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Press Release

COMMITTEE AGAINST TORTURE BEGINS EXAMINATION OF REPORT OF KENYA

Committee against Torture

13 November 2008

The Committee against Torture this morning began its consideration of the initial report of Kenya on the efforts of that country to give effect to the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Introducing the report, Martha Karua, Minister of Justice and Constitutional Affairs of Kenya, highlighted that, on coming to power in 2003, the current Government had closed down the notorious Nyayo House torture chambers in which many political prisoners had been routinely tortured by State agents. In addition, the Government had amended its criminal laws to protect persons from torture through the adoption of the Statute Law (Miscellaneous Amendment) Act of 2007. Prior to those amendments, confessions from persons suspected of criminal offences were taken in police stations by junior officers. A suspect could now only make a confession either before a judge, magistrate or police officer not below the rank of Chief Inspector, and all such confessions had to be made in the presence of a third person chosen by the accused.

Among measures completed since the report had been submitted, Ms. Karua drew attention to the establishment of an independent Civilian Police Oversight Board; the operationalization of a Public Complaints Standing Committee to act as an Ombudsman to handle complaints against public officials; and the establishment and operationalization of a National Legal Aid Scheme and Awareness Programme to enhance access to justice, especially for the poor and vulnerable. Sensitive to the gender dimension of torture, Kenyan laws prohibited and criminalized female genital mutilation and early and forced marriages, as enshrined in the Children's Act and the Sexual Offences Act. In addition, gender desks had also been set up in most police stations in Nairobi and the Police Commissioner had set up a task force to investigate sex crimes alleged to have been committed by security personnel in the violence following the December 2007 elections.

Serving as Rapporteur for the report of Kenya, Committee Expert Nora Sveaass was concerned that Kenya had missed a number of opportunities since its ratification of the Convention in 1997 to domesticate or incorporate

the definition of torture in its laws; one result was that psychological and mental suffering resulting from torture was not covered at all in Kenyan law. More information was requested on the regulations and time limits for pre-trial detentions, and whether individuals had to be informed of their rights. Another concern was the lack of protections for refugees, in particular against refoulement in cases where they might be subject to torture and ill-treatment if they were returned, and the situation of refugees from Somalia and Ethiopia living along the border.

Xuexian Wang, the Committee Expert serving as Co-Rapporteur for the report of Kenya, was concerned about overcrowding in prisons. He had heard that, in practice, even the National Human Rights Commission had difficulty in visiting some of the penal institutions in Kenya and had been prevented from doing so by police. A particular concern was an apparent lack of measures to ensure prompt and impartial investigation into torture. According to reports, in the court cases alleging torture raised directly with magistrates, no action was taken on 80 per cent of those cases. Moreover, the National Human Rights Commission had reported that, between June and October 2007, police had been responsible for 500 extrajudicial executions. What was being done to investigate that allegation?

Rapporteurs and Experts were seriously concerned about what action was planned to address the numerous allegations of torture and abuse contained in the Waki report on post-election violence that had spread throughout Kenya in 2007, including widespread cases of gender-based violence and reports of gang rapes by police and members of the security forces. Other issues raised included police corruption; a high level of impunity for acts of torture and violence; a huge volume of police custody cases, which gave rise to the hypothesis that people were being held to extort money; and the very low age of criminal responsibility, which was eight years.

As Minister Karua was travelling back to Kenya tonight, she provided some preliminary answers to questions raised today on a number of issues, including joint actions by the police and the armed forces; the allegation by the National Human Rights Commission of 500 extrajudicial executions by the Police; the situation of refugees; actions to implement the Waki report; and the cost of P3 forms.

Joining the Kenyan delegation was the Permanent Representative of Kenya to the United Nations Office at Geneva, Maria Nzomo, and other members from the Permanent Mission. The delegation of Kenya also included representatives from the National Police, the Prison Service, the Ministry of State and Internal Security, the Attorney-General's Office, the Ministry of Foreign Affairs, and the Ministry of Justice of Kenya.

The delegation will return to the Committee at 10 a.m. on Friday, 14 November, to provide its responses to the questions raised today.

Kenya is among the 145 States parties to the Convention and as such it must present periodic reports to the Committee on how it is implementing the provisions of the Convention.

When the Committee reconvenes at 3 p.m. this afternoon, it will hear the response of Belgium to questions posed by Experts on Wednesday, 12 November.

Report of Kenya

The initial report of Kenya (CAT/C/KEN/1) notes that acts constituting torture and other cruel, inhuman or degrading treatment or punishment are criminal and/or civil wrongs in Kenya. In addition, the Kenya National Commission on Human Rights is empowered to monitor and investigate abuses of human rights whether these are inflicted by or at the instigation of public officials or not. Together, these mechanisms ensure that Kenya is at all times in compliance with its obligations under the Convention against Torture. While the laws of Kenya prohibit torture and other cruel, inhuman, or degrading treatment or punishment, the Constitution of Kenya, does not define torture, thereby creating interpretation problems. The various acts that constitute torture as defined in the Convention are contained in different Acts of Parliament. These acts would include common assault, rape, and indecent assault and murder in the event that these occur in the presence of a public official or perpetuated by the same official in the course of his duties. As there is no definition in the laws of Kenya for torture, attempted acts of torture, commission of torture or orders to commit torture by persons in authority, acts of mental and psychological torture cannot be punished under the present penal system. The Kenya Law Reform Commission has been seized of this deficiency.

In 2003, the Kenya National Commission on Human Rights was established by law. It has quasi-judicial powers to investigate human rights violations including torture. It also has powers to make impromptu visits to prisons and other detention facilities e.g. police cells. The Commission has hitherto complained that they have been denied permission to visit some facilities and even went to court to safeguard this power. The Police and Prisons departments are currently undertaking reforms to improve their human rights record. Training programmes have been developed for this purpose with a view, among others, to sensitize the officers on the humane treatment of persons in custody. These and other shortcomings with respect to compliance with the Convention's provisions are being addressed in radical reforms in the Police and Prisons departments specifically with regard to the complaints procedure. To improve the accountability of investigative services, the authority to arrest has been removed from the Directorate of Security Intelligence and the Organisation has been separated from the Criminal Investigation Division. The Directorate has now been transformed and established by an Act of Parliament (the National Security Intelligence Services Act) into the National Security Intelligence Service with a specific mandate of conducting intelligence work only.

Presentation of Report

MARTHA KARUA, Minister of Justice and Constitutional Affairs of Kenya,

said that, since 2003, Kenya had been particularly keen to address human rights violations due to its history. Kenya had emerged from an oppressive one-party regime that had had a culture of gross violations of human rights nurtured by oppressive laws and institutions inherited from the colonial era. During that time, many Kenyans had been routinely killed, tortured, detained without trial, exiled, or economically destroyed as they struggled to assert their fundamental rights and freedoms. After the democratic elections held in December 2002, measures had been taken, not only to protect the Kenyan people against human rights violations, but also to promote peace, stability, freedom and justice in Kenya.

Various reform initiatives were currently ongoing towards establishing Kenya as a human rights respecting State, Ms. Karua said. They were currently in the process of developing a comprehensive human rights policy and action plan to provide a road map to address human rights challenges facing the country. Kenya had also launched the Governance, Justice, Law and Order sector programme, which aimed at reforming the entire legal and justice sector with a view to establishing an effective, fair and efficient system of governance and administration of justice that would respect, promote and protect human rights.

Touching on some concrete steps taken towards the elimination of torture and other cruel, inhuman treatment, Ms. Karua highlighted that, on coming to power in 2003, the current Government had closed down the notorious Nyayo House torture chambers in which many political prisoners had been routinely tortured by State agents. In addition, the Government had amended its criminal laws in order to protect persons from torture through the adoption of the Statute Law (Miscellaneous Amendment) Act of 2007. Prior to those amendments, confessions from persons suspected of criminal offences were taken in police stations by junior officers. A suspect could now only make a confession either before a judge, magistrate or police officer (who was not the investigative officer) who was not below the rank of Chief Inspector, and all such confessions had to be made in the presence of a third person chosen by the accused.

Further steps included the abolishment of corporal punishment under the laws of Kenya, the availability of the official police medical examination (P3) form in any public hospital in cases of torture allegations, which had previously only been available through the police themselves, and the initiation of reforms in the training curricula for law enforcement and public officials with an emphasis on human rights and the prohibition of torture, Ms. Karua said.

The Government had put in place a de facto moratorium on the death penalty. In February 2003, President Kibaki had suspended the hanging of those condemned to death, ordered the release of 281 long-term prisoners on death row, and commuted to life the sentences of 195 others. The Government and the Kenya National Commission on Human Rights, in collaboration with civil society organizations, had also been educating Kenyans on global trends on the issue of the death penalty with a view to eventually winning over the citizens so that Kenya could become a signatory

to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

Also worth noting, Ms. Karua said, was the fact that prisons in Kenya were now open for public scrutiny. The Kenya National Commission for Human Rights also had unrestricted visits to places of detention. That duty was not only recognized by law, but had been underscored by judicial pronouncement.

Ms. Karua observed that, since the submission of the report, a number of measures that had been reported on as in progress had now been completed. An independent civilian Police Oversight Board had been established to strengthen the public complaints mechanism against law enforcement officers; a Public Complaints Standing Committee to act as an Ombudsman to handle complaints against public officials and institutions had been operationalized; and a National Legal Aid Scheme and Awareness Programme to enhance access to justice, especially for the poor and vulnerable, had been established and operationalized. In addition, sensitive to the gender dimension of torture, Kenyan laws prohibited and criminalized female genital mutilation and early and forced marriages, as enshrined in the Children's Act and the Sexual Offences Act. The Ministry of Gender, Sports, Culture and Social Services coordinated an inter-ministerial Committee on Female Genital Mutilation that spearheaded implementation of the National Action Plan for the Eradication of Female Genital Mutilation. Gender desks had been set up in most police stations in Nairobi, with appropriately trained police officers to ensure the victims of gender-based violence were properly handled, and the Police Commissioner had set up a task force to investigate sex crimes alleged to have been committed by security personnel in the violence following the December 2007 elections.

In conclusion, Ms. Karua highlighted that, despite many challenges, including a lack of a definition of torture and the politicization of ethnic militias, criminal gangs and organized crime that undermined national security, there were a number of cases in which public officials had been charged, prosecuted and sentenced in criminal courts for acts constituting torture according to the Convention, and victims of torture who had filed claims in civil courts had been paid compensation by the Government.

Questions Raised by Committee Experts

NORA SVEAASS, the Committee Expert serving as Rapporteur for the report of Kenya, welcomed Kenya's openness in the report and in the introduction today and its reflection on shortcomings with regard to the implementation of the Convention and challenges faced. The political transition that had taken place in Kenya in 2003 had marked an historic step in the right direction. However, this year had also been marked by grave events, with serious and widespread reports of violence. Moreover, the Committee was concerned about the existence of underlying issues of social and economic injustice, in particular the rights to land, which were also sometimes the root causes of torture.

Turning to concerns, Ms. Sveaass lamented a lack of statistics in the report, as well as the lack of a core document, which could have provided a general background for the Committee's consideration of the situation in Kenya.

The inclusion of the full definition of torture in domestic law was an obligation under the Convention, Ms. Sveaass recalled. As Kenya had a dualistic system, it had to enact specific legislation to incorporate the provisions of the international conventions to which it was a party. That had not yet been done. Moreover, the Constitution, while it prohibited torture, did not define it and neither the Criminal Code nor the Criminal Procedure Code contained references to a crime of torture. What were the concrete plans to domesticate the Convention and what institutional amendments were needed to implement it? There had been a number of missed opportunities since Kenya had ratified the Convention for it to have domesticated or incorporated the definition of torture in its laws. That raised a serious issue of what priority was being accorded to this effort.

A further concern was the fact that psychological and mental suffering resulting from torture was not covered at all in Kenyan law, Ms. Sveaass underscored.

On prevention, Ms. Sveaass commended Kenya's active use of the Istanbul Protocol in its medical examinations, which was one area in which Kenya was ahead of others.

Regarding other protective and preventive measures, Ms. Sveaass asked about regulations and time limits for pre-trial detentions, and whether individuals had to be informed of their rights. The Committee had heard allegations of arbitrary arrests, in particular with regard to the post-2007 election violence.

Ms. Sveaass also asked for details of police regulations and codes of conduct. That was especially pertinent with regard to specific cases. There had been numerous allegations of torture stemming from joint police and military actions in the Mount Elgon District. In another case, a former member of Parliament had been held in the context of a protest in Nairobi for several days before being released. Had that incident been investigated?

Ms. Sveaass said the Committee had received the Government's Waki report, released in mid-October, on the post-election violence. What measures were now planned to address those events? In a similar vein, what steps were envisaged to protect human rights defenders?

Ms. Sveaass welcomed information presented today on measures to protect women and children from violence. In that connection, what had happened to the draft amendment to the Children's Act submitted in 2005 to provide further protections and rights for children?

A refugee law had been passed in 2006, but it still had not been implemented, Ms. Sveaass observed. Moreover, it did not provide for guarantees against refoulement where a person was under threat in their

home country. What, then, was the determination procedure for expulsion of persons under that bill? She was particularly concerned about summary deportations of individuals allegedly wanted on terrorist or security charges, and of the situation of refugees from Ethiopia and Somalia being held on the border.

XUEXIAN WANG, the Committee Expert serving as Co-Rapporteur for the report of Kenya, welcomed that, with regard to training, starting in 2003 training for law enforcement officials in Kenya included human rights in its curricula. However, did that training cover all those who might come into contact with detainees, military, civil and others, and not just law enforcement officials? That was pertinent with reference to the Mount Elgon incidents, where there had been allegations against the military as well. Also, was there a code of conduct that set out rules for interrogations and handling of detainees?

Regarding new legislation, Mr. Wang asked for further information on where Kenya stood with regard to the administrative police acts.

Overcrowding in prisons was acknowledged to be a problem in Kenya, and Mr. Wang asked what measures were being taken to address that issue. As for the monitoring of prisons, reports had been received that, in practice, even the National Human Rights Commission had difficulty in visiting some of the penal institutions and had been prevented from doing so by police.

The police had created four special units to deal with separate areas of crime. The problem was, those units did not have fixed detention centres. So what was done with detainees? Could they be kept far away, which would effectively cut them off from contact with families and others, Mr. Wang asked.

Mr. Wang also asked for more information on what legal procedures in Kenya ensured the prompt and impartial investigation of all allegations of torture. According to reports, in the court cases alleging torture raised directly with magistrates, no action was taken on 80 per cent of those cases.

On the P3 form (for police medical examinations), Mr. Wang welcomed the fact that the form was now available in hospitals and online. However, he had heard that it was expensive to use the form, which would cost about 10 euros. That could be prohibitive for poor persons.

A specific concern had been the report by the National Human Rights Commission that, between June and October 2007, police had been responsible for 500 extrajudicial executions. The Police Commissioner had said that that was a baseless allegation. However, the Police Commissioner's official reply did not deny the deaths. Was an independent investigation contemplated? Moreover, according to the Waki report on the post-election violence, there had been 1,133 casualties, including 962 casualties owing to gunshot wounds, 405 of whom had died. What was being done to investigate those deaths, Mr. Wang asked?

Also, quite a number of reports had been received of severe violence against women, including rapes that had been committed during the post-election events, Mr. Wang said. Particularly upsetting was one report that 29 women from the Kibera district had been gang raped by the police. Other reports had been received of gang rapes by the security forces. Did the Government plan to investigate those cases?

A further concern was that a new amendment provided for an exception to the complete prohibition against the taking of confessions by the police, and Mr. Wang asked what the rationale for that amendment was.

Other Committee Experts asked questions and raised concerns related to the prompt investigation and prosecution on the basis of the Waki report of post-election violence in 2007; police corruption; a high level of impunity for acts of torture and violence; gender-based violence; a huge volume of police custody cases, which gave rise to the hypothesis that people were being held to extort money; the very low age of criminal responsibility, which was eight years; and judicial independence, and the role of "police prosecutors".

An Expert noted that the report alluded to the previous "systematic" practice of torture in Kenya and wondered on what basis it could now say that the practice of torture was no longer systematic. She also asked what had been the outcome of the 106 cases of torture reported by the former Special Rapporteur on Torture following a country visit.

An Expert was not satisfied with the protections against extortion of confessions, because police were still allowed to take the confessions, as long as they were of a high enough level, and the stipulation for the presence of a third party of the defendant's choice could be manipulated.

Preliminary Response by the Delegation

In some preliminary responses to questions, Ms. Karua explained that, although it said in the report that persons could not be prosecuted for torture, that was not accurate. The court cases were there. The problem was that it was difficult to prosecute such cases as it was up to the Judge to define what constituted torture. The same was true for cases of mental or psychological torture.

In the case of Abdulmalik and the cases of Kenyans returned from Ethiopia, no one had been punished, Ms. Karua insisted. There was a silent understanding between Kenya and the United States regarding certain clauses in the Rome Statute. They were looking into ensuring that such steps would not violate international agreements in the future. In particular, a bill was pending before Parliament to domesticate the Rome Statute (of the International Criminal Court), and it was currently in a second reading.

With regard to cases of arbitrary and unlawful arrest in Mount Elgon and cases involving illegal armed gangs, in which the police and the armed forces had joined forces, Ms. Karua stressed that in all such cases the police were the ones responsible for dealing with civilians. The armed forces only

provided support in such cases. As for the allegations in the report by the Kenyan National Commission on Human Rights, she had read that report and discussed it with the Commission. She had stressed with them the need for accuracy in such reporting. The Commission had made a general statement that 500 had been executed, without specifying those allegations. Internal investigations were ongoing where credible reports were substantiated, for example with family members coming forward.

On the Waki Report, that had been published on 15 October 2008. It was under consideration. But both the President and the Prime Minister had given their pledge that the recommendations contained in it would be implemented. One problem encountered in addressing the post-election violence was that it had divided the country down the middle. Therefore one provision was that an independent Tribunal had to be set up to try those events.

The task force by the police on the investigation of sexual violence had been one of the ways in which they had been implementing the findings of the Waki report, Ms. Karua underscored.

The Kenyan National Commission of Human Rights had by law the right to examine all places of detention. But Ms. Karua had heard that they had had difficulty in gaining access to some such places as they had raised the issue directly with her. In her view, it was a matter of establishing working relationships. Nonetheless, it was not a matter of choice, but a matter of law. In one case they had gone to court to enforce that right. But she continued to believe it was something that had to be worked towards by improving relationships between these bodies, as they could not litigate each and every case.

The P3 forms were available online and they were also available free of charge at hospitals, Ms. Karua said. The problem was that sometimes doctors asked for money to fill out the forms. Whenever complaints were received that money had been requested, those complaints were looked into.

On deathrow inmates, Ms. Karua said that the delegation would provide further statistics. There had been no official announcement of a moratorium on the death penalty, but there had not been executions since 1987.

As to why torture was not considered systematic now, but had been previously, Ms. Karua noted that in the past torture was not investigated at all. While the reforms and changes to ensure prevention of and protection against torture might be slow, they were now ongoing.

For use of the information media; not an official record