



Shielding Impunity

A Human rights Accountability Report

2006









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Promoting Ethical Policing

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”





OSCAR FOUNDATION

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Profile

About Oscar Foundation free Legal Aid Clinic-Kenya (OFFLACK)

The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) Free Legal Aid Clinic Kenya was set up in 1998 and formally registered in 2002 as a non-governmental Organization, on a realization that Law, Policy and judicial action that upheld Human Rights Frame work had a central role to play in effectively dealing with the spread of HIV epidemic.

The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) has been dealing with HIV/AIDS & the Law since the year 2001 when it published its training manual on HIV/AIDS and Legal Implications in Kenya.

However, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) continues to do much of their litigation on HIV in an adhoc manner, as and when the need arose. In the 1990's, when Kenya saw the need to deal with HIV/AIDS urgently and effectively, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) felt that a planned legal intervention was necessary to support PLWHA. It also felt the need to sensitize decision markers and those affected, on law and its link with the public health crisis that HIV/AIDS created. With this in mind Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) set up a mobile full time Legal Aid Clinic with a 24hours help line response number **0900 555 999** the unit started Para- legal training in Nairobi, Ruiru, Thika, Mombasa and Kakamega town and published a HIV/AIDS protocol at work place.

This was followed with setting up of a project office (PO) at Vision Plaza, office No. 15 Mombasa Road Nairobi Kenya. Telephone 828127, 828975/6

The Foundation has a network of 150 Probono Lawyers working in their commercial offices country wide and heading Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) Local Project Advisory Group (LPAG)

The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) mobile full time Legal Aid Clinic has two main spheres of activity: -Providing Free Legal services to persons living with/affected by HIV/AIDS and the poor as provided in the Civil Procedure Act Cap 21 Order XXXII Rule 1-18 Laws of Kenya

-Advocacy and policy research on human rights and the law in order to access justice to those in custody and the poor.

Advocacy & Policy Research

The Foundation mobile Legal Aid Clinic unit's advocacy and policy research initiatives compliment the legal services. It's through the units' advocacy effort that links are made with other Non-Governmental Organization (NGO's). Policy Research initiative attempts to keep track of policy developments on human rights in Kenya.

The Advocacy and Policy Research Initiative of the Unit include: -

1. Conducting workshops/seminars/meetings on HIV/AIDS, human rights and the Law for various sectors including PLWHA, NGO's working in the HIV/AIDS field, Lawyers, and Policy Makers. The aim of these programmes is to empower and sensitize the various sectors that deal with the epidemic on the inextricable link between it and a right-based Framework and to build capacity and knowledge on human rights. Over the years the units has conducted several such programmes including monitoring places of detention via regular visits and training of paralegals Kakamega, Nairobi, Thika, Ruiru, and Mombasa.
2. Producing reports and materials that complement the aforementioned process. This includes reports on prison conditions and posters on access to justice.
3. Conducting and participating in campaigns (Access to Justice campaign).
4. Several other initiatives including teaming up with the judiciary, doctors, the police, and the prison department to organize and conduct training workshops, outreach activity in the form of stalls at fairs and in public, organizing monthly meetings as an opportunity monitor human rights accountability and make recommendations.

For More information about Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) activities Please call our HELPLINE 0900 555 999 and 0900 33 23 66 or visit our website at [http: www.oscarfound.org](http://www.oscarfound.org)

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Abbreviations

IMLU	:	Independent Medico Legal Unit
OFFLACK	:	Oscar Foundation Free Legal Aid Clinic-Kenya
IRCT	:	International Rehabilitation Council for Torture Victims
UNCAT	:	United Nation Convention Against Torture
OPCAT	:	Optional Protocol to Convention Against Torture
PLWHA	:	People Living with HIV/AIDS
KNCHR	:	Kenya National Commission on Human Rights
ICHRO	:	International Centre for Human Rights Observatory
UN	:	United Nations
MPs	:	Members of Parliament
NARC	:	National Rainbow Coalition
ODM-K	:	Orange Democratic Movement-Kenya
OB	:	Occurance Book
CP	:	Community Policing
DSC	:	District Security Committee
ICCPR	:	International Covenant on Civil and Political Rights
Sec	:	Section
Changaa	:	Local Brew

Acknowledgements

This report is the result of complaints of police abuse documented in Kenya over a period of four years, as well as subsequent surveys conducted by the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) in six provinces of Kenya namely; Rift Valley, Coast, Central, Western, Nairobi, and Eastern. A team of paralegals collected the information from these provinces. The staff at the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) worked tirelessly for the past six months to compile this report. Mr. Evans Wafula – a Consultant in Human Rights and Media Development compiled and edited the report for publication. Mr. Kamau Kingara– OFFLACK Executive Director provided both the moral and managerial support to enable the completion of this report. Mrs. Nancy Kingara–OFFLACK Board member provided both leadership and supervision of this report.

Our acknowledgment also goes to all our paralegals whose tireless works have necessitated the information that is contained in this report.

We also wish to acknowledge Professor. Ole Vedel Rasmussen of the International Rehabilitation Council for Torture Victims (IRCT) and Mrs. Wamuyu Rasmussen–Executive Director of the International Centre for Human Rights Observatory (ICHRO) for their moral support. We also salute all the staff at the Independent Medico-Legal Unit (IMLU) for volunteering information that has been cited in this report.

This report is dedicated to all victims and survivors of police abuse who despite the pain and suffering that they have endured they still live with hope.

This work has been published with generous financial support from the Chef Choice.

Word from the Director

This Human Rights Accountability report seeks to presents to you the current human rights discourse in Kenya. It reveals the ineptness of the police, a failed judicial system, a disenfranchised citizenry, a betrayed democracy, and a society on the brinks of corruption and lawlessness.

The report dubbed '**Shielding Impunity**' reviews how the culture of impunity and lawlessness have threatened the ability of the police to maintain law and order, and have perpetuated brutality and corruption. The failure by government to uphold democracy, human rights and a peaceful transition has compromised fundamental human rights.

Corruption and police brutality is increasingly becoming a common phenomenon that threatens development and social justice. Lack of administrative and judicial measures to deal with police misconduct have entrenched the culture of impunity among police officers that escape punishment in the face of their victims.

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) introduced the Access to Justice project as part of our quest to provide free legal aid to those willing to press charges against police officers accused of abuse.

In 2006, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) in collaboration with the International Rehabilitation Council for Torture Victims (IRCT) in Denmark conducted the first ever Prison visit under the international monitoring. The visit led us to enter to a new initiative that established International Centre for Human Rights Observatory (ICHRO) aimed at documenting various forms of human rights violations.

The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) collaborates with both internal and external partners. In 2006, (OFFLACK) was admitted to the Commonwealth Human Rights Network, Currently the foundation is in the process of finalizing its accreditation process to the IRCT, an opportunity that will improve our capacity to serve more victims of torture and related human rights violations in Kenya.

The foundation observed that the government has shifted from delivering its election pledges as promised. This report offers an opportunity to analyze the general human rights situation in Kenya and addresses the fundamental human rights obligations that must be up held by the government.

In conclusion, we believe that the speedy completion of the current constitutional reforms will offer Kenyans a comparative advantage to enjoy human rights without fear of torture, extra-judicial execution or arbitrary arrests by law enforcement agents. It's our view that a new constitutional dispensation will embrace need for a peaceful democracy, promote reconciliation and protect human rights.

Finally, this report seeks to ensure that accountability and transparency in the administration of justice is upheld without fear or favour. Every Kenyan will be treated justly devoid of tribalism, nepotism and favoritism.

Kamau Kingara

Executive Director

OSCAR FOUNDATION FREE LEGAL AID CLINIC-KENYA (OFFLACK)



Introduction

Human Right Discourse

The Kibaki administration missed the opportunity when it failed to address historic injustices and negated on resolving issues that are pertinent to the peaceful transition and the very future of democracy, human rights and the rule of law. The NARC government was voted into power primarily because the Moi government was regarded deceptive and undemocratic.

Undemocratic because the previous elections were characterized by violence and claims of malpractice; the state instruments were partisan; the government was intolerant to divergent opinions; and the government was insensitive to popular demands. However, since NARC came to power, there have been undercurrents that the Kibaki administration is no different from its predecessor after all.

Firstly, though the Kibaki government is more tolerant to different opinions, recent events indicate that the government is growing sensitive by the day. Indeed, like its predecessor, the administration is eager to use the oppressive tools of the state including the police, and provincial administration to muzzle opposing opinions. The recent attempt by the administration to bar proponents calling for constitutional change has been interpreted in this light.

Paradoxically, while the NARC leaders were in the opposition, they vigorously campaigned for the dismantling of the provincial administration and campaigned for the establishment of a democratic police system. The then official opposition party, Kibaki's Democratic Party of Kenya, presented a memorandum to the constitution of Kenya Review Commission calling for the scrapping of the provincial administration. However, on assuming power, they have not only defended the administration, but a minister in the office of the president has been quoted saying they will weed out those sympathetic to the opposition.

Secondly, the NARC leadership has increasingly been using the same old methods. In the previous held by-elections, NARC ministers have been criss-crossing the affected constituencies using the trappings of power, state resources and promising largesse from the state¹. Yet, when they were in the opposition last year, they constantly accused KANU, which was in power then, of using state resources for partisan gains.

1. See Sunday Nation 27 July 2003, " NARC has failed democracy test."

Closely related to that, of course, is the old tactic of divide and rule and the mentality that only those who support the government will benefit from government resources. Week after week, NARC ministers are quoted exhorting the various ethnic communities to support the government if they hope to benefit from its largesse².

Not even yesteryears' democracy and human rights crusaders are immune from this anachronistic thinking³. Indeed, when the president visited his home turf, there were deliberate efforts to isolate and condemn a part of Central Province that voted for the opposition. Apparently, the right to an opinion and association has lost meaning now that NARC is in power.

Thirdly, the old issue of selective application of the law has reared its ugly head again. There are increasing concerns that the much-taunted war against corruption is turning out to be selective and targeted at specific individuals and families. For many key players in the current administration were in stalwarts of the previous administration. It's therefore highly inconceivable that they were not involved in the corruption of that era.

Indeed, their names appear in several public accounts and public investment committee reports. Others were mentioned in the various human rights reports as players in various human rights abuses including ethnic violence. Yet, they continue serving in the cabinet as ministers, assistant ministers and others as influential NARC MPs, while government officers continue making allegations against certain families and individuals. Again the old adage that charity begins at home appears to have lost its meaning.

And fourthly is the question of the ruling coalition's internal democracy. As it were, a political party cannot give a country what it lacks internally. Thus, NARC cannot entrench democracy in the country if it cannot grant the same to its members. One measure of a party's attitude towards democracy is its capacity to subject its leaders to popular mandate, which is through party elections. Yet, this is the most divisive issue in NARC⁴.

The established tradition worldwide is that parties, whose ideological persuasions are close, form coalitions after elections in order to constitute a government, where no single party wins majority. For NARC, political parties and amorphous groups formed the coalition regardless of their political persuasions to win the December 2002 elections.

Thus, the party lacks clear structures and leadership, has no quantifiable membership, lacks unifying ideology and, much worse, has not agreed whether to be one party or to

2. See for instance Daily Nation 22 July 2003 where a former Minister for Water Resources is quoted telling Yatta residents to vote for a NARC candidate if they expect their water projects to be revived.

3. The above quoted minister is formerly a human rights and gender activist.

4. See Sunday Nation 27 July 2003.

retain its current amorphous state. The persistent war between NARC-Kenya and ODM-Kenya factions of the ruling NARC means that the party governs Kenya has failed to guarantee its membership internal democracy. And that undermines the capacity of the coalition to entrench democracy in the country.

On the human rights front, the NARC government has remained tinted and non-committal like the previous KANU one. On assuming power, it accorded human rights campaigners positions in its ranks, opened torture chambers and promised Kenyan to follow a piped dream, and embarked on 'reforming' the security organs.

However, there have been genuine concerns that the country may be sliding back into the days of dictatorship, torture and tyranny. In recent weeks, there have been complaints that police officers are engaging in arbitrary arrests; extra-judicial killings are still prevalent while the security officers have been accused of torturing suspects notably in Kisii⁵.

The Government continues to institutionalize the use of torture, cruel, inhuman and degrading treatment in places of detention. In 2004, fifty-eight prisoners were reported dead at the Meru GK prison in a span of 6 months. In another incident five prisoners were battered to death by prison officers at the same facility in mysterious circumstances.

The police have also been accused for use of torture to extract confessions from criminal suspects. According to a recent reports released by human rights organizations, torture, extra-judicial execution and mob justice accounted for a total of 574 deaths in 2004/2005 alone. The main causes of death were gunshot wounds (40%) occasioned by the police followed by blunt force trauma (36%). In several deaths caused by the police and other state agents, the reports points to a systematic and endemic mass execution by police of criminal suspects. In 2002 to 2005, a total of 1432 torture cases were reported to various organizations. Most of those who reported torture alleged to have been violated during arrest (60%), and 28% accounted for those tortured while in custody, and a staggering 2% were cases that occurred at home.

Moreover, the government recently initiated a disarmament operation in Marakwet, which was called off after a fierce battle between the residents and the security forces. While the numbers of the dead remains unknown, there are fears that the operation left behind trails of human rights abuses, which are not yet documented.

5. See the East African Standard 28 July 2003 Page 6.

There are also expressions of genuine grievances arising from the recent efforts to form a Truth, Justice and Reconciliation Commission. The concerns are that the proposed commission is a tactic to witch-hunt and humiliate certain individuals and communities, and not an effort to promote national reconciliation.

The old tactic of destroying people's income basis in an effort to remove them from certain areas, which was perfected in 1990s, has been brought back. In the last few weeks, the government, in conjunction with the Nairobi City Council, has been demolishing informal business structures in order to remove those businesses from supposedly road reserves. The problem is that this destruction, which has only been conducted in up market areas, leaves many people without an income and thus compromises their economic rights.



1 Police Misconduct

Police immunity

The cycle of police brutality continues to be perpetuated with impunity and remains the most serious and divisive human rights violations in Kenya. Excessive use of force by the law enforcement officers, including torture, extra-judicial executions, arbitrary arrests and intimidation, is rife in virtually all police stations in Kenya. The inability of the police force to make it possible for rogue police officers implicated in human rights violations in order to face the due process and be held accountable has been compromised by a rein of lawlessness and endemic corruption. This trend is rapidly precipitating a state of moral negligence and ineptness in the entire police force.⁶ A 'Democratic' police that guarantees protection and promotion of fundamental human rights of private citizens provides safeties for legal and administrative measures that deter impunity. In Kenya, a rogue police officer implicated in an offence that constitute a violation, is shielded from prosecution and is allowed transfer to another station where he goes to commit the same offences. Lack of administrative and legal measures to punish those implicated in human rights abuses virtually guarantees them impunity.

This human rights accountability report examines common obstacles to accountability for law enforcement agents in Kenya. Research for this report was conducted over five months, from early March 2006 through late July 2006.

Some of the cases sampled in this accountability report include: excessive use of force by police officer, torture, mob-justice, extra-judicial shooting and arbitrary arrest, which are set out in detail in chapters of this report, and are an example of cases that continue to be reported in the media and in survivors' testimonies.

6. "Excessive force" is used throughout this report to refer to force that exceeds what is objectively reasonable and necessary in the circumstances confronting the officer to subdue a person, as in Article 3 of the U.N. Code of Conduct for Law Enforcement Officials which provides that: "Law enforcement officials should use force only when strictly necessary and to the extent required for the performance of their duty." UN General Assembly resolution 34/169 passed on December 17, 1979, and in the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which stipulates that, "Whenever the use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved." UN Doc. A/CONF.144/28/Rev.1 (1990). Section 71 (1) of the Constitution of Kenya provides that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence. Police Act, Cap 84, Section 28 (c): Any persons who by force prevents or attempts to resists lawful arrest of himself or any other person; Sec 28 (j): Use of fire arm upon giving a warning that he intends to use arms and the warning is unheeded. Throughout this report, the term "excessive force" refers to abuse occurring both during apprehension and while in custody. This report also describes sexual assaults and torture by police officers that are unjustified and criminal assault

It is imperative to note, that, because of the inefficiency of the police oversight board to receive complaints against their fellow colleagues implicated in human rights abuses, only cases where there is public outcry and/or legal proceedings were reported, this report greatly relied on cases that are in the public domain; and where both administrative and legal action have not taken cause.

This gives stark evidence that police brutality is 'systematic and endemic' in Kenya; that measures to deter impunity have failed to yield any meaningful solutions; and that, in each case reported to us, survivors of police abuses face enormous obstacles in seeking legal redress to present any criminal prosecution against rogue officers implicated in human rights violations.

The obstacles to accountability are ostensibly similar from case to case. This Aspersions over the mode of recruitment, training, and management of the police force in Kenya pauses a question of moral negligence rather than an absolute failed system. So it is suffice to note that rogue officers who repeatedly perpetuate human rights violations represent a small minority; but critical to the image of the police force that is evidenced by the protection they systematically receive, and by the silence and lack of a structured system of administrative accountability, reporting and an independent civilian oversight.

Another set back to accountability is the lack of flow of information about patterns, trends and prevalence of abuse by police officer and other law enforcement agents; lack of openness regarding the police forces' plans and actions to prevent brutality and to end the culture of impunity makes it impossible to instill accountability. In most instances where there is credible data implicating the police in abuse, there is lack of evidence showing action taken by the force to deter human rights abuse. The practice is often coupled with institutionalized and official unwillingness to punish officers who commit abuses against citizens, only when they are faced with sensitive cases that expose long-standing negligence or tolerance of brutality. The formation of a customer care desk at all police stations has improved the public image of the police.⁷ Usually cases involving sexual assault and abuse of minors are reported and data is compiled for necessary action. Where there are no such desks, the report is directly received at the Occurrence Book (OB) by the officer on duty who later refers the matters to the relevant department for further action.

7. In 2002, the police Commissioner established a police complaints department to be situated at the police headquarter. Its mandate was to receive complaints against police officers and institute administrative and criminal prosecution. The Department was also tasked with collecting data on the frequency and types of abuse complaints filed nationwide. By 2006, nearly four years later, no prosecutions had been brought against any police officers implicated in abuses despite the numerous complaints received by the department.

Another positive development has been the launching of the “community policing” a civil crimes prevention strategy, and the subsequent police reforms initiative emanating from a five year strategic plan.⁸ The task force charged with the task of guiding the reforms observed shortcomings in dealing with accountability for misconduct in the ‘ police force; the task force recommended that radical administrative reforms be implement to end the culture of impunity rather than risking judicial injunctive action. This reforms where supported by community activists and civil rights groups, and included promoting ethical policing, launch of human right curriculum for police training, demilitarizing the police by putting into better use-of-military training and rules, creation of independent reporting mechanisms to deal with current and potential human rights violators in the police force, and enhance administrative disciplinary procedures. The police do not usually make its internal investigative public, but the Kenya National Commission on Human Rights (KNCHR) conducts independent investigations touching on police conduct. The commission receives numerous complaints on allegations of police brutality and conducts hearings. Upon establishing a case against the accused police officers, the commission recommends for prosecution.

This, however, have not be possible due to official arrogance and inept displayed by senior police officers who blatantly disregards the mandate of the commission and remain non-committal to abrogate the recommendations of the commission.

Police abuse experts, and some police officials, refer to “problem” officers, by which they mean officers who either have significant records of abuse or significant records of complaints from the public, and who thus should receive special monitoring, training and counseling to counter the heightened risk that they will be involved in some future incident of misconduct or brutality.

Allegations of police abuse are rife in most police stations in Kenya and take many forms. This report gives stark incidents as evidence of the obstacles to deterring, investigating and acting upon perceived police brutality and related human rights abuses. The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) is using these case studies to describe how the fabrics of impunity and a failing policy, legal and institutional framework have caused barriers that address meaningful accountability. Any alleged incident of brutality has a corrosive effect on the public image of the police force, and it is important that the system be overhauled to address the conduct of the police and protect and promote the human rights discourse. The cases described below provide a clear picture of moral negligence of the police force.

8. On 13th April 2004, president Mwai Kibaki appointed a 15 member Task Force on Police Reforms to recommend policy and institutional reforms as emanating from police strategic plan and other relevant documents. The terms of Reference call for extensive review of institutional and organizational changes that would mobilize the Police Forces into world-class people friendly and responsive institutions that would make Kenya not only a secure country but an investment destination of choice. The report of the task force (Pg 46, no 87) proposes that the Police Reform Agenda will ensure total rationalization and transformation of polices, staff, structures, systems and processes in a bid to deliver modern, accountable, responsive and quality policing services.

On 19th February 2005, Erastus Kirui Chemorei was shot dead in an ‘execution style’ by a team of police officers led by Kitale district security team. An independent postmortem conducted by Dr. Nathan Buziba of the Independent Medico-Legal Unit (IMLU)⁹ accompanied by Prof. S. Koslovo and Prof. V. Koslovo of the Moi Teaching and Referral Hospital, revealed that Kirui was shot on the head, chest, abdomen, pelvic area and upper limb. The report concluded that Kirui was shot at close range and died due to gunshot wounds from a high velocity rifle. Serious omissions were cited during the operation that was supervised by the Trans-Nzoia District Security Committee (DSC). No warning to use the firearms was ever issued to Mr. Kirui and at the time of shooting, he had been disarmed. Serious flawed background of security team that has a history of ineptness and intolerance, apparent misuse of firearm and lack of coordinated intelligence gathering were evident in the case (*see IMLU annual report 2004 for details.*).

Violation of the right to fair a trial

In January 2005, five police officers accused of torturing to death a suspect, Paul Kimani Wambiru, three years ago, were acquitted. The trial judge Hannah Okwengu, in her ruling said the prosecution failed to establish a *Prima facie* against the five police officers, yet independent autopsy reports presented to the court established sufficient evidence to conclude that Wambiru was tortured to death. The acquittals of the police officers in the Wambiru case casts legal benchmarks in the way prosecutions and investigations are conducted by the police. The practice is such that investigations are done by the police officers. It’s thus overt that crucial evidence that would have secured conviction was left behind deliberately to cover up and harden evidence implicating the officers.¹⁰ Kimani died while in police custody after police officers repeatedly torture him in 2002. Kimani, a robbery suspect, was bound with wrist and ankle cuffs, and according to fellow inmates he was hit

9. The Independent Medico-Legal Unit (IMLU) is a registered non-governmental organization that provides free legal and medical help to victims and survivors of torture in Kenya. In its monthly bulletins (Rights Journal, April 2005, pg 3): A human rights lawyer Juma Kiplenge, said that the police were holding a key witness in the Chemorie case at the Kitale police station. “Abubakar Ndiema had gone to the deceased home to buy a bull when two police Land Rovers arrived at the homestead. They (police) ordered him to stop and after shooting Chemorie, Abubakar was forced to eat the diseased brains and to carry the body the Land Rover. There have been attempts by the police to poison the witness, as he is the principle witness.

10. The report of the Task Force on Police Reforms appointed to recommend policy and institutional reforms emanating from the police strategic plan (pg 40, 5.1.3: Police Involvement in Crime), (i): Adopt zero tolerance strategy. Notify their native Districts/Locations of all officers dismissed due to involvement in crime.

with blunt objects.¹¹ The **police Act** was apparently broken when the police officers subjected Kimani to torture and they did not accord him medical attention while holding him in their custody as required by law. It's not clear why the investigating officers failed to take in account the evidence found in the autopsy that was conducted by the IMLU.¹² The press reported that the government doctor presented a conflicting autopsy report that may have given only a partial account of the cause of death and the deceased medical history and no thorough check was conducted during the first autopsy. The government pathologist was accused of ineptness and engaging in a conspiracy to conceal evidence, which in effect exonerated the accused officers. In large part; due to public dismay over cases of police brutality, implicated police officers are often transferred or suspended on disciplinary grounds.

A record of brutality complaints, inadequate supervision, and the conspiracy of silence were illustrated in the case of Kamau Njoroge. (**See IMLU monthly bulletin November 2005-Blinded by the Bullet**). Kamau (17yrs) was shoot through the eye and injured during an encounter with a police reservist on December 22, 1994. Kamau was then arrested and locked at the Central Police Station. A police reservist accused of being the mastermind behind the ogre of executions within the Nairobi Central Business District (NCBD) was implicated in the shooting and in at least two other brutality incidents that had been reported over the same period, including one that was substantiated by police complaints department involving the shooting of another street boy who had allegedly robbed a motorist along Waiyaki Way, westlands. Kimani was acquitted of any criminal offence by a magistrate's court after facing fabricated charges of Robbery with violence. In finding the prosecution's case unproven, the judge nevertheless criticized conflicting and inconsistent prosecution testimonies given by mostly police officers, citing a "nest of perjury" within the police force.

11. Section 74 (1) of the Constitution of Kenya provides that no person shall be subjected to Torture or to Cruel, Inhuman, or Degrading Treatment and Punishment. Although Section 74 (2) limits the application of this provision to the extent that punishment can be mated out legally, the degree to which the punishment ought to be imposed is not defined. The Criminal Law Amendment Act 2003, outlaws corporal punishment, hence reducing the ambiguity. The Police Act, Sec 14A (2) provides that no police officer shall subject any person to torture or any other 11. Section 74 (1) of the Constitution of Kenya provides that no person shall be subjected to Torture or to Cruel, Inhuman, or Degrading Treatment and Punishment. Although Section 74 (2) limits the application of this provision to the extent that punishment can be mated out legally, the degree to which the punishment ought to be imposed is not defined. The Criminal Law Amendment Act 2003, outlaws corporal punishment, hence reducing the ambiguity. The Police Act, Sec 14A (2) provides that no police officer shall subject any person to torture or any other cruel, inhuman or degrading treatment. Police Act, Sec 14A (3) makes it an offence for any police officer to contravene the provisions of Section 14A (2). Under Section 250-253 of the Penal Code Cap 63 Laws of Kenya, torture is a punishable offence, since it amounts to criminal assault. Subsequently the Police Act, Cap 84, Section 28 (c): States that any persons who by force prevents or attempts to resists lawful arrest of himself or any other person shall be guilty of an offence. See also Kenya Human Rights Commission (KHRC), Quarterly Human Rights Report, April -June 2003, Pg 18.

12. See Forensic Medicine, Medical Law and Ethic in East Africa 2005, pg 163, Chapter 6

Recommendation

Break the conspiracy of silence

That all state holders, who have an obligation to uphold international human rights standards by which Kenya is bound should be held accountable by to promote and protect human rights.

That police officers accused of extra judicial executions, torture, and harassment of suspects should be brought to justice expediently.

That all police officers accused of alleged of official misconduct should be subjected to administrative punishment. The punishment should be within the scale and magnitude of the alleged act of misconduct.



2 Accountability

Community Accountability and Oversight

Attempts by the public to address police brutality and miss conduct of law enforcement agents have been prompted whenever the local news media highlights cases of brutality or when certain cases of high profile attract public attention.¹³ This happens infrequently and in contrast with the prevalence of police brutality and ill treatment due to lack of public awareness and accurate information regarding allegations of police brutality.

The Kenya National Commission on Human Rights (KNCHR) and other Civil Society Organizations (CSOs), tasked with the mandate of monitoring and investigating cases of excessive use of force by police officers, are undermined from all sides: by the government and senior police officers who refuse to act on cases reported to them. The limited mandate of some Civil Society Organizations (CSOs) discourages them from taking decisive action against police abuses. Some CSOs do not produce credible reports on cases of police abuses, while others provide scant information on cases that have no legal basis. None of the reports produced indicates the action taken in dealing with specific cases reported: whether there was administrative or judicial punishment taken against specific police officers is difficult to establish. Although these organizations represent the point of greatest accountability and transparency in holding the government accountable to citizens, their reports fail to address cases that are of great importance to public policy advocacy.¹⁴

Police complaints department situated at the police headquarters, which investigates and recommends for administrative or criminal prosecution against any rogue police officer implicated in abuses, operates with excessive secrecy. Often, the public is not put abreast to what the complaints department undertakes, in fact, public opinion on the police has eroded. It's impossible to access information on the activities of the complaints department at vigilant house; in some cases, police investigators at the complaints department refused

13. The advocacy officer arranges a series of meetings with various news reporters and editors and shares with them the concept of advocacy journalism as a participatory strategy and introduces them to the various case studies and findings that CHARJ and the Consortium against torture and related Human Rights Violations is investigating and provides them with available information on the alleged violations (the victims names, addresses, telephone numbers, and the circumstantial report-usually a signed statement of account) with the guidance of the advocacy officer the news reporter/editor prepares a questionnaire and makes a number of references depending on the allegation, there are specific questions that we want the reporter to pass across while making his cross-reference on the case. Which, for instance, in most cases the police refuses to speak to human rights activists, the reporter must find out what information the police may be holding. In practice, the police may refer the reporter to his superior for comment because of the protocol not allowing him to comment on matters touching on the operations of the police force. Advocacy journalism sets room for more debt after the reporter writes a newspaper article or airs a television documentary or runs a radio commentary, making it easier for the allegations to be investigated and the perpetrator to be prosecuted- (Report on Advocacy Journalism, Engaging the Media in human rights) pg3, edited by Evans Wafula.

14. The Kenya Human Rights Network-(K-HURINET) stake holders meeting held at the Methodist guest house, deliberated on the need to establish a network of human rights organization and empower them through a secretariat.

to provide information on specific cases of public interest. Even, specific information that might be of great national interest, such as the number of deaths in custody in a particular police station, is withheld or is released in uncoordinated manner that lacks specifics to ascertain the cause for the death.¹⁵ While the police attribute their secrecy to part of investigations, information on specific cases of public knowledge.

Police prosecutors have been accused of ineptness and lack of transparency and accountability while dealing with cases involving officers accused of committing human rights violations when they appear in court facing charges resulting from torture, manslaughter, assault, torture, rape or sexual assault. There is no available statistic that is elaborate on prosecutorial decisions, or prosecutorial precedents in cases involving police officers. Without statistical information regarding the number of police officers on trial or those convicted, which information is not available at the prosecutions office, making it impossible to track the quality of investigations conducted by the police against fellow officers accused of human rights abuses.

The State Law Office (SLO) hardly handles cases involving police officers to the logical conclusion. However, the SLO receives a numbers of complaints against police officers filed by individuals who have been aggrieved by known officers. In exercising its mandate, the Kenya National Commission on Human Rights (KNCHR) receives complaints against the police from a number of individual and conducts investigations in accordance to the powers conferred upon them.¹⁶ However, there is no comprehensive information on the number of indictments against police officers accused of human rights abuses, but the police confirm that those officers accused of misconduct are punished according to the **Police Act** and are suspended on disciplinary grounds while others are transferred as a deterrent to repeating the same offence, often officers have been transferred to escape administrate or criminal prosecution before investigations even when investigations are incomplete.

Almost two years after the launch of Community Policing, intended to step up crime detection and prevention networks at the community level, the initiative have failed to yield the anticipated gains. A nationwide audit on the relationship between the police and members of the public indicates that the relationship is characterized by mistrust and accusations of brutality. Indeed, complaints of excessive use of force by police officers have escalated.

15. Forensic Medicine, Medical Law and Ethics in East Africa. Pg 185, Death during interrogation- a report published by the Independent Medico-Legal Unit (IMLU).

16. "A person wishing to lodge a complaint of the violation of human rights shall do so orally or in writing addressed to the Secretariat or such other person as may be duly authorized by the Commission for that purpose"-KNCHR Act, 2002, Sec 22 (1). "Upon receipt of a complaint under subsection (1), the Commission may- (a) Call for information or a report regarding such complaint from the Government or any other body within such reasonable time as may be specified by the Commission"-KNCHR Act, 2002, Sec 23 (3).

In June 2006, the **Economic Survey Report** cited a reduction in reported cases of rape cases and robberies along the major highways and that Community Policing has also contributed to fighting crime in the country. But, in a November 2005, household survey conducted by the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK), revealed that the contact between police and the public remained at the crossroads. In May 2006, the OFFLACK released another report on **police brutality and corruption**; the report was indicative of the fact that corruption induces the use of excessive force by police officers whose intention is to extort bribes from suspects, while police brutality is a case of moral negligence.

In 2005, a report of the Task Force on Police Reforms recommended that Community Policing be implemented through collaboration between the policing services, private sector and community organizations. This formed the basis for the OFFLACK survey which solicited information from households on all types of encounters with police, both receptive and hostile encounters, also the use of available data on excessive use of force by police officers was obtained from independent sources, which contain comprehensive and credible statistics on reported incidents of police abuses.

The police internal investigative mechanism, have deliberately avoided to address crucial questions that perpetuate impunity. The police needs to be responsive to its mandate and deal with crime in whatever form its committed and without selectively investigating cases. Where flow of information is extremely impossible for governments and policy makers to draft policies that balance the importance of public policy and human security, state obligation to protect and promote human rights; as well as holding perpetrators of human rights violations accountable, becomes compromised due to lack of both administrative and judicial commitment that would ensure accountability and transparency in punishing those officers accused of abuse.

Ethical Policing

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) document cases of police brutality and related human rights abuses. During this period, it became apparently evident that moral negligence of the police force and failure to promote ethical policing was a major impediment to reforms in the police force. Hence, hindering efforts to develop a 'democratic police service ' that is responsive to the needs and aspiration of the public.¹⁷ A police officer who arbitrarily arrests a suspect and locks him up without booking him in

17. Commonwealth Human Rights Initiative report of the Round table Conference on Police Reforms: Police as a Service Organization held in Nairobi between April 24-25, 2003 focused to making the image of the police from that of fear and mistrust to a service that generates confidence, is professionally run and delivers expected services. "In a democratic society, the police serve to protect, rather than impede, freedoms. The very purpose of the police is to provide a safe, orderly environment in which these freedoms can be exercised. A democratic police force is not concerned with people's beliefs or associates, their movements or conformity to state ideology. It is not even primarily concerned with the enforcement of regulations or bureaucratic regimens. Instead, the police force of a democracy is concerned strictly with the preservation of safe communities and the application of criminal law equally to all people, without fear or favour" (United Nation International Police Task Force, 1996.

the Occurrence Book (OB) or one who fabricates charges against a suspect and solicits a bribe from the suspect or one who has a record of brutality and a tainted reputation as “rogue” will often be shielded from internal investigations.

In practice, most police officers accused of brutality escape both administrative and judicial punishment. Even where there is sufficient evidence to prove the use of excessive force. It's simply regarded as a case of assault; the severities of police brutality or related abuse may require internal administrative guarantees to hold the accused officer accountable. Retraining of specific police officers to man units that are responsive to promotion and protection of human rights is indicative of change in the image of the force. Its also prudent for those police officers who may be facing stress to be offered counseling to help them deal with personal stress and job frustration.

The recruitment of police officers has been marred by irregularities and corruption allowing the force to employ officers who may be holding questionable qualifications or those with a history of criminality. The quality of training should be reviewed and the force be allowed to ‘demilitarize’ its curriculum to accommodate only competent and upright officers to serve. Those police officers accused of brutality -often are protected by senior police officers and are used as ‘batmen’ to solicit for bribes - in most instances victims and survivors of police abuse who implicate police officers in cases of abuse end up being forced to prove their allegation beyond reasonable doubt. Yet the police internal complaints department and the prosecution divisions fail to provide conclusive and collaborated information on the case or deliberately fails to conduct quality and conclusive investigations to detect and identify evidence that would warrant a successful prosecution case. Officers who escape punishment are bound to repeat the same abusive practice with impunity.¹⁸ However, there are instances where a ‘rogue’ police officer with a record of brutality undermines the morality of a disciplined police force.

In all the 178 cases of systematic police abuses reported at the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) between May 2004 and May 2006, the police lacked the capacity to detect and punish officers implicated in gross human rights abuses or those who blatantly violated the forces standing orders and, in some cases, the internal complaints department exonerated the accused officers.

18. Police Monitoring Report of the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) revealed stark pattern, trend and prevalence of systematic abuse by police officers. The failure to monitor and rein of the police force encourages impunity – Mostly those implicated in alleged abuse and other forms of official misconduct are shielded from administrative or judicial 18. Police Monitoring Report of the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) revealed stark pattern, trend and prevalence of systematic abuse by police officers. The failure to monitor and rein of the police force encourages impunity - Mostly those implicated in alleged abuse and other forms of official misconduct are shielded from administrative or judicial punishment. This pauses a dangerous deficiency in the command of the police force and leads to a culture of institutionalized impunity. No police officers have been dealt with administratively even after being accused of serious human rights violations -a situation that have allowed perpetual offenders within the force to escape the due process.

Where evidence is overwhelmingly pointing to the police-investigations are only carried out after complaints have been lodged against an officer and the same investigations are summarily closed without sufficient findings. Because of the cost of filing complaints against police officers and the conspiracy of silence, among senior police officers, many victims of brutality remain disenfranchised and lack legal representation. Filing a lawsuit against police officers, even when they are found to have committed serious human rights violations, the complaints is usually dismissed. Detailed information on circumstantial evidence on abuses often never finds its way into the personnel files of those accused of abuse.¹⁹ A large number of police officers accused of violating human rights of innocent citizens and escape punishment, often ignore the forces code of conduct. The police complaints department in vigilant house has remained silent; it often makes it easy for 'rogue' officers to escape punishment and is usually promoted based on performance; even when performance involves the shooting of innocent citizens. A former Assistant Commissioner of police confirms: "We had knowledge of how officers engage in corruption. But we failed to apprehend them. The station commanders failed to provide us with information that would warrant administrative punishment against those accused of abuse".



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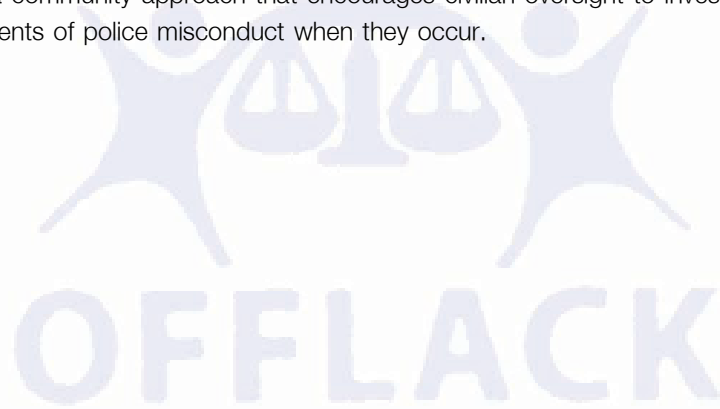
Recommendation

Ensure safety for the public

That it is patently obvious that a credible, accountable and independent civilian oversight to deal with public complaints is essential to respond to allegations of police abuse, intolerance or other misconduct by police.

That “Systematic and endemic” human rights abuses must be dealt with and all police officers accused of human rights violations be subjected to the due process.
That the inclusion of members of the public in structured and logical dialogue be implemented to restore public confidence.

That the unwillingness of the community to report criminal activities to the police be dealt with through a community approach that encourages civilian oversight to investigate and report all incidents of police misconduct when they occur.



3 Impunity

The Police Oversight Unit

The police oversight unit conducts investigations; monitors police misconduct and evaluate how police officers relate with members of the public, and ensure the promotion and protection of human rights.²⁰ The oversight unit also receives and examines complaints of human rights abuses filed by citizens against police officers. This trend has proved ineffective and lacks fairness and accounts for the increase in cases of abuse. It's therefore, important to establish an independent civilian oversight that will include the Kenya National Commission on Human Rights (KNCHR), and other stakeholders.

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) visited 9 police stations and received a number of complaints; including allegations of torture, sexual assault, extra-judicial killings and arbitrary arrests. The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) conducted independent findings and established that in all the cases reported at each police station; substandard investigation procedures were never followed and there was a deliberate failure to provide the evidence needed to file a complaint against a 'rogue' officer.

In all the cases handled by the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK), evidence of a conspiracy to harden up evidence in favor of officers facing disciplinary action was reported. Officers on the line of command allowed brutal officers to escape punishment, and remained defiant when it was so obvious that the complaints warranted administrative punishment as a deterrent measure to repeat abusers. The concept of militarizing the police has affected the mode of training among the recruits who are hardened up to deal with citizens as adversaries.

The operation of the police oversight units is camouflaged in secrecy, and details on their functions are obtained through newspaper articles, and during public inquiries to investigate alleged police misconduct, usually after a breach of security. In practice, the public is not allowed to participate in such inquiries that are bent to unearth police

20. The image of the police force has to be changed as a contemporary issue in modern policing through training that will change the attitude and mindset of all police officers and impart knowledge on contemporary issues such as Human Rights, gender and children rights, integrity, and ethics, good governance and democracy. Report of Task Force on Police Reforms Pg2, that was presented on 17th May 2005 at a stakeholders forum held at the Kenya School of Monitorial Studies.

misconduct or punish officers who have violated the **police Act** and have escaped punishment. Senior police officers insist that investigation held in camera (**order room**) are intended to protect information about incidents that require administrative action, the police oversight also conceals information even where the culprits are well known to members of the public.

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) through a project dubbed to monitor human rights violations in Kenya, reviewed 24 cases of police misconduct, and concluded that the internal police oversight units were perpetuating impunity and lawlessness within the force, by failing to deal with complaints of police abuse.²¹

It was revealed that the police oversight unit lacks the capacity to investigate and act on complaints reported by citizens against police officers accused of abuse. In a survey conducted by the OFFLACK, it was suggestive that the investigation procedures used by the police are in conflict with the functions of the Criminal Investigation Department (C.I.D). Both procedures were marred with corruption and lack of clarity on monitoring and evaluation. Often, their investigations produce scant information that fail to support any possible administrative or judicial punishment.²² The internal oversight units at the police headquarter are unfairly under staffed, demoralized and subjective to those who file complaints to them. Due to the above factors, the police oversight and Criminal Investigation departments only manages a staggering 25% of complaints filed against police officers. In 2004, the police oversight only managed to investigate 8% of the complaints that it has received against police officers accused of torture, bribery and extra-judicial execution. A former deputy commissioner of police confirmed that police used torture during interrogations and as a tool of intimidation. This made it difficult to investigate the allegation where the complainant has not been issued with a P3 form that enables him/her to file a formal complaint.

21. The Centre for Human Rights Observatory is a project of the Oscar Foundation that protects and promotes human rights through monitoring places of detention. The Access to Justice Project launched in 2005 as an advocacy initiative. Also see the Task Force on Police Reforms recommendations: (a) Rolling-out and providing logistic support and personnel for the internal complaints/customer care desks after the implementation of the pilot project, (b) Improving the handling of complaints registered and booking records; (c) Establishing a computerized system to facilitate quick logging-in of complaints.

22. It was recommended in the Report of the Task Force on Police Reforms that: (a) Carry out regular monitoring and evaluation exercise; (b) Establish an Independent Complaints Structure with an appropriate legal frame work; and, (c) Strengthen supervision at all levels to ensure proper accountability of personnel, equipment and resources.

When the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) received complaints from members of the public, who had complained of delays in issuance of P3 forms, the foundations mobilized a team of *pro bono* lawyers to take up individual cases against police officers accused of abuse. The oversight unit does not issue complainants with P3 forms as required by law. In order for one to launch formal complain against an alleged act of abuse resulting to bodily injuries, one must be issued with a P3 form. The P3 form is then duly filled by a police doctor who conducts examines the injuries and certifies a medical report that is necessary for criminal prosecution. The procedure is so tailored that it makes it easier for the accused officers to manipulate the findings.

Kakamega Police Station

In 2004, a woman was raped by police officers at Kakamega police station; the woman was denied a P3 form as required by law. The case was later referred to the police oversight unit, which handles complaints from members of the public. However, the case was marred by irregularities that allowed the culprits to escape punishment. In another incident, police officers were accused of conspiring with court prosecutors to steal crucial information from court files where suspects have complained against police officers. In 2006, the Chief Justice issued a statement warning judicial officers of engaging in bribery and stealing of documents from the courts.²³

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) published an in-depth surveys that touched on the police oversight unit describing it as a failure. It was revealed that most suspects on trial lack detailed information regarding their files and that most cases commence even before the investigations are complete. Lawyers representing accused persons are allowed to view information appearing in their clients' files that are before the court as part of a normal court procedure. This however, did not offer sufficient information to the accused person who may in turn be willing to file a complaint against a

23. A P3 form is a police medical form required for filing complaints of assault or that have resulted to injuries, the form is issued by the police and is certified by a police doctor.

police officer for an act of abuse that might have been committed during the time of arrest. Where there is a case of extra-judicial execution, officers have always used the incident to justify the actions of fellow officers who might have committed an offence.

In 2005, when the government issued a “shoot-to-kill” order to the police, the police oversight unit failed to conclusively investigate any reported complaints involving police shootings, it was established that the oversight unit was only investigating the circumstances of the shooting and allowed accused officers to escape prosecution. The commissioner of police was also unable to give information on intelligence gathering especially where an abuse has occurred.

Rapid response

The formations of rapid respond units to deal with the escalation of urban crime was viewed as obstacle to ‘democratic police’ the units namely; the Flying squad, Rhino squad, Spider and the Kanga Squad all of which were accused of perpetuating the worst human rights violations with full impunity and for being a trigger happy lot.

In 2004, the government disbanded the infamous police reservist unit for failing to account for numerous allegations of corruption, brutality and high-level misconduct involving its officers. Details emerged on how the unit engaged in blackmail, corruption and murder of innocent citizens.

In Nairobi, a lawyer who represented victims of torture accessed police files that were mishandled; he also discovered how police reservists planted evidence from other sources as proof of prosecuting innocent victims so as to deter them from filing complaints against accused reservists.

In most instances, the burden of proof of innocence in criminal prosecution was left to rest on the accused persons even when the police prosecutor was bent to prove the guilt of the accused- the fact that all criminal cases must be proved “beyond a reasonable doubt” did not matter to the prosecution.

During the crack down on **Mungiki** operatives, it was established that cases of misuse of firearms rose from 4% to 10%. Complaints filed against officers by relatives of victims and survivors sustained a high rate of complaints against police officers.²⁴

Although the police maintain that the crime rate declined with the crack down on **mungiki** operatives, it is also evident that, police officers were also involved in the under world. Those officers accused of misconduct, particularly those involved in brutality or domestic violence are assisted to escape punishment and no complaint against them is investigated conclusively to warrant any form of punishment. The oversight unit has failed to track down on those officers who engage in “moonlighting” when they are off-duty. These officers become involved street brawls and even engage in violent robbery. They escape punishment due to lack of proper accountable systems. It’s evident that police officers act above the law by violating the same law they are hired to protect. Often, police officers that commit human rights abuses enjoy impunity for the crimes they have committed. In 2005, only 5% of officer who faced capital offences were punished while those who committed other forms of human rights violations were either transferred to other stations or retired.



24. **Mungiki** is a cult suspected to be behind a spate of murder, rape and extortion. See Daily Nation 1 Sep, 2006 Pg 29.

Recommendation

Fostering meaningful relationships

That the **Police Act** should be amended to require that any officer involved in an investigation falling within the jurisdiction of the force be required to turn any requested information and evidence over to the civilian oversight or any other independent team interested in the investigation, and in any event no later than 24 hours after the request.

That there should be more attention to complaints reported by citizens against police officer's accused of brutality so as to investigate police misconduct and determine whether charges should be laid.

That any officer who fails to cooperate with the investigating team (s) should be suspended or dismissed from the police force for failing to meet a condition of employment.

That the Commissioner of Police should develop an internal supervision unit to supervise community policing and encourage citizen participation in police reforms and strategic planning.

That the **Police Act** be amended to provide that the Commissioner of Police may, in circumstances where it is in the public interest and where he does not cause an information pertaining to the investigations to be laid, make recommendations with a view to improving current police practices and policies when he is of the opinion that such practices or policies may have contributed to impunity.

4 Police Brutality

Arbitrary Arrest and Extra-Judicial Execution

In 2005, the police remained the most notorious abuser of human rights, accused of committing serious human rights violations including torture, extra-judicial execution and arbitrary arrests. Most victims were executed in crossfire with the police, while others were executed soon after arrest, The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) documented incidences involving arbitrary shootings involving innocent minors and elderly victims who had been caught in crossfire with the police.²⁵

On April 8, 2003, Asma Jahangir, the special rapporteur on extra-judicial, summary and arbitrary execution expressed concern on the pace at which Kenya was handling the situation.²⁶

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) documented a total of 45 reported cases of extra-judicial execution involving the police. The police justified the shootings and insisted that most victims were suspected armed robbers and carjackers who had defied orders to surrender. In most cases reported to Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK), there was neither evidence of investigation by the police oversight to establish neither the truth nor any judicial inquiry launched to investigate the cases.²⁷

25. Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR) provides that every human being has the inherent right to life, which ought to be protected by law, and no one shall be arbitrarily deprived of his or her life. Article 4 (2) prohibits derogation from this provision even if the state party is in a state of an emergency. Section 71 (1) of the Kenyan Constitution retaliates the contents of the provision but gives exceptions to the extent that the right is not guaranteed where a sentence is being executed, where reasonable force is applied as is justified in cases of defense from violence or property damage, when a lawful arrest is being effected or to prevent escape of a person who is lawfully detained, for the purpose of suppressing a riot, insurrection or mutiny or preventing the commission of a criminal offence or if a person dies as a result of lawful act of war. This section does not define what amounts to 'justifiable and reasonable force' and that is why police officers have used excessive force when either carrying out arrests, suppressing a riot or preventing the commission of an offence without impunity.

26. Six rapporteurs addressed the commission under debt on Civil and Political Rights, Commission on Human Rights, 59th Session, April 8, 2004.

27. The law requires that upon receiving complaints of death filed against a police officer by relatives of deceased person, commissioner of police is expected to institute investigations into the incident with a view of establishing the truth about the shooting. The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) defines extra-judicial execution as any unlawful, deliberate killing by law enforcement agent(s) by order or complicity or acquiescence thus defying the victim the right to life, liberty and security of person and the right to a fair trial.

Case profiles: Death occasioned by police officers

Simon Kiragu Waweru in his twenties was executed in 2003 in Nairobi's summer rest restaurant. According to his family, he was at his uncles' business premises at the time of a crime for which he was executed.

In December 2003, 14-year-old Benson Maundu was shot dead and his body was taken to the City Mortuary and marked as unknown.²⁸ Maundu had been accused of snatching a mobile phone from a woman. The Police handcuffed him before bumping six bullets on him.

On August 12th 2004, Henry Kimit Muturi suffered double tragedy when he was robbed of his car by armed robbers and only to be executed by police officers from the flying squad. The police later claimed he was a carjacker.

The Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) opposes summary executions in all circumstances because it is inherently cruel and inhumane and undermines the due process. In Kenya, extra-judicial executions by police are often carried out with rapid response units of the police force, which can't be held, to account, and most of the intelligence information that lead to the executions lack basis.²⁹

In other cases, the police fabricate evidence to justify their actions and after the courts fail to protect the suspects' right to a fair trial. Police officers from the infamous Flying squad executed suspects. Several deaths caused by the flying squad and other law enforcement agents, coupled with armed murders have been accompanied by a conspiracy and a systematic attempt to conceal them and harden up evidence justifying unlawful slaying by the state. The flying squad tops the list of the most notorious execution squad. Most survivors complained of blackmail and witch haunt perpetuated by a ring of corrupt police officers.

As stated earlier, family members are never notified after a relative has been executed, so that they could collect their relatives' bodies. The police instead call the media to air 'scenes of terror'. The executions are stage-managed and the media are called in minutes before it is scheduled to occur. In most cases forensic experts never come to the scene of the shooting to collect evidence that would be of use during investigations. Promotions are based on performance not on merit.

28. Under international law, the death penalty must not be imposed for crimes committed by persons below 18 years of age. The Convention on the Rights of the Child, a treaty to which Kenya is a party, also prohibits this.

29. There is wide spread violation of the International Covenant on Civil and Political Rights, to which Kenya acceded. Detainees continue to be arbitrarily arrested, held in inhumane conditions, subjected to torture, extra-judicial execution and denied access to legal counsel.

Arbitrary arrests and detentions

When the NARC government came to power after the December 2002, it promised to protect and promote human rights and the rule of law. The police reservists unit was disbanded for failing to live up to its expectation. President Kibaki introduced the Community Services Order (CSO) and announced the release of petty offenders from prison to serve under the CSO, except for capital offenders; arbitrary arrests and detentions remain commonplace in Kenyan police stations. This public commitment followed Kenya's renewed eager to foster reforms in the prisons system.

Following Kenya's ICCPR report to the U.N. Human Rights Commission it was recommended that the report lacked details on the activities of the flying squad and other police units accused of executing suspects and that many Kenyans still languish in police custody awaiting to face trial. The Kenya National Commission on Human Rights (KNCHR) was also given full and unimpeded access to all places of detention as stated in the KNCHR Act, 2002.³⁰

In 2000, the Special rapportuer on Torture, Cruel, Inhuman or Degrading Punishment, Sir Nigel Rodley observed that arbitrary arrest and detention of petty offenders was wide spread in almost all the police stations he visited.³¹

In the year 1980s, during the crack down of dissident groups and the 1990s unrest that followed the glamour for constitutional forms, more 1,300 people were reportedly arrested mostly university dons and students. Many of those who were arrested were never charged, and many more faced torture and ill treatment during interrogation. The police continue to use tactics that include moving prisoners around different facilities and detaining individuals in unofficial sites to divert the stipulated statutory provisions of holding a suspect.

During a community Access to Justice forum held at Kariobangi, it became apparent that there has been a rise in reported cases of insecurity in that area. The reason is because the police have failed to rein in on those accused of terrorizing citizens. Most of the suspects are linked to the police. The off-duty officers have also been implicated of rape and armed robberies and only according protection to those who part with bribes. It has also become a common phenomenon that drunken officers have been allowed to roam the streets armed with firearms.

30. The Kenya National Commission on Human Rights (KNCHR) is mandated as part of its functions: (b) to visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon.

31. The UN Special Rapporteur on Torture visited Kenya from 20th –29th September 1999. the visit was aimed collecting first hand information from a wide rang of contacts in order to asses the situation of torture in Kenya.

Recommendation

Inform and protect the public

That the internal oversight departments have sole mandate to conduct investigations in all cases that involve police misconduct. This mandate must not be capable of being delegated to another body within the force.

That the force be allocated more resources to allow it to hire and train more investigators and staff. And the majority of investigators should be experienced customer care staff that reflects a friendly force.

That the police should make it public all reported incidents involving police misconduct and brutality with 24 hours of the incident. The force should have the resources necessary to carry out investigations.

That the public be encouraged to police the police by detecting and reporting all cases of police misconduct to the relevant authorities.

That the public needs to be sensitized to and understand and appreciate the challenges faced by police officers in performance of their duties.

5 Torture, Cruel, Inhuman or Degrading Treatment or Punishment

Torture

Kenya ratified the United Nation Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment in 1997. The convention is yet to be domesticated seven years since Kenya acceded to the convention.³² Torture is still prevalent in police stations; police officers subject criminal suspects to torture in order to extract confessions. In an attempt to address the “systematic” practice of torture, the government introduced legal provisions that outlawed torture: The Criminal Law Amendment Act, 2003. The Miscellaneous Criminal Amendment Act 2003 that seek to, *inter alias*, to make inadmissible any confessions made by persons in police custody, unless made before a magistrate—thus making the prospect of torture of an accused person in custody improbable was enforced by the amendment to the Evidence Act, Chapter 80 Law of Kenya by adding the new Section 25A. The amendment states, “a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in open court. Both the Kenyan constitution and the Police Act outlaws torture and grants every citizen the right to be free from torture.”³³

Torture by police officers is prevalent in police stations in Kenya. Police officers are responsible for upholding the law and protecting life and property of all citizens. However, police officers have been cited to be the major perpetrators of torture in Kenya. Most victims of torture are criminal suspects, others are victims of harassment who are subjected to ill treatment for failing to obey order and are targeted for corruption.

32. Torture is defined in Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. It goes on to add that torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. However, such lawful sanctions are expected to be reasonable and command respect of the dignity of the person.

33. In Chapter V of the constitution. Sec, 74 (1); provides that no person shall be subjected to torture or to cruel, inhuman, or degrading treatment and punishment. Sec 74 (2) limits the application of this provision to the extent that punishment can be meted out legally; the degree to which the punishment ought to be imposed is not defined. The police Act sec 14A (2) provides 33. In Chapter V of the constitution. Sec, 74 (1); provides that no person shall be subjected to torture or to cruel, inhuman, or degrading treatment and punishment. Sec 74 (2) limits the application of this provision to the extent that punishment can be meted out legally; the degree to which the punishment ought to be imposed is not defined. The police Act sec 14A (2) provides that no police officer shall subject any person to torture or any other cruel, inhuman or degrading treatment. Section 14A (3) of the Act makes it an offence for any police officer who contravene the provisions of section 14A. Under Section 250-253 of the penal code cap 63 Laws of Kenya, torture is a punishable offence, since it is a form of assault.

Often those most at risk of torture are the poor who fail to pay bribes to buy their freedom. In most urban suburbs the number of complaints received revealed how off-duty officers engage in 'moonlighting' and extortion sprees.

In 2005, the Oscar Foundation Free Legal Aid Clinic-Kenya (OFFLACK) recorded 24 cases of torture and ill treatment. Victims complained of victimization and intimidation by members of the flying squad who solicit bribes from suspected criminals. The police complaints departments have failed to discipline officer's accused of brutality and corruption. The current rise of insecurity in Kenya has been seen as a recipe for torture and ill treatment. Police also use torture to obtain intelligence information from arrested criminal suspects. During the crackdown on members of the outlawed *mungiki sect*, the police used torture and ill treatment. Many of those arrested complained of ill treatment while in custody. A man suspected to be a member of the sect was seized by police while he was in his house in Nyeri. He died in a police cell three day later. An autopsy found that death had been due to blunt trauma as a result of server beatings with blunt instrument. No inquest was opened to this date.

Police brutality and corruption is used to blackmail and intimidate the victims in order to extract a confession, or to punish the individual, or simply to extort a bribe.³⁴

Forty two- year-old Jackson Oganga ended up at the Coast General Hospital after being interrogated in Kilindini harbour police station, Mombassa, in June 6, 2003. He was suspected of a robbery. Oganga died on July 22, 2003 at the Coast General Hospital. An autopsy found that death had been due to torture. The authorities subsequently claimed that he died of injuries sustained from beatings by a mob.

Torture and informal repressions at Ogembo Police Station

On June 29th 2003, Richard Mugusu Orina was arrested and taken to Ogembo for failing to pay a bribe. He was subjected to 32-days of routine torture before being charged in court for robbery. On July 10th, 2003, Lamack Bogomba, Abele Moranga and Robert Kimori were arrested on allegation of having committed a burglary. They were taken to Ogembo police station where subjected to torture and sodomy from other inmates. The three were tied with ropes; their private parts were pierced with razor blades. On July 16th 2003, both Lamack and Abele succumbed to torture and died in custody.

Although the police are allowed to apply force in carrying out their duties, both local and international standards place strict limits on the extent to which law enforcement agents may use force.³⁵

34. Transparent International (TI-Kenya) Corruption Index Report 2006

35. The UN Code of Conduct for Law Enforcement Officials and the Un Basic Principles on the Use of Force and Firearms by Law Enforcement Official: police officers may use force only when strictly necessary, and to the minimum extent required in the circumstances, As far as possible they should employ non-violent means before resorting to the use of force. Officers are required to exercise restraint and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.

The UNCAT was adopted on 10th December 1984 and Kenya ratified it on 11th February 1997. However, the government has not taken any active steps to implement the provisions of the convention both in its legal and administrative set up. There has been no concrete attempt by the legislative authorities to address the prevalence of torture in the country and whether there has been any move to adopt the Convention against torture remains unclear. No torture case has been adequately followed up as the main ingredient of the acts of torture, that is the acquiescence or consent or direction of a public official has never been the subject of cases of acts constituting torture in the criminal jurisprudence.

Each State party to the convention, including Kenya, which acceded it on 21st of February 1997, has a legal duty among other things to:

- a) Take effective legislative, administrative, judicial or other measures to prevent acts of torture;
- b) Criminalize acts of torture, including complicity or passive participation therein;
- c) Limit the use of incommunicado detention; ensure that detainees are held in places officially recognized as places of detention; ensure the names of the persons responsible of their detention are kept in registers including relatives and friends; record the time and place of all interrogations together with the names of those present; and grant physicians, lawyers and family members access to detainees.

In 2003, the office of Attorney General established a treaty committee, which was mandated to prepare, and submit Kenya's initial report to the CAT. However, the committee in 2005 presented Kenya's initial ICCPR report to the UN Human Rights Committee. The report raised fundamental questions in regard to Chapter 7 of the ICCPR. The committee raised questions on the establishment of the police rapid response units which account for the increase in reported cases of extra-judicial executions, torture and arbitrary arrests. The Police Act Sec 14(a) out laws the use of torture by police officers. The 'systematic' torture and execution of criminal suspects by police officers is unaccounted for in the ICCPR report.³⁶

Kenya has not submitted her CAT report as required by the rules of the convention. There have been attempts to present a report, it will be fundamentally important for Kenya to be examined under the current conditions.

36. In 2003 the Government enacted the Statute Law that repealed the miscellaneous amendments on the Evidence Act, which expressly prohibits the use of torture by the police.

The Miscellaneous Criminal Amendment Act 2003 that seek to, inter alias, to make inadmissible any confessions made by persons in police custody, unless made before a magistrate-thus making the prospect of torture of an accused person in custody improbable was enforced by the amendment to the Evidence Act, Chapter 80 Law of Kenya by adding the new Section 25A. The amendment states, "a confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in open court

Lack of political good will has hampered the government's commitment to fulfill its international obligations. There is fundamental need for Kenya to comply with the international reporting procedures and make her initial report available for examination.

The treaty committee, which is chaired by the Attorney General (AG), works in collaboration with Kenya National Commission on Human Rights (KNCHR). This collaboration has been subjected to mistrust and lack of political good will.

Article 20 of the UNCAT, should apply for the case of Kenya which has remained silent in dealing with reported cases of police abuse.

Lack of an independent investigation unit at the Attorney Generals office to investigate and prosecute cases of police abuse.

The conspiracy to protect and assist accused police officers from prosecutions are in violation of the due process as provided to in the constitution.

Cruel, Inhuman or Degrading Treatment or Punishment

The prison remains to be single out as the main place where cruel, inhuman or degrading or treatment or punishment is practices with impunity. Since inception 1595, many people have viewed prisons to function as punitive centers where inmates are subjected to torture and ill treatment.³⁷

37. See Daily Nation on September 28,2004: "Five prisoners found dead in Jail". See also IMLU investigative report on the Deaths in Meru Prison-pg 6. "The five were among 12 men who has been crammed into a cell measuring only 6ft by 3ft "barely enough to take one single bed". Prison officials blamed the tragedy on suffocation. This claim was quickly contradicted by police reports, which pointed out that three of the bodies bore marks of physical injuries. Prison officials are reported to have said that the five, who were jailed for being inn possession of *Chang'aa* (local brew), had died of drink related illnesses. But the local Medical Officer of Health thought the five, in mid thirties, suffocated because of congestion in the cells where they had been held for less than a week.

Whereas, the Prisons service is designed to contain and keeping in safe custody of prisoners, rehabilitation and reformation of prisoners through training and counseling and provision of basic human needs to inmates, the prison has continued to subject inmates to suffering of untold magnitude.

There are a total of 89 penal institutions in Kenya, two of which are women's prisons. These facilities are over starched to cater for 40,000 inmates. This has led to overcrowding and hence death in custody. Due to ineffective and sluggish judicial system persons facing trial end up incarcerated while awaiting determination and judgment of their cases.

Although the prison Act (Chapter 90) empowers the Commissioner of prisons to order the canning of a prisoner if he has violated the prison rules or subject him to penal diet as a punishment, the Criminal Law Amendment Bill 2002 abolished corporal punishment.

Prisoner may also be put in punishment cells they violate the prison rules and regulations accordance with section 66 and 67 of Prison Rules 1977 Revised.

The law requires all persons in custody must be afforded adequate medical attention when they fall ill. However, due to inadequate funding inmates are denied the right to better health when they are in need.³⁸

In practice, inmates end up dying in custody for lack of adequate medical attention or due to negligence. Often the prison authorities abuse the powers to grant such rights like removal of sic prisoner to hospital as granted to them (See Prison Act Cap.90, Sec 39:1).

38. See Prison Act Cap.90, Sec 39 (1): In the case of the illness of a prisoner detained in a prison in which there is not suitable accommodation for such prisoners, the officer in charge, on the advice of the medical officer, may order his removal to a hospital, and in case of emergency such removal may be ordered by the officer in charge without the advice of the medical officer.

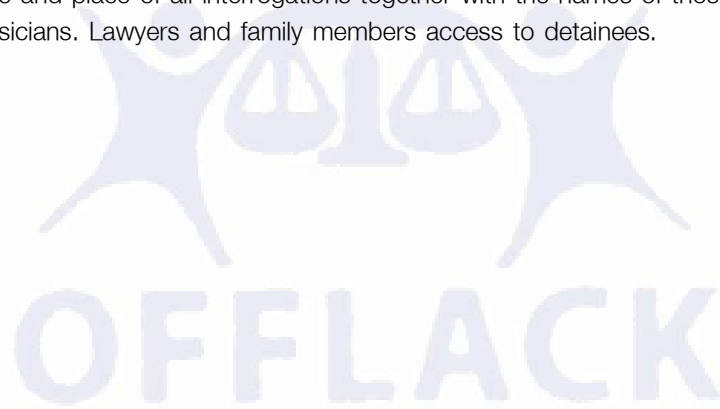
Recommendation

Mobilizing citizen participation for change

That Kenya to under take effective legislative, administrative, judicial or other measures to prevent acts of torture. This measures should include the domestication of the UNCAT and ratification of the OPCAT.

That the government criminalizes all acts of torture, including complicity or passive participation therein and enact legislative amendments to punish persons accused of torture.

That the arresting authorities limit the use of incommunicado detention; ensure that detainees are held in places officially recognized as places of detention; ensure the names of the persons responsible of their detention are kept in registers including relatives and friends; record the time and place of all interrogations together with the names of those present; and grant physicians. Lawyers and family members access to detainees.



6 Informal Repression

Mob Violence

The ineptness of the police to provide security and safe guard the rule of law has witnessed the rise in cases of lawlessness and informal repression. With 80% increase in reported incidences of mob violence, it's become apparent that the government upholds human rights and protects social justice. In a space of five months, 24 people were reported killed as a result of mob violence.³⁹ In Gachie village, members of the public seized a suspected criminal after he had been arrested by police officers. He was later lynched in full view of the police officers.

Minister for Justice and Constitutional Affairs, Martha Karua, in a televised interview on BBC-TV attributed the rise in mob violence to corrupt officers and a disenfranchised public, which has lost confidence in the judiciary and the police. Mob violence undermines the rule of law and betrays the democratic gains. Most victims of crime are willing to take the law into their own hands because the government has failed to provide security for them.

In June 2006, villagers in Kisii on suspicion of engaging in witchcraft lynched two members of a family. In another bizarre attack members of the public lynched five villagers in killing spree after accusing them of armed robberies.

The hiring and arming of vigilantes and other private security gangs has led to informal repression. Most of these gangs have a track record engaging in criminal activities and run a number of extortion rings. Politicians have perfected the use of hired gangs to provide them with security during political campaigns, while they accuse the government of selectively providing security to those allied to government.⁴⁰

A failed police system and a judicial system marred by corruption and ineptness have occasioned instances of lawlessness. Suspects easily buy freedom and escape justice, only to be subject to the public's wrath. Violence affects the lives of Kenyans, regardless of their social status and cuts across cultural and religious barriers. Mob violence continues to be the most common form of abuse that arbitrary allows the public to engage in act of murder, assault or attempted murder in Kenya.

In 2005, Rift Valley recorded the highest number of violent incidents with a record of 15,320 (30%), followed by Central and Eastern province recorded 17.4% and 14.0% respectively. North Eastern Province recorded the lowest number of cases (202 or 1.7%). The total number of cases increased by 1.4% from 11,867 in 2004 to 12,036 in 2005.⁴¹

39. In the proposed Constitution of Kenya: Right to life Section 35 (1) Every person has a right to life except as may be prescribed in an Act of parliament, Section 36 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law

40. The government withdrew the security of members of the Orange Democratic Movement-Kenya (ODM-Kenya) for spearheading the rejection of the proposed constitution in a referendum, which the government side lost.

41. See The Economic Survey Report 2005, Pg 53.

Recommendation

Get the Public involved

That there should be an open and transparent system of hiring more public agencies, organizations, and people involved in community policing to best improve public participation in community policing.

That the prison and the police should make community monitoring systems open to public scrutiny in order to improve re-entry procedure of ex-convicts who come back to the community.

That people who lead security meetings must have credibility with the community and not those with vested self-interests.

That the nature of community policing be made easier and open to vetting to avoid the temptations of mistrust and impartiality.

That all members of the public should be involved in fighting corruption and be encouraged to report all cases of corruption to the relevant authorities.

That personal details of all people appointed to serve in community policing teams at the respective communities be made available to the public for easy tracking and cases reporting.

7 Right to Life

The Death Penalty

Kenya still upholds the death penalty. In practice, suspects on capital offence like murder, violent robbery and treasons risk being condemned to hang if found guilty of committing the offence of which they are charged. Although Kenya last executed a convict in 1987, the continued incarceration of prisoners on death row amounts to torture, cruel, inhuman or degrading treatment or punishment.⁴²

On the international fronts, the United Nations Human Rights Commission has passed a resolution for all nation states that continue to impose capital punishment to restrict the number of offences for which the death penalty may be imposed. The Second Optional Protocol to the ICCPR seeks to abolish the death penalty.

In the draft Constitution it is proposed that although every one has a right to the full enjoyment of life, except as may be prescribed in an Act of parliament. This contradicts earlier provisions in the present constitution that protects the right to life, and the full enjoyment of life. In 2005, a suspect was sentenced to death for violently robbing a motorist Ksh.70 (\$1). There have been allegations of arbitrary sentencing of suspects to death even where the evidence adduced still remains inconclusive to warrant a conviction. This has led to suffering among suspects who still await appeals in their convictions. In 2004, the Court of Appeal commuted 12 prisoners on death row upon appealing and described their sentencing and conviction "improper and dangerous" since most of the cases lack.⁴³

Nineteen years since the suspension of the death penalty, Kenya still holds 4300 waiting to be executed. Most of those sentenced have pending appeals, which have been waiting for determination for the past 10-15 years.

In the recent months, inmates have staged sit-ins at the high court demanding that their cases be determined. The Chief Justice has attributed these delays to corruption and understaffing at the judiciary.

In June 2006, a suspect on a charge of robbery with violence petitioned the Chief Justice to order for his convictions to be set aside or be released after waiting for his appeal for 7 years.

42. In 1987 the death penalty was abolished in Great Britain (except for cases of treason) in 1971; France abolished the death penalty in 1981. Canada abolished it in 1976. The United Nations General Assembly affirmed in a formal resolution that throughout the world, it is desirable to "progressively restrict the number of offences for which the death penalty might be imposed, with a view to the desirability of abolishing this punishment." By mid-1995, eighteen countries had ratified the Sixth Protocol to the European Convention on Human Rights, outlawing the death penalty in peacetime. See IMLU Annual Report 2004, Pg 27.

43. See Draft Constitution: Right to life Sec 35 (1).

Recommendation

Under standing the issue

That all inmates in sentenced to death be offered counseling because of the ith psychological torture.

That the courts be sensitized to exercise fairness when making judgment against suspects facing capital sentences.

That all suspects on capital offences be accorded legal representation by the state. Since most of them can't comprehend the seriousness of the charge facing them.

That the prison department be transparent when appointing members to the releasing board and ensure that only people who may have better understanding of the correctional system and are open in making release decisions.



8 Terrorism

Suppression of terrorism Bill

The published *Suppression of Terrorism Bill* has sent shock waves into the spines of many Kenyans and human rights activists. Indeed, the bill has met resistance from many quarters including members of parliament, human rights activists, churches and from the public. The resistance is attributed to a number of issues.

The government published the bill without consulting with stakeholders, and appeared to be bowing to pressure from both the American and the British governments. Indeed, despite protests against this bill, the government through the Ministry of Justice and Constitutional indicated its resolve not to withdraw the bill.⁴⁴

And much worse, the bill is highly repressive, runs against the national spirit and militates against our national sovereignty in favour of western interests. In their analysis, the Chambers of Justice, a legal civil society group, says the bill germinates out of the US Patriot Act 2001, whose official title is *Uniting and Strengthening America by Providing Tools Required to Intercept and obstruct Terrorism Act*.

In the US, the group notes, the “application of the Patriot Act by the US government has resulted in some of the grossest violations of human rights ever revealed since the Nuremberg trials.” It cites the case of the al-Qaeda suspects who are still incarcerated incommunicado at the US military base in Quatanamo Bay in Cuba, six years after they were arrested in Afghanistan.

The bill contravenes Sections 72, 74(1), 77 (2a), 77(4), 77(8), 82 and the bill of rights; contravenes the penal code section 9; and lowers the standard of the burden of proof as required in all criminal cases. Needless to add that the bill lacks adequate provisions for compensation of victims of terrorism and gives sweeping powers to the police. These powers include powers to detain cash belonging to a suspect and forfeit the property of suspected persons to the state.

Ironically, the bill not only allows foreign security forces to arrest and detain Kenyans, but it also sanctions torture and police brutality. Indeed, according to a report on terrorism in Kenya recently published by Amnesty International (AI), there are reports that a team of Kenyan CID officers and foreign agents tortured suspects arrested recently in Mombassa on terrorism suspicion.⁴⁵

44. The Chamber for Justice addressed a forum in 2003 at the Silver Springs and pointed that the bill is as a result of pressure from foreign nations to force Kenya to enact an anti terrorism legislation.

45. See Kenya National Commission on Human Rights (KNCHR) reports 2004, the case of Mohammed Surur.

Recommendations

Redefine the agenda

That government should increase resources to the police in order to hire and train more investigators and staff. The majority of investigators should be experienced police officers with admirable track record that reflects competence.

That all anti terrorism legislations be designed in consultation with all stakeholders in order to avoid the ambiguity caused by the quest for a law to fight terrorism. It's important to guarantee national security and foster the protection and promotion of human rights.

That adequate supervision of all entry points at all boarder point should be upgraded and administrative supervision of all security personnel should be made transparent.

That the office of the anti terrorism unit should be retrained so as to be responsive to human rights and protect life where necessary and in conformity with the UN basic principle on the use of force by law enforcement officers.



9 Public Safety, Law and Order

Criminal conduct of the police

In the mid 1980s, following the repressive crack down on political dissident, the role of the police was subjective to divergent opinion, often engaged in perpetuating police brutality and extra judicial executions, which caused death and despair to millions of Kenyans.⁴⁶

In 2003, a **Conference on Police Reform: Police as a Service Organization** proposed radical administrative and legislative reforms to change the image of the police force.

In 2004, the president appointed a Task Force on Police Reforms, which was mandated to recommend policy and institutional reforms in line with the Police Strategic Plan. The Task Force addressed the very serious concerns of promoting a democratic police that is responsive to the interaction between the public and the police". The Task Force was also mandated to inquire into, and report on, among other things, "the policies and practices of the police relating to service delivery".⁴⁷

In its Report, the Task Force made a number of recommendations regarding police reforms.⁴⁸ As a result of the report, the government, in 2005, made several changes to the police force. These changes were intended to reflect the spirit of the Task Force Report.

In our preceding chapters, we have pointed out the failure of the police to subject police officers accused of abuse to the due process; due to the ineptness of the internal oversights to conduct credible and conclusive investigations. Another major impediment to police accountability has been the lack of a transparent and accountable judicial system to deal with police misconduct.

Members of the public have expressed their concerns about the functioning of the judiciary while dealing with cases of police misconduct.⁴⁹

46. Police brutality is not confined to the mid-1880s. Several people who were detained without trial or jailed during the first post-colonial administration have chronicled their experiences at the hands of police and prisons officer. Ngugi wa Thion'o has mentioned in his book **Ngugi Detained: A Writer's Prison Diary**, the various torture methods that were used to break down political opponents

47. See the Kenya Police Force, (2004) Strategic Plan 2004-2008, Administration Police Strategic plan 2004-2008.

48. Report of the Police Reforms Task Force, (Pg 3-9).

49. See report by Justice Aaron Ringera on Corruption in the Judiciary

Perhaps the most difficult aspect of the functioning of the judiciary is the fact that the office of the police prosecutor refuses to cooperate with judicial officers in summoning the accused officers to appear in court. Unless they are first given a written assurance that at the time of the trial they are not considered suspects.

Many proceedings and investigations are unnecessarily deferred because an application for information by the court to a police force is not responded to or is not responded to appropriately.

In the case of Paul Kimani Wambiru, the case involving charges of criminal negligence causing death and criminal negligence causing bodily harm. In that case five police officers were arrested and charged with murder. The five accused requested a repeat post-mortem and an exhumation, which was conducted by their pathologist who found the cause of death, was brain inflammation. These findings were different from the initial post-mortem, which found the left testicle crushed, and the bladder and intestines ruptured. The finds also included peritonitis, bilateral haemo-thorax (blood in lung cavity), facial bruising and subconjunctival haemorrhages. It was concluded that a blunt object caused the injuries and as a result the death was as a result of torture.⁵⁰

Police officers who refuse to cooperate with the courts allege that investigations conducted to establish the cause of serious injuries or deaths that may have resulted from excessive use of force discourages collaboration as it places the burden of guilt on them. However, the refusal is based on arguments, which are based on the fact that the officers share the same rights as a member of the force and therefore cannot be compelled to judicial punishment without utilizing internal administrative mechanisms.⁵¹

Conduct of investigations.

It is important to note that where an accused officer fails to turn up in court to give evidence or to take plea, he or she is therefore in violation of the **police Act**. He is also in contravention of the Criminal Procedure Code (CPC). Although the **Police Act** itself does not provide any mechanism for enforcing the officer who have refused to appear before an inquiry.

The Kenya National Commission on Human Rights

Section 19 (1) of the **KNCHR Act** provides, that the Commission shall have powers of a high to: (a) issue summons or other orders requiring the attendance of any person before the Commission and the production of any documents or record relevant to any investigation by the Commission". The Commission therefore has the authority to order any police officer to appear before it and cooperate. Section 19 (6); (c) Warns that Any person who:

50. See Kenya Human Rights Commission (KHRC) Quarterly Human Rights Report April-June 2003, Pg 18.

51. See Daily Nation 1st Sep 2006 Pg 29. "Mungiki Men Charged"

(c) Knowingly gives any false or misleading information to the Commission; or (d) causes an obstruction or disturbance in the course of any proceedings before the Commission, commits an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand shillings, or to imprisonment for term not exceeding six months, or both.⁵²

In a case involving two senior journalists from the *Standard Newspaper* and a police officer accused of stealing video tapes containing information on the interrogations of four murder suspects, questions dealing with the validity of orders issued pursuant to on going investigations involving the four suspects who had alleged that the police tortured them during interrogation.⁵³ The four had appeared before the court to take plea on a murder charge. It's vital for courts to protect witnesses and persons being investigated including protection against self-incriminating evidence being used in subsequent criminal proceedings. The decision by the court therefore concluded that, in the context of the investigation in to the *Mbai Murder trial*, fundamental justice was violated. When their initial testimonies, which had been recorded, appeared self-incriminating and there was no granted protection against the use of their testimony in the subsequent proceeding.

This is the common risk that every victim of police abuse faces. As pointed out throughout this report, the police are not like most citizens. The difference is that in certain circumstances police are sanctioned by the state to use deadly force in the course of their duties to achieve certain results. Obviously the police are bent to maintain a *status quo*.

The City Inspectorate Department

The City Inspectorate was established to enforce the by-Laws as stipulated in the City Council Act. The force has in the recent years been accused of misconduct and for usurping the powers of the police. The city inspectorate department is currently faced with understaffing and lack of professionalism. This has forced it to utilize the services of 2400 personnel from other departments in order to enforce its mandate. Currently, there is an under staffed lot of city inspectors servicing in the department to enforce the council's by-laws in a city with 3m people. This has made it necessary for the department to restructure and include artisans, sweepers and other subordinate staff to enforce the by-laws; especially conducting arrests contrary to the law and in violation of their appointment contracts.⁵⁴

It's obvious that those officers mandated to enforce the by-Laws are overwhelmed and the work has been left to other members of staff without the authority to enforce the by-Laws. This has led complaints of arbitrary arrest, corruption, sexual violence, harassment and intimidation by officers from city inspectorate department.

52. See the KNCHR Act Sec.19 (1); (a), Sec.19 (6); (c), (d)

53. Ramadhan Karume Otieno, Collins Kilel and Moses Gitogo Mbuthi were arrested and tortured on suspicion that they had committed a murder

54. See the City Council Human Resources Department Report.

Recommendations

Determine criminal liability

That the government should empower the KNCHR, as it currently lacks the power to act expediently and has limited constitutional powers. Therefore officers, who refuse to comply with the **Commissions Act**, should be charged with obstructing justice (in addition to other consequences as recommended in the **Act**).

That the **Police Act** be amended to provide that the Commissioner of Police the authorized to charge and suspend any officer who fails to provide information or evidence in a timely fashion forthwith without any pay.

That there be security of tenure of all Commissioners of the Kenya National Commission on Human Right (KNCHR), so as to enable them to enforce the Act.

That a Special Prosecutions department be established in the Ministry of the Justice and Constitution Affairs to prosecute all charges involving police officers accused of abuse, and rules for functioning of the department be established in consultation with police, public and the civil society and representatives from the Ministry of Justice and Constitution Affairs.

That police work independent from the city inspectorate department and only authorized city inspectorate officers be deployed to enforce the by-laws.

Accession

Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an “instrument of accession” with the Secretary-General of the United Nations. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession. The Secretary-General, as depositary, has tended to treat instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned have been advised accordingly.

The conditions under which accession may occur and the procedure involved depend on the provisions of the relevant treaty. Accession is generally employed by States wishing to express their consent to be bound by a treaty where the deadline for signature has passed. However, many modern multilateral treaties provide for accession even during the period that the treaty is open for signature.

See articles

2(b) and 15 of the Vienna Convention 1969





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