defeat justice not only frustrated the family and NGOs concerned but also the office of the Attorney General who regularly wrote to the Commissioner of Police highlighting concerns on how the matter was handled by police investigators and prosecutors (IMLU 2011, 2013).*

# 7

## CONCLUSION

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117. This research showcases the state of torture in Kenya with a view of strengthening the quest for the fulfilment of Kenya's obligations to ensure absolute prohibition of torture and act as an impetus in access to justice for the thousands of survivors and victims that have suffered violations without recourse to justice.
118. Use of brute force in regular policing work and criminalization of poverty appears to be entrenched in the law enforcement agencies in Kenya. This is demonstrated by the fact that TCID took place not only in public but also in places of detention, with a majority of the victims of TCID being indigents, particularly those living in poor urban settlements and rural areas, as well as people working in the informal sector like touts, mechanics, and hawkers.
119. Law enforcement officers routinely shot at civilians or beat them up in public or in custody, which occasioned loss of life or serious injuries. The perpetrators instantly denied engaging in the practice of TCID even without any form of investigation and despite medical and autopsy reports that indicated that 45.6% of TCID survivors had blunt object injuries, severe soft tissue injuries, moderate severe tissue injuries, and minor soft tissue injuries. Victims of extrajudicial killings were often described as dangerous criminals.
120. The practice of TCID in Kenya has been taking place despite Kenya's commitments at national and international levels to end this abhorrent practice. The Constitution of Kenya 2010, which among other things embraces international conventions ratified by Kenya and entrenches the Bill of Rights, and the recent reforms in the judiciary, the police and prisons represent progress towards eradication of practices like TCID in Kenya. What is more urgent however is the operationalization of these milestones, holding perpetrators to account and facilitating access to justice for the survivors and families of victims of TCID.

121. Furthermore, mechanisms like the TJRC are expected to not only document the plight of survivors and families of victims but also ensure that perpetrators are held to account and victims benefit from various forms of reparations.
122. On its part, IMLU has since its inception supported torture survivors and families of victims through medical assistance, bail assistance and litigation. IMLU has also assisted in the filing of civil suits to demand for the implicated officers to be held accountable and for purposes of seeking compensations; commencement of inquest proceedings; legal defense on fictitious charges; and criminal appeal against judgments on the criminal charges leveled against the victims. IMLU has also kept the Government on its toes by exposing extrajudicial killings, torture, arbitrary arrests, inhuman and degrading treatment of victims and through its legal interventions, some torture survivors have been vindicated while others have been awarded compensation over the torture and the economic ruin that they have suffered.
123. Additionally, the Government must demonstrate its commitment to wipe out the practice of TCID by implementing the 2003 public commitment to convert the Nyayo House torture chambers into a "monument of shame"<sup>45</sup> as a memorial, which remains an unfulfilled promise nine years later.

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<sup>45</sup> GOK *Initial Report by Kenya to CAT* . 2008. CAT/C/KEN/1 Para 104

# 8

## RECOMMENDATIONS

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For Kenya to fulfil its obligations under international law and its Constitution, it is imperative that the following recommendations be taken into consideration.

### **8.1. Legal Reform and Treaty Compliance:**

- i. Taking all necessary steps to ratify the Optional Protocol to the Convention against Torture immediately and to recognise the full competence of the Committee against Torture to receive and consider individual communications;
- ii. Enacting legislation to implement the provisions of the Convention against Torture, especially by making torture a specific offence in line with Article 1 of the Convention and by providing for an effective right to reparation for torture;
- iii. Immediately enacting of the Coroner Bill to delink investigations relating to custodial and suspicious deaths occasioned by law enforcement officers from the police; and
- iv. Adhering to the decisions and recommendations of United Nations treaty-monitoring and charter-based bodies as well as the relevant regional commissions and courts.

### **8.2 Institutional Reforms:**

- i. Prioritising reform within the law enforcement system that emphasizes the prohibition against torture and consequences which flow from it;
- ii. Carrying out institutional reforms, particularly relating to the operation of the police and army, including the development and dissemination of detailed guidelines and training modules for the eradication of torture focusing on acceptable investigative techniques, establishing independent complaint bodies to receive complaints of torture and to carry out prompt investigations in relation to accountability in the use of fire arms and ammunition, crowd control and chain of command in public demonstrations;

- iii. Ensuring that all substantiated allegations of torture lead to criminal investigations and ultimately, to prosecutions;
- iv. Making the fact that torture is prohibited and that there is no context in which it can be condoned a central component of the Constitution and of the training curricula of police and armed forces academies and of medical officers;
- v. Prioritising reform within the law enforcement system by strengthening investigative and forensic techniques through practical training and re-education at all levels; and developing mechanisms of positive reinforcement for law enforcement and security forces personnel who promote and respect human rights, and refrain from exercising torture; and
- vi. Initiating an annual review of actions taken by law enforcement officials on allegations of torture and ensuring that the review is in the public domain.

### **8.3. Recognise torture survivors' rights and needs for reparation by:**

- i. Public acknowledgement of responsibility by the State;
- ii. Creation of a reparations schemes for victims and survivors of torture.
- iii. Creation of a restitution program to clear criminal records of persons convicted based on evidence illegally obtained through torture.
- iv. Memorialising systematic torture through the immediate opening up of "Nyayo House Torture Chambers" and its converting into a monument of shame in line with the multiple commitments made by the Government, and other places where TCID took place;
- v. Formulating and implementing clear policies committed to recognizing and enforcing the right to reparation for serious human rights violations, and specifically for TCID;
- vi. Ensuring that survivors and victims of TCID have an effective and enforceable right to reparation through adequate legislation; and
- vii. Ensuring that adequately funded State compensation/reparation schemes are in place to provide accessible remedies in cases of mass crime or where individual perpetrators have impunity. Such schemes should enable torture victims to claim reparation in an affordable, simple and accessible manner.

- 8.4. Ensure the Individual Criminal Responsibility of Perpetrators of TCID and those who Order or Condone Acts of TCID by:
- i. Making the punishment of all perpetrators of torture a policy goal and supporting this policy by directing official investigations into each and every allegation of torture. Equally, ensuring that the results of these inquiries are fully and publicly disseminated;
  - ii. Ensuring an environment that enables victims of torture to raise allegations of torture in confidence. This recommendation will require substantial changes to the many institutions dealing with victims, including the police, prosecution, the judiciary and the medical profession. In order to assess how best to implement such changes, an independent audit should be undertaken to expose the difficulties faced by victims when approaching and dealing with these institutions;
  - iii. Conducting investigations more efficiently and transparently by ensuring the independence and protection of investigating and prosecuting bodies; and
  - iv. Eliminating any immunity, amnesties and defenses in relation to torture; particularly those provided for members of armed forces in general or in specific areas of conflict or for security forces by means of emergency laws or prevention of terrorism acts. This would include revoking any legislation that requires permission from the authorities for prosecution of the armed forces in so-called 'sensitive' regions.

**8.5. Strengthen Awareness of the Plight of Torture Survivors by:**

- i. Taking steps to increase dialogue within the police and security forces on the need to eradicate torture, its causes and consequences, and on the severe impact torture has on individual victims, their families and society at large;
- ii. Undertaking confidence-building measures between the police and other law enforcement officials and civil society, such as using community liaison officers, setting up victim and witness protection and support units, holding open days or public meetings in which the public has the opportunity to highlight concerns, with the aim of encouraging victims of torture to speak out, to name alleged perpetrators and to seek reparation; and
- iii. Highlighting a culture of respect, tolerance and non-violence by including training modules in school curricula, civic education campaigns, and by using the mass media; and using 26 June, the International Day for Victims of Torture, to organise activities aimed at publicising the plight of torture survivors in different communities and to encourage local initiatives to improve their conditions.

**8.6. Improve Procedures for Claiming Reparation for Torture by:**

- i. Deepen the mapping of all victims of TCID with the purpose of improving access to justice for survivors of torture by ensuring greater access to legal aid, obliging the legal community to provide free legal services to torture victims, and simplifying and streamlining procedures for invoking legal remedies;
- ii. Ensuring that those subjected to pre-trial detention or imprisonment are provided with written guidelines or are otherwise informed, by the agency in the criminal justice process they come into contact with, be it police officers in the course of arrest and detention, the magistrate, the public prosecutor, prison directors, or others, on their right to be free from torture and the steps they may take if those rights are violated;
- iii. Enabling victims to have a more active role in civil, criminal and administrative processes by streamlining procedures and removing bureaucratic impediments. This should be accomplished by ensuring that victims may initiate private prosecutions in a simple and affordable manner; by removing the structural and financial impediments to the lodging of civil claims; and by facilitating access to the judicial review of administrative decisions; and
- iv. Facilitating victims of TCID to access non-judicial remedies such as medical treatment and support by way of a waiver of fee program and by adopting legislation to protect victims, their lawyers and other witnesses from intimidation and harassment and ensuring that allegations of intimidation and harassment are taken seriously and dealt with expeditiously.

**8.7. The Judiciary, in particular the Supreme Court, is urged to develop a consistent jurisprudence on reparation for torture, by:**

- i. Taking into account the gravity of torture as one of the worst violations of human rights and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate nature and scope of reparation;
- ii. Incorporating the wide array of domestic and comparative constitutional jurisprudence, and as appropriate, taking into account international human rights law in their judgments;

- iii. Not confining the scope of reparation to compensation but awarding measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition when ruling on reparation for torture victims, and taking into account the particular needs and circumstances of torture survivors;
- iv. Refusing to admit statements and confessions elicited through torture and ordering investigations into allegations of torture when they arise in the course of judicial proceedings;
- v. Ensuring a mandatory judicial enquiry into all deaths in custody to reflect the letter and spirit of the provisions of Section 386 and 387 of the Criminal Procedure Code (Cap. 75);
- vi. Ensuring that magistrates and lower courts carry out appropriate investigations into allegations of torture by maximizing on the provisions of Section 89 of the Criminal Procedure Code;
- vii. Retaining a primary role in overseeing the enforcement of awards for reparation issued by the courts; and
- viii. Ordering wide scale institutional reforms when systematic practices of torture are uncovered through judicial proceedings.

# 9

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