

Kenya's Anti-Torture Framework: Rethinking Kenya's Legal Approach

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Declaration

I, IMRAN IBRAHIM A. OGLE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

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This dissertation has been submitted for examination with my approval as University Supervisor.

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Acronyms

KNCHR – Kenya National Commission on Human Rights

IPOA - Independent Police Oversight Authority

UN – United Nations

NIS – National Intelligent Service

ATPU – Anti-Terrorism Police Unit

KDF – Kenya Defence Forces

CAT – Convention Against Torture

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND

On 10th December 1984 the UN General Assembly adopted the UN CAT (herein referred to as the UN Convention against Torture)¹. The main aim of the Convention was the prevention of torture and other acts of cruel, inhuman, or degrading treatment or punishment on a global scale² an effort that had been long in the making especially since the inception of the 1949 Geneva Conventions. The Convention came into force on 26th June 1987 and Kenya became a State Party to it in 1997 and thus took on the responsibility that requires states to take effective measures to ensure the prevention of torture in any territory under their jurisdiction and also forbids states to transport people to any country where there is reasonable ground to believe the person will be subject to acts of torture³.

In Kenya's 2010 Constitution, having taken into account the historical mistreatment of people in the country primarily at the hands of the state, provisions against torture are provided as a means of safeguarding the people⁴. Under the belief that certain freedoms are inalienable human rights, the Constitution guarantees the Bill of Rights for every individual⁵. The Constitution also provides for the freedom from torture and cruel, inhuman or degrading treatment or punishment being unlimited and guaranteed by the constitution⁶. The Constitution provides that the freedom from

¹UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39/46 of 10 December 1984, 39/46 of 10 December 1984.

² UN CAT, 39/46 of 10 December 1984.

³ UN CAT, 39/46 of 10 December 1984.

⁴ The World Organisation Against Torture, *State of Torture and Related Human Rights Violations in Kenya Alternative Report to the Human Rights Committee to Inform its Review of Kenya's Third Periodic Report at its 105th Session (9-27 July 2012) on the Implementation of the Provisions of the International Covenant on the Civil and Political Rights on Relation to Torture*, June 2012, 24. ; Citizens of Justice, *We Lived to Tell the Nyayo House Story*, Friedrich Ebert Stiftung (FES), 2003. ; Kenya Human Rights Commission, *International Day in Support of Victims of Torture*, 28 June 2011.

⁵ Article 19(3) (a), Constitution of Kenya, 2010.

⁶ Article 25(a), Constitution of Kenya, 2010.

torture and cruel, inhuman or degrading treatment or punishment cannot be limited⁷. When creating National Security Organs in Chapter fourteen of the Constitution which includes the Kenya Defence Forces⁸, the National Intelligence Service⁹ and the National Police Service¹⁰ the Constitution still guarantees this protection in security-related scenarios. It does so by providing constitutionally mandated principles which crucially includes the requirement that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms¹¹. To this end, both civilian¹² and parliamentary¹³ oversight authorities are created to ensure a system of checks and balances to ensure proper accountability within the national security framework.

However, with the rise of clandestine non-state military actors and the expansion of their operations, Kenya has become an active frontier in the fight against global terror due to its geographical proximity to Somalia.¹⁴ After Kenya's military intervention in Somalia in October 2011, it has become a clear and accessible target of the Somalia-based terror group Al-Shabaab, which is trying to further its political goals in light of an extremist interpretation of Islamic teachings¹⁵. At the outset it is important to establish the fact that Kenya is home to a sizeable ethnic Somali population¹⁶, which is overwhelmingly Muslim, that is indigenous to the North-Eastern region of Kenya. In general, the country also has a significant portion of its population that is affiliated with the Islamic religion.¹⁷

Due to an increase in indiscriminate non-conventional militant attacks perpetrated by the terror group on civilian and military targets, Kenya's national security organs have found themselves ineffectual in an information-intensive form of warfare and as such their counter terror response

⁷ Article 25(a), Constitution of Kenya, 2010.

⁸ Article 241(1), Constitution of Kenya, 2010.

⁹ Article 242(1), Constitution of Kenya, 2010.

¹⁰ Article 243(1), Constitution of Kenya, 2010.

¹¹ Article 238(2) (b), Constitution of Kenya, 2010.

¹² Article 239(5), Constitution of Kenya, 2010.

¹³ Article 95(5) (b) and Article 239(6), Constitution of Kenya, 2010.

¹⁴ Aronson S, 'Kenya and the Global War on Terror: Neglecting History and Geopolitics in Approaches to Counterterrorism' 7 African Journal of Criminology and Justice Studies (2013), 24.

¹⁵ The group is affiliated with the Salafist Jihadi ideology that is controversial due to its promotion of overt militancy based on a contentious reading of religious texts.

¹⁶ 2,385,572 according to the Ministry of State for Planning, National Development and Vision 2030, 2009 Population and Housing Census Results, 31st August 2010.

¹⁷ 11.1% according to the Ministry of State for Planning, National Development and Vision 2030, 2009 Population and Housing Census Results, 31st August 2010.

has been less than ideal.¹⁸ It has been documented that since the commencement of Operation Linda Nchi and subsequent domestic anti-terror operations, Kenya's National Security Organs have carried out acts that have severely impacted primarily on the human rights of Kenyan Somalis.¹⁹ There have been reports of these security forces perpetrating acts that have resulted in arbitrary arrests, illegal detentions, holding suspects *incommunicado*, torture and enforced disappearances which inevitably result in extra judicial killings²⁰.

1.2. STATEMENT OF THE PROBLEM

The above example of Kenya's security forces anti-terror operations is but a single example in the mass perpetration of torture by security forces in Kenya. In a survey carried out in 2016 by the Independent Medico Legal Unit it was discovered that 30.3% of the surveyed respondents when asked indicated that they had indeed been victims of torture or ill treatment at one time or the other. This was in stark comparison to a similar survey conducted in 2011 where just 23% of surveyed respondents indicated that they had been victims of torture or ill treatment²¹. The survey findings found that 61.4% of these acts were perpetrated by regular police, 13.0% was carried out by the administrative police, county government security and local chiefs were each responsible for 4.9% and 4.8% respectively and the army was responsible for 4.6%.²²

Despite Kenya being party to the UN Convention Against Torture, providing for protection from torture and creating a system of accountability in its own Constitution, the prevailing conditions within the country seem to be ineffectual in curtailing torture and other acts of cruel, inhuman, or degrading treatment or punishment which results in the violations of an absolute and non-derogable right that is inherent to every human being²³.

¹⁸ Kenya National Commission on Human Rights, *Occasional Report (2010-2014), 'Are We Under Siege? The State Of Security in Kenya'*, 2014.

¹⁹ Kenya National Commission on Human Rights, Preliminary Report, '*The Error of Fighting Terror with Terror*', September 2015.

²⁰ Kenya National Commission on Human Rights, Preliminary Report, '*The Error of Fighting Terror with Terror*', September 2015.

²¹ Independent Medico Legal Unit, *Kenya Fact Sheet, National Torture Prevalence Survey*, 2016.

²² Independent Medico Legal Unit, *Kenya Fact Sheet, National Torture Prevalence Survey*, 2016.

²³ Article 2(2), UN CAT, 39/46 of 10 December 1984.

1.3. JUSTIFICATION OF THE STUDY

This study is justified on the basis that although the vast majority of the world has agreed on the fact that torture is to be prohibited and it has since attained the status of *jus cogens* in the international arena²⁴, it still remains a pertinent issue on the global stage and this is especially true in Kenya where it is hindering the constitutionally guaranteed enjoyment of fundamental freedoms. One of the main reasons contributing to its prevalence is the differences of opinion on what constitutes torture on the global stage and how to best curtail it. As such state parties to the UN Convention against Torture have mandated that the treaty be domesticated in national legislations and countries such as Kenya have not done so²⁵. The purpose of this study will be to interrogate the established torture framework, its shortcomings and explores legal solutions.

1.4. STATEMENT OF OBJECTIVES

The primary aim of this study is to interrogate the sufficiency of Kenya's established Anti-Torture framework and its implementation in considering national security. The secondary purpose of this study is to make evident the shortcomings of such a system and to suggest viable legal solutions to remedy them.

1.5. RESEARCH QUESTIONS

The research questions that are of relevance to this study are:

- i) What is the existing framework in place in Kenya to prevent torture?
- ii) What are the implications of Kenya's monist versus dualist state debate by virtue of Article 2 (6) of the 2010 Constitution on the established framework?
- iii) What are the shortcomings of the existing framework?
- iv) How can the framework be improved to so as to yield better results?

²⁴ United Nations Commission on Human Rights, *Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Report by the Special Rapporteur, Mr P. Kooijmans, appointed pursuant to Commission on Human Rights Resolution 1985/33*, 1986, 1.

²⁵ Article 2, UN CAT, 39/46 of 10 December 1984. ; Article 4, UN CAT, 39/46 of 10 December 1984.

1.6. LITERATURE REVIEW

The prohibition of torture was first legally provided for on the international stage when it became a pertinent issue in the international community, especially after the events of the World Wars in the first half of the twentieth century. As the international community became more concerned about the gravity of torture, primarily guided by natural law theories and principles on human dignity, their stance on the legal status of torture continue to change. At first, torture was condemned as unacceptable in the Universal Declaration on Human Rights and subsequently, it was unanimously agreed upon by the signatories of the Geneva Conventions of 1949 and the Additional Protocols I and II that none of them would torture captured persons in armed conflicts, whether international or internal. The most comprehensive international legal instrument that deals with torture is the UN Convention Against Torture. Kenya's primary instrument in its anti-torture framework is the Constitution and the UN Convention against Torture which both prohibit torture. The UN Convention against Torture is an international treaty and the prohibition against torture has since attained the status of *jus cogens* in the international arena²⁶. This means that it forms part of a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances²⁷.

However both instruments only provide for the substantive element of the legal prevention of torture leaving its procedural aspect lacking. This is clearly seen in the UN Convention against Torture where it obliges State Parties with the primary responsibility of ensuring that effective legislative, administrative, judicial or other measures are taken to prevent acts of torture in any territory under its jurisdiction²⁸ and that acts of torture are offences under its criminal law²⁹. Further obligatory provisions are provided in the Convention.

Regional commendations and international instruments also offer suggested systems that may be applied to address the issue of torture. The Robben Island guidelines offers a practical approach

²⁶ United Nations Commission on Human Rights, *TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Report by the Special Rapporteur, Mr P. Kooijmans, appointed pursuant to Commission on Human Rights Resolution 1985/33*, 1986, 1.

²⁷ Hossain K, 'The Concept of *Jus cogens* and the Obligation under the U.N. Charter', *Santa Clara Journal of International Law* (2005), 73.

²⁸ Article 2 (1), UN CAT, 39/46 of 10 December 1984.

²⁹ Article 4, UN CAT, 39/46 of 10 December 1984.

for effective implementation of the prohibition and prevention of torture at a national level with special regard for African states³⁰. Additionally, the Istanbul Protocol provides a set of guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body³¹.

Furthermore the hierarchical application of international instruments in Kenya has changed with the promulgation of the 2010 Constitution. With the addition of Article 2 (5) and Article 2 (6) of the Constitution, Kenya would seem to have moved to become a monist country but incoherent and inconsistent judicial jurisprudence with regards to cases³² have failed to clarify the theoretical basis for the application of international law. This is because while it is clear that The Constitution is superior to International Law³³, the relationship between International Law and Municipal Law has yet to be clarified³⁴. As such it is necessary to determine Kenya's position on the monist-dualist spectrum in order to finally establish the position of international law and by extension, the UN Convention against Torture in Kenya's legal realm.

Due to this paradigm shift there has arisen a debate with regard to the application of International Law which will inevitably affect the legal framework pertaining to torture. In a bid to exhaust the options available to Kenya, I will look into monist system jurisdictions and their approach to International Law. I will then do the same for dualist system jurisdictions and finally I will look into 'mixed' system jurisdictions and how they have approached International Law. Whichever approach will be implemented in Kenya will subsequently have an effect on the implementation of treaties on torture. Furthermore, there is a lack of definition of what constitutes torture and what

³⁰ Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, APT, ACHPR and OHCHR, (2008).

³¹ Istanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9th August 1999.

³² David Ndungo Maina v Zipporah Wambui Mathara, Bankruptcy Cause 19 of 2010. ; Beatrice Wanjiku & Another v The Attorney-General Eklr (2010)

³³ Article 2, Constitution of Kenya, 2010.

³⁴ Wasonga N, The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective, The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective (Chapter 7 Vol 2) [2013] *African Human Rights Law Journal*, 18.

constitutes cruel, inhuman and degrading treatment since its definition varies from country to country³⁵ and I will look into its ramifications.

1.7. HYPOTHESIS

In pursuit of the above objective, the working hypothesis for the following research will be the presumption that there exists gaps within Kenya's current Anti-Torture framework which requires re-examination, restructuring and reinforcement in order to address and prevent cases of torture and cruel, inhuman or degrading treatment or punishment especially by security forces. This is best done through the legislation of national statutes that prevent torture in Kenya. It also proceeds on the presumption that International Laws with regards to the prevention of torture have to be domesticated in Kenya in order to be sufficiently enforceable.

1.8. RESEARCH METHODOLOGY

The foundation of this research will be qualitative and will rely on secondary data where the research process will be desk based and will primarily rely on library research and internet searches. It will primarily be an analysis of existing literature. Secondary data will be obtained from analysis and review of statutes, cases, books, journals, papers and other available literature on the issue under study. The chosen research methodology is deemed to be sufficient considering the analytical approach to the study. The results will be presented under identified themes. A degree of quantitative data will be obtained from already conducted surveys.

³⁵ Kenya National Commission on Human Rights, *Report to the Committee against Torture on the Review of Kenya's Second Periodic Report on Implementation of the Provisions of the International Covenant against Torture and Other Cruel, Inhuman and Degrading Treatment and/or Punishment*, March 2013.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1. THEORETICAL FRAMEWORK

What are the ultimate goals sought by mandated laws and the sanctions they prescribe upon a society? This is a question that lies at the heart of all theories of punishment which forms a rudimentary foundation for any legal regime. Over the years, several scholars have undertaken the task of trying to propose a comprehensive theory of punishment that seeks to determine the fundamental aim of punishment that justifies its existence and distribution. In his book '*Punishment*', author Thom Brooks identifies traditional general theories of punishment as retributivism which is found under the deontological school of thought on one hand and deterrence, rehabilitation and restorative justice which forms the utilitarian school of thought on the other. Below I shall analyse the two schools of thoughts further.

The concept that the 'punishment should fit the crime' was first coined by Cesare Beccaria, who is considered the father of the Utilitarian school of thought deriving it from two major philosophies; that of 'social contract' and 'free will'.³⁶ Under a social contract, one was attached to his respective society by virtue of his consent and therefore society was responsible to them and vice versa. Guided by this staunch belief in the social contract, Beccaria reflected a similar view that each individual surrendered only enough liberty to the state to make society viable. Therefore, the necessity of laws should be no more than a condition of the social contract. Furthermore, punishment 'should exist only to defend the sacrificed liberties against usurpation of those liberties by other individuals.'³⁷ He was also guided by a utilitarian view vis-à-vis the legislature, which was that Parliament should be guided by the principle of the greatest happiness be shared by the greatest number of people.

³⁶Beccaria C, *On crimes and punishments* (introduction by H. Paolucci, Trans.). New York: Macmillan. (Original work published (1764) (1963).

³⁷Beccaria C, *On crimes and punishments*.

Under the philosophy of free will, Beccaria argued that human behaviour is purposive and that it is based on hedonism which was guided by the pain and pleasure principle. According to this view, people select actions that yield pleasure and abstain from actions that yield pain. This led to the philosophy of ‘punishment should fit the crime’. This philosophy proposed that punishment should be attached to each crime to a level that would result in greater pain than those who committed the forbidden act.³⁸

Jeremy Bentham was influenced by Beccaria’s argument that mankind is ruled by the hedonistic principle of pursuit of pleasure and avoidance of pain. According to him, these two agents of hedonism affect the behaviour of man and could be used to rehabilitate criminal behaviour through the diligent implementation of the law.³⁹ This idea was based on a theory called the ‘hedonistic calculus’. It was comprised of two ideas; that man was rational and hedonistic and thus sought to increase pleasure and consequently, reduce pain. Bentham propounded that “all punishment is mischief and if it ought to be admitted, it should only be admitted in as far as it promises to exclude some greater evil.” By “reforming the criminal, by deterring him or others from similar offences in the future, the good that comes out of punishment may outweigh the intrinsic evil of suffering deliberately inflicted.”⁴⁰ If that is not the effect, or if the punishment inflicted exceeds the suffering avoided, the instigation of punishment would be unjustified.

Bentham also believed that a legal system could precisely ascertain the correct measure of punishment that was required to somewhat offset the possible pleasure derived from a criminal act. Therefore, if done accurately everyone would rationally choose to observe the law because of the pain and pleasure dynamic of the hedonistic principle.⁴¹ From Bentham’s perspective, the goals of punishment were to avert all offences, to avert worse offences, to avert mischief and to act at the least expense.⁴² Thus, the Utilitarian school of thought was guided by the view that punishment must govern the good coming from it, must offset the intrinsic evil of such punishment and that

³⁸Bentham J, (*An introduction to the principles of morals and legislation* (with an introduction by W. Harrison, Ed.). New York: Macmillan. 1948.

³⁹ Bentham J, *An introduction to the principles of morals and legislation*.

⁴⁰ Bentham J, (*An introduction to the principles of morals and legislation*).

⁴¹Gibbs JP, *Crime, Punishment and Deterrence, Advances in Applied Sociology*, Southwestern Social Science Quarterly, 1968. 515–530.

⁴² Bentham J, (*An introduction to the principles of morals and legislation*).

the subsequent benefits of imprisonment must be rehabilitation and deterrence. It is with specific regard to this deterrent and rehabilitative purpose of law that I will approach this study.

On the other end of the spectrum there exists the retributive school of thought which asserts that society has a right to punish criminals, in so far as it is carried out within the ambit of the law and in proportion to the crime committed by the offender.⁴³ It propounded that one who is guilty should suffer and in pursuit of justice and moral order which demand punishment.⁴⁴ The retributive school of thought was of the view that as opposed to the punishment fitting the crime as seen in the utilitarian school, it should instead fit the criminal. It criticised the utilitarian school of thought by further propounding that if reforming criminals justified punishment, then it would be more fitting to punish criminals before rather than after they have committed a criminal act. The retributive school of thought asserted that the utilitarian school of thought had dismissed two conditions which are mandatory to the idea of punishment. These are; “that an offence has been committed and that punishment should be for the offender himself who alone deserves it.”⁴⁵ Elements of this school of thought have also been incorporated in modern legal systems especially in the sentencing phase of a case and in the prisons system.

⁴³ Akers RL, *Criminological theories: Introduction and Evaluation*, Roxbury, California, 2000.

⁴⁴ Murphy J, *Punishment and rehabilitation*, Wadsworth publishers, California, 1973, 21.

⁴⁵ Murphy J, *Punishment and rehabilitation*, 23.

CHAPTER THREE

KENYA'S EXISTING ANTI-TORTURE LEGAL FRAMEWORK

The primary purpose of this chapter will be to delve into the legal status that the prohibition of torture enjoys on the international stage, the obligations that Kenya has undertaken with regards to it and finally, how these obligations have been provided for within the country's domestic legal framework. To do so I will expound on the most prominent international legal instruments that are instructive on the prohibition on torture and will demonstrate how the prohibition on torture has come to be part of *jus cogens*. I will then proceed to investigate the status of international law within Kenya's legal framework, with due regard to special status enjoyed by provisions prohibiting torture, and then demonstrate how these international obligations have found effect within Kenya's domestic legal framework. I will do so by highlighting key legal instruments and institutions that have been created in response to these obligations.

3.1. INTERNATIONAL LAWS

I will begin this chapter by first providing the key international provisions that prohibit torture and the obligations that Kenya has as a result. The prohibition of torture was first legally provided for on the international stage when it became a pertinent issue in the international community, especially after the events of the World Wars in the first half of the twentieth century. As the international community became more concerned about the gravity of torture, primarily guided by natural law theories and principles on human dignity, their stance on the legal status of torture continuously changed. At first, torture was condemned as unacceptable in the Universal Declaration on Human Rights and subsequently, it was unanimously agreed upon by the signatories of the Geneva Conventions of 1949 and the Additional Protocols I and II that none of them would torture captured persons in armed conflicts, whether international or internal. However, the most comprehensive international legal instrument that deals with torture is the UN Convention Against Torture and it is from this document that I will begin my analysis.

3.1.1. THE CONVENTION AGAINST TORTURE, 1984.

As mentioned above, the primary international instrument pertaining to torture in international law is the Convention against Torture which came into force on 26th June 1987 and to which Kenya became a State Party to in 1997. The Convention was meant to give effect to Article 55 of the United Nations Charter which stated that in order to create conditions of stability and well-being necessary for peaceful and friendly international relations, the United Nations would promote among other things the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion⁴⁶. In pursuit of this objective the Convention revised and gave force to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975⁴⁷ which was concerned with Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. As such it was meant to provide a legal foundation for the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world⁴⁸.

The first part of the Convention⁴⁹ defines torture as follows:

*“... the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions...”*⁵⁰

⁴⁶ Article 55, Charter of the United Nations, 1945.

⁴⁷ UN CAT, 39/46 of 10 December 1984.

⁴⁸ UN CAT, 39/46 of 10 December 1984.

⁴⁹ Part 1, Articles 1 -16, UN CAT, 39/46 of 10 December 1984.

⁵⁰ Article 1, UN CAT, 39/46 of 10 December 1984.

The Convention then proceeds to oblige parties to take effectiveness measures to prevent any act of torture in any territory under their jurisdiction⁵¹. This is to be done by ensuring that torture is a criminal offense under the State Party's national laws⁵², establishing jurisdiction over acts of torture committed by or against a State Party's nationals⁵³, ensuring that torture forms part of a State Party's extraditable offenses⁵⁴ and establishing universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited⁵⁵. State Parties are obliged to investigate any allegation of torture without delay⁵⁶ and also afford the enforceable right to compensation to victims of torture or their dependants in the case that victims die as a result of torture⁵⁷. In addition to this State Parties are obliged to ban the use of evidence produced by torture in their courts⁵⁸ and are impeded from deporting, extraditing, or refouling people where there are substantial grounds for believing they will be tortured in another jurisdiction⁵⁹.

Furthermore, State Parties are required to train and educate their law enforcement personnel, civilian or military personnel, medical personnel, public officials and other persons involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment regarding the prohibition against torture⁶⁰. Parties also must keep interrogation rules, instructions, methods and practices under systematic review regarding individuals who are under custody or physical control in any territory under their jurisdiction in order to prevent all acts of torture⁶¹.

The second part⁶² governs reporting and monitoring of the Convention and the steps taken by the parties to implement it. It establishes the Committee against Torture⁶³ and gives it the power to investigate allegations of systematic torture in the jurisdiction of State Parties⁶⁴. It also establishes

⁵¹ Article 2, UN CAT, 39/46 of 10 December 1984.

⁵² Article 4, UN CAT, 39/46 of 10 December 1984.

⁵³ Article 5, UN CAT, 39/46 of 10 December 1984.

⁵⁴ Article 8, UN CAT, 39/46 of 10 December 1984.

⁵⁵ Article 5, UN CAT, 39/46 of 10 December 1984.

⁵⁶ Articles 12 and Article 13, UN CAT, 39/46 of 10 December 1984.

⁵⁷ Article 14, UN CAT, 39/46 of 10 December 1984.

⁵⁸ Article 15, UN CAT, 39/46 of 10 December 1984.

⁵⁹ Article 3, UN CAT, 39/46 of 10 December 1984.

⁶⁰ Article 10, UN CAT, 39/46 of 10 December 1984.

⁶¹ Article 11, UN CAT, 39/46 of 10 December 1984.

⁶² Part 2, Articles 17 – 24, UN CAT, 39/46 of 10 December 1984.

⁶³ Article 17, UN CAT, 39/46 of 10 December 1984.

⁶⁴ Article 20, UN CAT, 39/46 of 10 December 1984.

an optional dispute resolution mechanism between State Parties⁶⁵ and allows them to recognize the competence of the Committee to hear complaints from individuals about violations of the Convention by a State Party⁶⁶. The third part⁶⁷ governs ratification, entry into force and amendment of the Convention. It also includes an optional arbitration mechanism for disputes between State Parties⁶⁸. Aside from the Convention, there also exists the Optional Protocol to the Convention against Torture⁶⁹ which establishes an international inspection system for places of detention. While Kenya is party to the Convention Against Torture and its provisions are binding upon it, it is not party to the Optional Protocols and as such, these provisions are not binding upon it.

3.1.2. AFRICAN UNION RESOLUTION 105, 2007

The African Union Resolution on the Prevention and Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 2007, serves the same purpose as the Convention against Torture and additionally urges States Parties to implement the Robben Island Guidelines and Measures, and to ratify all regional and international instruments dealing with the prevention of torture. It further urges States Parties to criminalise and penalise all acts of torture, promote and support cooperation with international mechanisms, establish complaints and investigation procedures, establish and support training and awareness-raising programmes for enforcement agents. It also requests States Parties to inform the African Commission of the concrete measures that they are taking to implement and operationalise the Robben Island Guidelines when they submit their Initial and Periodic Reports in compliance with Article 62 of the Charter⁷⁰.

3.1.3. THE ROBBEN ISLAND GUIDELINES, 2008

The Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa offers a practical approach for effective implementation of the prohibition and prevention of torture at a national level with special regard for African states. It is complementary to the above international

⁶⁵ Article 21, UN CAT, 39/46 of 10 December 1984.

⁶⁶ Article 22, UN CAT, 39/46 of 10 December 1984.

⁶⁷ Part 3, Article 25 – 33, UN CAT, 39/46 of 10 December 1984.

⁶⁸ Article 30, UN CAT, 39/46 of 10 December 1984.

⁶⁹ The Optional Protocol to the UN CAT (OPCAT), 2002.

⁷⁰ African Charter on Human and Peoples' Rights, 1981.

instruments by providing for the prohibition of torture in its first part⁷¹. It envisions that this will be possible by State Parties ratifying regional and international instruments relevant to torture, the promotion and support for cooperation with international mechanisms, the criminalization of torture, the respect for non-refoulement, combating impunity by strengthening the rule of law in the jurisdictions of State Parties and the implementation of complaints and investigation procedures. The guidelines were annexed to the UN General Assembly Resolution A/55/89 of December 2000 dealing with torture and other cruel, inhuman or degrading treatment or punishment and is thus binding on Kenya.

3.1.4. THE PROHIBITION OF TORTURE AS A PART OF *JUS COGENS*

Jus cogens, the literal meaning of which is “compelling law,” is the technical term given to those norms of general international law that are argued as hierarchically superior⁷². They comprise set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances⁷³. It is generally understood that a state’s treaty making power is subdued when confronted by a super-customary norm of *jus cogens* and that abrogate such a rule is impossible⁷⁴. Therefore, a treaty providing that *pacta sunt servanda* is mere reaffirmation and one denying it is an absurdity⁷⁵. By this logic, rules contrary to the notion of *jus cogens* could be regarded as void, since those rules oppose the fundamental norms of international public policy⁷⁶. As a result, *jus cogens* rules has gained the nature akin to that of international constitutional rules for two reasons. First, they limit the ability of states to create or change rules of international law. Second, these rules prevent states from violating fundamental rules of international public policy since the resulting rules or violations of rules would be seriously detrimental to the international legal system⁷⁷.

⁷¹ Part 1, Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, APT, ACHPR and OHCHR, (2008).

⁷² R Wallace, International Law 33, 2d E, 1994 and K Hossein, The Concept of *Jus cogens* And The Obligation Under The U.N. Charter, Santa Clara Journal of International Law, 73, 2005.

⁷³ K Hossein, The Concept of *Jus cogens* and The Obligation Under The U.N. Charter, Santa Clara Journal of International Law, 2005. 73

⁷⁴ K Hossein, The Concept of *Jus cogens*, 73.

⁷⁵ K Hossein, The Concept of *Jus cogens*, 73.

⁷⁶ K Hossein, The Concept of *Jus cogens*, 73.

⁷⁷ K Hossein, The Concept of *Jus cogens*, 73.

In the case of the *Prosecutor v Anto Furundzija*⁷⁸ the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in the *obiter dictum* that the violation of the prohibition against torture was the violation of a *jus cogens* norm that had direct legal consequences for the legal character of all official domestic actions relating to the violation⁷⁹. This was an affirmation of the conclusion made by the United Nations Commission on Human Rights Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which informed the UN position on torture. It was in this report that the Special Rapporteur stated as follows:

“... the International Court of Justice has qualified the obligations to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations erga omnes, obligations which the State has vis-à-vis the community of States as a whole and in the implementation of which every State has a legal interest. The International Law Commission in its draft articles on State responsibility has labelled serious violations of these basic human rights as “international crimes”, giving rise to the specific responsibility of the State concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of jus cogens.”

He went on to elaborate in no uncertain terms that “... *If ever a phenomenon was outlawed unreservedly and unequivocally it is torture*”⁸⁰.

3.2. APPLICATION OF THE INTERNATIONAL LAWS ON TORTURE IN KENYA

Depending on the type of approach a State takes to international law, whether monist or dualist, it will have different repercussions on the applicability of international law within its jurisdiction. As such, it is of utmost importance that one be able to identify the status of international law within the Kenyan jurisdiction and give special attention to the law relating to the prohibition of torture. It is with this in mind that I undertakes to clarify the place of international law in Kenya, determine

⁷⁸ Prosecutor v Anto Furundzija, Case No. IT-95-17/1-T10, Trial Chamber Judgement, 10 December 1998.

⁷⁹ Prosecutor v Anto Furundzija, 1998.

⁸⁰ P Kooijmans, *United Nations Commission on Human Rights Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. E/CN. 4/1986/15, 1, 1986, para 5.

the effect it has on the laws on the prohibition on torture and finally establish how these laws are meant to be given effect within the country's domestic legal framework.

3.2.1. THE MONIST VERSUS DUALIST DEBATE

Prior to Kenya's promulgation of a second constitution in 2010, it was regarded as a primarily dualist country⁸¹ where, by borrowing heavily from English practice, treaty making was the sole function of the executive⁸². Parliament was only involved when the treaty was placed before it for domestication in order to give municipal effect to its provisions⁸³. After the promulgation of Kenya's second constitution in 2010, Article 2 (5) and 2 (6) had the effect of introducing and integrating general international law as well as treaties ratified or acceded to by Kenya into Kenya's legal framework. This would seem to suggest that at least *prima facie* Kenya had embraced the monist approach to international law and transitioned from its previous dualist approach⁸⁴.

Monism, is based on the concept that both international law and domestic law form part of a unified legal system and by virtue of this domestic courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature⁸⁵. It asserts that domestic and international law are two components of a single body of knowledge called Law⁸⁶. This is because once a treaty has been ratified and published 'externally', it becomes part of domestic law and no legislative action is needed to lower international law norms to national laws⁸⁷. It adopts the doctrine of incorporation where a rule of international law becomes part of national law without the need for express adoption by the legislature or by the local courts. This 'automatic adoption is said to operate unless there is some clear provision of

⁸¹ Okunda v. Republic, [1970] E.A. 453 at p. 455.

⁸² Harrington J, Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament. McGill Law Journal, 2005. 465-509.

⁸³ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission. Nairobi, 2005, 154-155.

⁸⁴ Jama I, What is the place of international law in Kenya?

⁸⁵ H Kelsen, Principles of International Law, 2nd ed, 569, 1969 and Kabau T and Ambani J, The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism? Africa Nazarene Law Journal, 2013, 38.

⁸⁶ M Dixon, Textbook on International Law, Clarendon Press, New York, 1996, 65.

⁸⁷ F Viljoen, International Human Rights Law in Africa, Oxford, 18, 2007 and Kabau T and Ambani J, The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism? Africa Nazarene Law Journal, 2013, 38.

national law, such as statute or judicial decision, which precludes the use of the international law rule by the national court⁸⁸. With regards to which system, international law or domestic law, has supremacy over the other, Kelsen has stated that either of the systems has supremacy over the other in a given dispensation⁸⁹.

The dualist doctrine asserts several essential differences between international law and municipal law⁹⁰ and concludes that the two systems of law are different, each competent in its own domain⁹¹. Consequently, States ought to apply municipal law with no obligation to make it conform to international law and international law is binding municipally only if the State, through a deliberate process, allows it to do so⁹². It utilizes the doctrine of transformation where rules of international law do not become part of national law until they have been expressly adopted by the State. International law is not *ipso facto* part of national law⁹³. Consequently, a national court cannot apply a particular rule of international law until that rule has been deliberately ‘transformed’ into national law in the appropriate manner, as by legislation⁹⁴. This approach is prevalent in common law countries, of which Kenya is a part of, where parliamentary sovereignty is fundamentally protected especially from the excesses of the executive arm of government and thus when new obligations are created by treaty, legislation is needed for them to become rules of national law⁹⁵.

However some scholars have argued that Kenya’s transition has been wrought with incoherent and inconsistent judicial jurisprudence with regards to cases which have failed to clarify the theoretical basis for the application of international law⁹⁶. Consequently it has left ambiguity with regards to the hierarchical status of international law vis-à-vis other sources of law and most importantly its status in relation to national law⁹⁷. Under Justice Martha Koome, in the High Court case of *Re: The Matter of Zipporah Wambui Mathara*, the Court stated as follows;

⁸⁸ M Dixon, Textbook on International Law, 65.

⁸⁹ H Kelsen, Principles of International Law, 38.

⁹⁰ L Oppenheim, International Law: A Treatise, New York. Longmans, Green & Co, 1912, 25.

⁹¹ F Rigaux, Hans Kelsen on International Law, European Journal of International Law 9, 1998, 325 – 343.

⁹² J Maina, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?* 2013, 6.

⁹³ M Dixon, Textbook on International Law, 65.

⁹⁴ J Maina, *Do articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?* 8.

⁹⁵ S Ololade, *Monism/Dualism Or Self Executory: The Application Of Human Rights Treaties By Domestic Courts In Africa*, Institute For Human Rights, Abo Akademi University, 2009, 9.

⁹⁶ Kabau T and Ambani J, *The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?* Africa Nazarene Law Journal, 2013, 38.

⁹⁷ Kabau T and Ambani J, *The 2010 Constitution and the Application of International Law in Kenya*, 38.

“...before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law.”⁹⁸

This was reiterated in the High Court case of *David Macharia v Republic*⁹⁹.

While the above approach would seem to have the effect of elevating international law above municipal law, Justice Majanja gave an opposing view in the case of *Beatrice Wanjiku & Another v Attorney General & Another* where he stated that the use of the phrase ‘under this Constitution’ in Article 2 (6) of the Constitution meant that international conventions and treaties are subordinate to and ought to be in compliance with the Constitution. With regards to the position of international law in relation to the domestic legislation the learned Judge stated that in his opinion the framers of the Constitution did not intend to make international conventions and treaties superior to local legislation thus giving them precedence over laws enacted by chosen representatives. His understanding was that Article 2 (5) and 2 (6) should not be taken as creating a hierarchy of laws akin to that set out in the provisions of section 3 of the Judicature Act but must rather be seen in the light of the historical application of international law in Kenya where there was a reluctance by the courts to rely on international instruments even those Kenya has ratified in order to enrich and enhance the enjoyment of human rights¹⁰⁰. This reiterates a similar approach that was taken in the case of *Diamond Trust (K) Ltd. v. Daniel Mwema Mulwa*¹⁰¹.

In addition to the above judicial ambiguity it has also been argued that the retention of constitutional supremacy and the incorporation of a Treaty Making and Ratification Act into Kenyan law that requires treaties be subject to public scrutiny along with parliamentary supervision and approval before they are ratified by the executive makes Kenya a hybrid system which is neither pure dualist nor pure monist in the domestication of treaties¹⁰². However, I will discuss below that the above debate is inconsequential to the application of international law with

⁹⁸ David Ndungo Maina v Zipporah Wambui Mathara, Bankruptcy Cause 19 of 2010

⁹⁹ David Njoroge Macharia v Republic [2011] eKLR.

¹⁰⁰ Beatrice Wanjiku & Another v Attorney General & Another [2012] eKLR.

¹⁰¹ Diamond Trust (K) Ltd. v. Daniel Mwema Mulwa HCCC No. 70 of 2002.

¹⁰² D Maraga, The Legal Implications Of Article 2(6) Of The Constitution Of Kenya 2010, 2012, 117.

regards to torture due to the fact that it qualifies as a non-self-executing treaty and the implications that this has.

3.2.2. THE APPLICATION OF NON-SELF EXECUTING TREATIES

In international law an important distinction is made between treaties which are self-executing and those which are not, in determining the effect of a treaty in domestic law. A self-executing treaty is one which of its own force furnishes a rule of municipal law for the guidance of municipal courts in deciding cases involving the rights of individuals¹⁰³. It can be carried into effect by administrative authorities and create a rule for the courts¹⁰⁴. In monist jurisdictions such an approach is ideal but although treaties automatically become part of municipal law in such dispensations an existing paradox of the direct application of international law within municipal setting is that the treaty in question may call for implementing legislation¹⁰⁵. As such although they still form part of the State's laws they are not immediately operative with the domestic legal system. As was stated by Chief Justice Marshall in the case of *Forster & Elam v Neilson*:

*“...Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial Department, and the Legislature must execute the contract before it can become a rule for the Court.”*¹⁰⁶

US courts have since proceeded to develop several criteria for the determination of the self-executing nature of a treaty, which includes the following: the purpose of the treaty and the objective of its creators; the circumstances surrounding its execution; the nature of obligations imposed by the agreement; the existence of domestic procedures and institutions appropriate for direct implementation; the availability and feasibility of alternative enforcement methods; and the immediate and long-term implications of self or non-self-execution¹⁰⁷. In addition to this it has

¹⁰³ Henry L, ‘When is a Treaty Self Executing’. Michigan Law Review, Vol 27, No. 7, 776-785. 1929

¹⁰⁴ Evans A. ‘Self-Executing Treaties in the United States of America’, 30 BYIL, 1953, 193.

¹⁰⁵ Kabau T and Ambani J, *The 2010 Constitution and the Application of International Law in Kenya*, 48.

¹⁰⁶ *Forster & Elam v Neilson* 27 US [1829] USSC 16; (2 Pet) 253 (1829) 314.

¹⁰⁷ Wasonga N, *The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system*, 18.

been stated by the KNCHR that in general, the significance of ratification of any treaty will vary widely, with diverse impacts on compliance by different State agencies with the ratified instrument. The Commission was of the view that provisions of ratified treaties have to be practically enforced, which may require responses by various sectors for incorporation to happen. They stated that the enforcement of some treaty obligations may have budgetary implications, while some may need policy change or development, yet others may require national plans of action. A key example given was the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, to which Kenya acceded to in 2001. The Commission stated that it is not an instrument whose implementation is possible by the simple enactment of its provisions as domestic law. To a large extent it requires specific measures to be devised and taken by the State in order to give effect to its provisions”¹⁰⁸

With regard to the application of non-self-executing treaties within the municipal legal system it has been stated that

“... the constitution may permit a specific category of treaty to be internally operative, but if a particular treaty within this category is not intended for immediate internal application some further action would seem to be necessary. Hence, for a treaty to apply internally, ex proprio vigore, it must be self-executing in both international law and municipal law...”

Finally, the Constitution has provided for the application of such treaties under Article 21 (4) where it states the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”¹⁰⁹ It is under all these qualifications that the international obligations for the prohibition of torture have been determined to be non-self-executing in Kenya and in need of domestication regardless of whether a country implements a monist or dualist approach to international law¹¹⁰

¹⁰⁸ Kenya National Commission on Human Rights, ‘*Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations*’, 2011, 10.

¹⁰⁹ DP O’Connell ‘The Relationship between International Law and Municipal Law’, *Georgetown Law Journal* 431, 1960, 452.

¹¹⁰ Sloss D. *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, Santa Clara Law Digital Commons, 1999.

3.3. DOMESTIC LAWS

I will now proceed to the next section of this chapter where I shall provide the key domestic legal provisions that have provide mechanism meant to prohibit torture in Kenya. It is key to note that these provision have been heavily influenced by the international instruments provided above. This is because the prohibition of torture has been a critical issue for the international community since even before the inception of the United Nations and has such been developed a great deal on the international stage as demonstrated above. As such, the provision below mainly give effect to the above provisions in fulfillment of Kenya’s international obligations. Furthermore, I will identify and discuss the key institutions that have been created and are crucial to implementing measures meant to prohibit torture.

3.3.1. THE CONSTITUTION OF KENYA, 2010

The most important domestic law that seeks to prevent torture in Kenya is found in the Constitution. In 2010, Kenya promulgated a new Constitution, which being heavily influenced by the South African Constitution, is now deemed to be one of the most progressive Constitutions in Africa and indeed in the world¹¹¹. A key improvement made by the new Constitution as opposed to its predecessor, is the inclusion of an updated Bill of Rights which was altered. The scope of existing fundamental rights were also extended with new rights being added to the existing ones. The introductory first part, titled “*General provisions relating to the Bill of Rights*” has been added containing provisions on the application, enforcement and the limits of the Bill of Rights¹¹². The second part, which is the most extensive in the chapter, touches upon fundamental rights and freedoms which are greatly enhanced and amplified¹¹³ while the third part deals with the application of these rights to specific groups of society including the youth, disabled persons and older people¹¹⁴. The fourth part of the chapter comprises the rules governing the State’s power to declare a state of emergency¹¹⁵ and the fifth part finally establishes the Kenya Human Rights and Equality Commission and outlines its function and powers¹¹⁶.

¹¹¹ C Glinz, Kenya’s new Constitution, 5.

¹¹² Part 1, Articles 19 – 25, Chapter 4, Constitution of Kenya, 2010.

¹¹³ Part 2, Articles 26 – 51, Chapter 4, Constitution of Kenya, 2010.

¹¹⁴ Part 3, Articles 52 – 57, Chapter 4, Constitution of Kenya, 2010.

¹¹⁵ Part 4, Article 58, Chapter 4, Constitution of Kenya, 2010.

¹¹⁶ Part 5, Article 59, Chapter 4, Constitution of Kenya, 2010.

With specific regards to torture, Article 25 (a) of the Constitution states that “*Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited; (a) freedom from torture and cruel, inhuman or degrading treatment or punishment ...*”¹¹⁷ The effect of this provision is that it entrenches freedom of torture as a fundamental right that cannot be limited. Furthermore, the right is absolute and non-derogable. The Constitution proceeds to ensure freedom from torture by introducing caveats¹¹⁸ when creating national security organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) that provide constitutionally mandated principles, which crucially includes the requirement that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. The reasons for creating these caveats is due to the fact that statistically speaking, freedoms have historically been most at risk in security-related scenarios¹¹⁹. This extends to situations where the country is in a state of emergency¹²⁰. To this end, both civilian¹²¹ and parliamentary¹²² oversight authorities are created to ensure a system of checks and balances to ensure proper accountability within the national security framework.

In addition to the above mentioned measures, the Constitution seeks to enforce the prevention of torture by elevating the status of general international laws and international treaties of which Kenya is party to. With specific regard to human rights the Constitution states that “*...The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms...*”¹²³This particular provision requires that international obligations undertaken by Kenya be domesticated in the form of legislation meant to ensure their enforcement. This is in particular reference to non-self-executing treaties which shall be further discussed below. To enable enforcement of rights, Article 22 of the Constitution states that “*... Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened...*”¹²⁴ One can

¹¹⁷ Article 25 (a), Constitution of Kenya, 2010.

¹¹⁸ Article 238(2) (b), Constitution of Kenya, 2010 and Article 58, Constitution of Kenya, 2010.

¹¹⁹ Kenya National Commission on Human Rights, Preliminary Report, ‘The Error of Fighting Terror with Terror’, September 2015.

¹²⁰ Article 58, Constitution of Kenya, 2010.

¹²¹ Article 239(5), Constitution of Kenya, 2010.

¹²² Article 95(5) (b), Constitution of Kenya and Article 239(6), Constitution of Kenya, 2010.

¹²³ Article 21 (4), Constitution of Kenya, 2010.

¹²⁴ Article 22, Constitution of Kenya, 2010.

act in their own interest, on behalf of another person, as a member or in the interest of a group or class of persons and in the public interest. An association may also act in the interest of one or more of its members.¹²⁵

3.3.2. THE PERSONS DEPRIVED OF LIBERTY ACT, 2014

The Persons Deprived of Liberty Act is representative of a key statutory attempt to prevent torture. It is meant to give effect to the constitutional right to freedom and security for every person¹²⁶ and also guarantees the rights and fundamental freedoms of all persons who are detain, held in custody or imprisoned¹²⁷. It highlights the rights of persons deprived of liberty¹²⁸ who are defined as person deprived of liberty under authority of the law either by a law enforcement official for the purpose of investigation of a crime or so as to be charged with an offence or by a private person where there is reasonable suspicion that a crime has been committed; or a person deprived of liberty by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship or for protection¹²⁹. It also outlines the duties of person who is in charge of the detainment¹³⁰.

All persons deprived of liberty are guaranteed the right to be treated in a humane manner and with respect for their inherent human dignity at all times¹³¹. Any person who violates this right commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years, or to both¹³². The Act also provides restrictions on searches¹³³ and provides additional rights such as the right to be notified of legal aid when available¹³⁴, the right to the due process of law¹³⁵ and of importance the right to inspect the receipt book which shall be used by the law enforcement official to list the property in the possession of the person upon arrest and upon release¹³⁶. This allows the person arrested or

¹²⁵ Article 22, Constitution of Kenya, 2010.

¹²⁶ Article 29, Constitution of Kenya, 2010.

¹²⁷ Section 3, Deprivation of Liberty Act, No. 23 of 2014.

¹²⁸ Part 2, Sections 3 – 25, Deprivation of Liberty Act, No. 23 of 2014.

¹²⁹ Section 2, Deprivation of Liberty Act, No. 23 of 2014.

¹³⁰ Part 2, Sections 3 – 25, Deprivation of Liberty Act, No. 23 of 2014.

¹³¹ Section 5, Deprivation of Liberty Act, No. 23 of 2014.

¹³² Section 5, Deprivation of Liberty Act, No. 23 of 2014.

¹³³ Section 10, Deprivation of Liberty Act, No. 23 of 2014.

¹³⁴ Section 3 (b), Deprivation of Liberty Act, No. 23 of 2014.

¹³⁵ Section 7, Deprivation of Liberty Act, No. 23 of 2014.

¹³⁶ Section 9, Deprivation of Liberty Act, No. 23 of 2014.

detained to have the right to restoration of all his or her property. However the right to privacy is limited for persons deprived of liberty¹³⁷.

Of great importance to achieve the end of prevention of torture Sections 24 (5) which guarantees the persons deprived of liberty to the right to visits. This includes the right to be visited by human rights officers of duly recognized institutions for the purposes of inspecting and assessing the conditions under which such persons are held.”¹³⁸ This gives effect to the Robben Island requirement that provides the need to establish mechanisms of oversight, for example a system for regular visits to places of detention and independent bodies empowered to receive complaints. Furthermore, Section 32 states that the provisions of the Act shall be in addition to and not in derogation from any other law relating to the rights of persons deprived of liberty.¹³⁹ This goes to protect the person deprived of liberty freedom from torture. In addition to providing for the rights of deprived aliens¹⁴⁰, the Act also provides for the hearing of persons deprived of liberty complaints and disciplinary procedures under Part IV of the Act¹⁴¹.

3.3.3. THE NATIONAL POLICE SERVICE ACT, 2011

Provisions under the National Police Service Act are among the few that explicitly prohibits the use of torture by its officers. Under Section 2, the Act adopts the definition of torture proposed in the Convention against Torture which is “... *torture*” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of— (i) obtaining information or a confession from the person or from a third person; (ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed; (iii) intimidating or coercing the person or a third person; or (iv) for any reason based on discrimination of any kind..” However the definition includes the exception that torture does not include any pain or suffering arising from, inherent in or incidental to lawful sanction. Section 95 of the Act states that it shall be unlawful for a police officer to subject any person to torture or other cruel, inhuman or degrading treatment and a police officer who subjects a person to torture

¹³⁷ Section 4, Deprivation of Liberty Act, No. 23 of 2014.

¹³⁸ Section 24 (5), Persons Deprived of Liberty Act, No. 23 of 2014.

¹³⁹ Section 32, Persons Deprived of Liberty Act, No. 23 of 2014.

¹⁴⁰ Section 11, Persons Deprived of Liberty Act, No. 23 of 2014.

¹⁴¹ Part 4, Sections 27 – 28, Persons Deprived of Liberty, No.23 of 2014.

commits a criminal offence. The punishment for such an offence is that the police officer is liable on conviction to imprisonment for a term not exceeding fifteen years¹⁴².

3.4. DOMESTIC INSTITUTIONS

3.4.1. THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

Part V, Article 59 of the Constitution and the Kenya National Commission on Human Rights Act establishes the Kenya National Commission on Human Rights whose primary function is to promote the protection and observance of human rights in public and private institutions¹⁴³. Among its powers is the power to receive and investigate complaints about alleged abuses of human rights¹⁴⁴ and take steps to secure appropriate redress where human rights have been violated¹⁴⁵. It may on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs¹⁴⁶.

Part III of the Act deals with the matter of investigations by the commission and it states that it should resolve any matter brought before it by conciliation, mediation or negotiation¹⁴⁷. If the inquiry into a violation of human rights or negligence discloses a criminal offence, the commission may refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons¹⁴⁸. Alternatively the Commission may recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution or recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation of human rights other appropriate methods of settling the complaint or to obtain relief¹⁴⁹.

¹⁴² Section 95 (3), National Police Service Act, No. 11A of 2011.

¹⁴³ Article 59 (2) (a), Constitution of Kenya, 2010.

¹⁴⁴ Article 59 (3), Constitution of Kenya, 2010 and Section 32, Kenya National Commission on Human Rights Act, No. 14 of 2011.

¹⁴⁵ Article 59 (2) (e) and (f), Constitution of Kenya, 2010 and Section 41, Kenya National Commission on Human Rights Act, No. 14 of 2011.

¹⁴⁶ Article 59, Constitution of Kenya, 2010.

¹⁴⁷ Section 29, Kenya National Commission on Human Rights Act, No. 14 of 2011.

¹⁴⁸ Section 29, Kenya National Commission on Human Rights Act, No. 14 of 2011.

¹⁴⁹ Section 29, Kenya National Commission on Human Rights Act, No. 14 of 2011.

3.4.2. THE OFFICE OF THE DIRECTOR OF PUBLIC PERSECUTION

The Constitution also establishes the office of the Director of Public Prosecutions under Article 157 who has the power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct¹⁵⁰. The DPP may then institute and undertake criminal proceedings against any person before any court of any offence alleged to have been committed or alternatively take over and continue any criminal proceedings commenced in any court with the permission of the person involved or authority¹⁵¹. However, this does not apply to court-martials¹⁵². The DPP's powers may be exercised in person or by subordinate officers acting in accordance with general or special instructions¹⁵³. The KNCHR forms part of the investigative commissions mandated to assist and guide the office of the DPP to conduct investigations into crimes¹⁵⁴.

3.4.3. THE INDEPENDENT POLICE OVERSIGHT AUTHORITY

To implement the constitutional mandate of independent oversight over the police and bolster the prevention of torture in the police framework as envisioned in the National Police Service Act there is also the establishment of the Independent Police Oversight Authority which is meant to hold the police accountable to the public in the performance of their functions and also ensure independent oversight of the handling of complaints by the Service¹⁵⁵. Among their functions IPOA is obligated to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations¹⁵⁶.

¹⁵⁰ Article 157 (4), Constitution of Kenya, 2010.

¹⁵¹ Article 157 (6), Constitution of Kenya, 2010.

¹⁵² Article 157 (6), Constitution of Kenya, 2010.

¹⁵³ Article 157 (9), Constitution of Kenya, 2010.

¹⁵⁴ Section 5 (2) (b), Office of the Director of Public Prosecutions Act, No. 2 of 2013 and Section 5 (3), Office of the Director of Public Prosecutions Act, No. 2 of 2013.

¹⁵⁵ Section 5, Independent Policing Oversight Authority Act, Chapter 88, 2011.

¹⁵⁶ Part III, Independent Policing Oversight Authority Act, Chapter 88, 2011.

CHAPTER FOUR

SHORTCOMINGS OF KENYA'S EXISTING ANTI-TORTURE LEGAL FRAMEWORK

In the previous chapter, I provided the legal basis for the prohibition of torture on the international stage, the State obligations that arose as a result, and their application in the Kenyan legal framework. I then proceeded to demonstrate how these obligations had been given effect within Kenya's domestic legal framework. As such, the purpose of this chapter will be to evaluate the legal gaps that exists in Kenya's anti-torture framework by determining which obligations it has failed to undertake and the result of such omissions.

The first critical shortcoming of the Kenya's Anti-torture legal framework is that it lack a comprehensive definition of what constitutes torture¹⁵⁷. Kenya acceded to the UN Convention against Torture in 1997 and is also part to several other international agreements that are relevant to the prohibition of torture and cruel and degrading treatment. Of great import is the fact that a definition of torture has been provided for in Article 1 of the Convention Against Torture and State Parties are obliged to adopt this definition as the minimum standard of what constitutes torture¹⁵⁸. Furthermore, Article 2 provides that “...*State Parties shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction*”¹⁵⁹. The Convention also states that State Parties may provide a wider definition in their national legislation¹⁶⁰.

As seen above, part of Kenya's international obligations, is to provide a comprehensive definition of what comprises torture within its jurisdiction through legislation. However, to date, there has been no such provision that does so. A definition was included as a part of a 2014 amendment to the National Police Service Act which takes the definition provided for in the Convention but this

¹⁵⁷ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁵⁸ Article 1, UN CAT, 39/46 of 10 December 1984.

¹⁵⁹ Article 2, UN CAT, 39/46 of 10 December 1984.

¹⁶⁰ Article 1, UN CAT, 39/46 of 10 December 1984.

is limited to police discipline. The main reason as to why a definition of torture is so crucial is so as to determine when an act constitutes torture. There have been instances where actions taken by security forces have been perceived to constitute torture but due to a lack of a definition or adoption of a narrow definition, such actions have failed to qualify as such. The most well-known case of such an instance is the actions undertaken by the Central Intelligence Agency in the United States to interrogate terrorist suspects. Suspects were subjected to several procedures, the most infamous one being water boarding, which were justified as not amounting to torture, which is illegal, but rather enhanced interrogation techniques which were permissible¹⁶¹. As such a comprehensive definition that is applicable to all instances of torture is extremely important in Kenya but is still non-existent.

Another glaring problem of the existing legal framework is that act of torture have not been included as a part of Kenya's penal offenses. Article 4 of the Convention against Torture states that "...each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."¹⁶² This obliges a state to criminalize acts of torture within its jurisdiction by providing for it in its penal code. This is an obligation that Kenya is yet to undertake as torture is only criminalized in the National Police Service Act with specific regard to members of the National Police Service.

In addition to the above, with regards to Kenya's anti-torture legal framework, there is a lack of a dedicated redress process with accompanying sanctions and remedies¹⁶³. This is especially of importance when one takes into account the grave nature of acts of torture and the effect it has on victims¹⁶⁴. This issue originates from an ineffective investigative procedure as it was noted in the recent IMLU survey that while the majority of tortured individuals reported these incidents to the police, over sixty percent stated that no action was taken at all¹⁶⁵. Only a measly eight percent stated that these incidents resulted in perpetrators being arrested, charged in court and convicted¹⁶⁶.

¹⁶¹ Congressional Research Service, *Perspectives on Enhanced Interrogation Techniques*, Anne Daugherty Miles, Analyst in Intelligence and National Security Policy, January 8, 2016

¹⁶² Article 4, UN CAT, 39/46 of 10 December 1984.

¹⁶³ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁶⁴ Istanbul Protocol, 1999.

¹⁶⁵ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁶⁶ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

This is especially worrying when one takes into consideration the fact that only twenty seven percent of the tortured respondents indicated that they had reported these incidents to some institutions¹⁶⁷. These institutions include, the Police, Prisons administrations, IPOA, the office of the DPP, KNHRC and the Judiciary. Key reasons why a majority of individuals do not report incidents of torture include the belief that one will require money to cater for costs related to access to justice which was raised by thirty percent of the tortured respondents¹⁶⁸, twenty seven percent who believed that no assistance will be given despite reporting¹⁶⁹, twenty three percent who had a fear of reprisals¹⁷⁰ and sixteen percent who lacked knowledge of the relevant investigative body to whom one is to report¹⁷¹.

With regards to remedies available, the current legal dispensation is lacking. Sixty percent of tortured individuals surveyed in the recent IMLU report indicated that they had suffered adverse psychological effects as a result of experiencing torture or ill treatment¹⁷². Some of the most worrying psychological issues reported include, a state of perpetual fear which was reported by thirty nine percent of the tortured respondents, constant worry and anxiety, recurring intrusive thoughts of the events, chest and heart pains, sexual problems and suicidal thoughts¹⁷³. This is in addition to other physical problems, which was reported by over fifty two percent of the tortured respondents. This physical damage was encountered by tortured respondent who have undergone the following types of torture; physical injuries that result in maiming and scarring, being held in flooded cells, being deprived of sleep, being forced to observe others being tortured, bagging and suffocation, burning and scalding, hanging and rape¹⁷⁴. The provision of rehabilitative remedies are neglected as they are not readily available for these victims and neither are State provided funds meant to cater for these treatments.

With regards to the perpetration of torture, a majority of which the police are responsible, almost forty percent of the tortured individuals were tortured in police cells, almost twenty two percent were tortured on the way to the police cells while twenty percent were tortured at the time of

¹⁶⁷ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁶⁸ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁶⁹ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁰ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷¹ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷² Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷³ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁴ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

arrest¹⁷⁵. In addition to this, thirty three percent of the tortured respondents indicated that they had been tortured for no apparent reason, twenty nine percent stated that they were tortured to reveal more information, twenty four percent indicated that they were tortured to make a confession while almost twenty percent were tortured as punishment for a crime¹⁷⁶. These statistics point to a Police force that seems to be poorly trained in carrying out their mandate while respecting human rights with regards to the prohibition of torture.

The primary institutions credited with any success in investigating acts of torture and effectively prosecuting them while actively protecting victims include the Independent Police Oversight Authority, the Office of the Director Public Prosecution, the Kenya National Commission on Human Rights and the Judiciary¹⁷⁷. These institution were noted for being especially active and effective in undertaking cases of torture and ill treatment on the country with significant contribution from the media, civil society organizations and affected communities¹⁷⁸. These contributions range from informing the general population of their rights and the legal actions they may take in case of violation of these rights, aiding in the investigation of acts of torture and providing support to victims of torture which aids them in their rehabilitation.

While the above institutions were recognized as generally being the most effective institutions in the fight against torture, the Police, Prisons administrations and County Governments were noted as being the least effective institutions¹⁷⁹. This is despite the fact that as previously stated, a majority of afflicted individuals report their grievances to these ineffective institutions. This is extremely troubling news if one takes into account the vulnerable situations that victims of torture find themselves in once they dare to report these cases since it has been noted that intimidation and reprisals by the culprits of torture is common¹⁸⁰.

As seen above, the existing anti-torture legal framework is lacking in several aspects. The first problem is that there is a lack of a comprehensive definition. This creates a problem where it becomes extremely difficult to determine which actions legally amount to torture. This problem is exemplified in the CIA enhanced interrogation techniques case where security forces may justify

¹⁷⁵ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁶ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁷ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁸ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁷⁹ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

¹⁸⁰ Independent Medico – Legal Unit, National Torture Prevalence Survey, Kenya Fact Sheet, 2016.

inhumane actions that cause harm and injury as permissible. Additionally, the act of torture has not been criminalized in Kenya's penal code. The inclusion of torture in the penal code is one of Kenya's international obligations and as such it has to undertake it. Furthermore, the law is silent on matters of deportation, extradition and refoulement with specific regards to matters where torture is a prevailing issue. Finally, the law fails to take into account the adverse mental repercussions that torture victims suffer and thus does not provide rehabilitative remedies. This is linked with the overall issue that there is no dedicated mechanisms for reparations for victims of torture.

If one takes into account the culture of torture that is tolerated within the national security forces, as proved by the IMLU national statistics, these glaring omissions in the law cannot be ignored. It is important to provide for them in order to allow for effective investigations and prosecutions of these crimes that will not only deter such actions in the future, but also allow for the mental and physical rehabilitation of victims of torture. Two bills that seek to address this issues have been tabled in Parliament. These are the Prevention of Torture Bill and the National Coroners Service Bill. In the next chapter, I will discuss and critique these bills as part of the recommendations of how Kenya's anti-torture legal framework can be improved.

CHAPTER FIVE

RECOMENDATIONS AND CONCLUSION

In this chapter, I will seek to address recommendations on how to resolve the shortcomings of Kenya's anti-torture legal framework that had been highlighted in the previous chapter. I will give due regard to the analysis of the Prevention of Torture Bill and the National Coroners Bill that have been tabled in parliament in a bid to supposedly resolve the implementation gaps in the prohibition of torture and then proceed to include other recommendations before finally providing a conclusion to this research paper.

5.1. RECOMENDATIONS

As of November 2016, two proposed bills have been tabled in the National Assembly: the Prevention of Torture Bill of 2016¹⁸¹ and the National Coroner Service Bill of 2013¹⁸² which are relevant to Kenya's effort to address the implementation gaps that exists within its anti-torture legal framework.

5.1.1. THE PREVENTION OF TORTURE BILL, 2016

The Prevention of Torture Bill has been drafted with particular reference to the investigations conducted by the Truth Justice and Reconciliation Commission that revealed great instances of torture and related violation of human rights and historical injustices. The report further established that torture, extra-judicial executions, murders, harassments by law enforcement agents and many other forms of human rights violations are still being reported across the country. Despite the Constitution's attempt to provide for freedom from torture and inhuman, cruel and degrading treatment as an unlimited right, it has been noted that the provision falls far short of defining what constitutes torture nor establishing mechanisms for reparations for victims of torture. The problems

¹⁸¹ Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁸² National Coroners Service Bill, 2013.

with this omission include the difficulty associated with determining which actions legally amount to torture. As such, the Prevention of Torture Bill seeks to provide for such implementation gaps in accordance with Kenya's international obligations¹⁸³.

The first major step that the Bill takes is providing for a comprehensive definition of torture that is applicable to all. The Bill defines torture in accordance with Article 1 and Article 2 of the UN CAT¹⁸⁴. It goes further to provide what constitutes physical torture by stating that it includes beating, gunshots, electric shocks, drowning, rape and sexual abuse, strangling, use of drugs to induce pain etc.¹⁸⁵. This also applies to mental or psychological torture which includes threats to victim or his/her family, denial of sleep or rest, secret detention, unnecessary solitary confinement, stripping the victim, simulation of killing among other degrading acts¹⁸⁶.

In addition to the above, the Bill provides that third parties that instigate, consent or acquiesce to the perpetration of torture are liable¹⁸⁷. Another key improvement made by this Bill is that it provides that torture is now an offence and anyone who commits such an offence shall be liable on conviction to imprisonment for a term not exceeding twenty five years and if the torture results in death, one shall be liable on conviction to life imprisonment¹⁸⁸. Persons refusing to obey an order from a superior officer or public authority to commit, aid or abet in torture are also legally protected from any disciplinary actions¹⁸⁹ and the use of information obtained through torture commits an offence and is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding fifteen years or both¹⁹⁰.

According to the Bill the proposed procedure for reporting torture and related offences for persons alleging that an offence has been committed is to complain to the police, the Kenya National Commission on Human Rights or any other relevant institution or body having jurisdiction over the offence¹⁹¹. The Bill goes further in stating that the person receiving such a complaint must register the complaint in writing and the offence investigated promptly by the Directorate of

¹⁸³ Prevention of Torture Bill 2014 commentary, Independent Medico-Legal Unit.

¹⁸⁴ Section 4, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁸⁵ Schedule to Prevention of Torture Bill, National Assembly Bills, No. 47, 2016.

¹⁸⁶ Schedule to Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁸⁷ Section 4, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁸⁸ Section 5, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁸⁹ Section 6 (3), Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹⁰ Section 9, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹¹ Section 12 (1) (a) and Section 13, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

Criminal Investigation¹⁹². According to the Bill, the division in charge of investigating such matters within the police is the Internal Affairs Unit and the Independent Police Oversight Authority is meant to follow the procedure prescribed in its Act¹⁹³.

Furthermore, the Bill introduces a Victim Impact Statement which means a “...*statement by the victim or where incapacitated, the victim's representative on the psychological, emotional, physical, economic or social impact of the offence committed against the victim and includes any recording, summary, transcript or copy thereof...*”¹⁹⁴This allows for the personalization of the crime which helps the court in determining perpetrators liability and also contributes to the process of healing and overall rehabilitation of the victim. It further provides the court with details on descriptions of medical treatment or psychological services that victims require as a result of the crime, highlights the victims safety concerns, the need for reparations and the victim’s opinion of an appropriate punishment for the offender¹⁹⁵. This provision goes in hand with the establishment of the Victims Trust Fund through the Victims Protection Act¹⁹⁶ to be used to afford reparations to victims of torture in Kenya. The aim of the Fund is to help victims and their families to rebuild their lives and have redress for the human rights violations they have suffered.

Victim under the Bill shall obtain redress and have an enforceable right to adequate reparation including restitution, adequate compensation, rehabilitation satisfaction and guarantees of non-repetition. In the event of the death of a victim as a result of an act of torture, his dependents shall be entitled to necessary reparation¹⁹⁷. The state shall also ensure that specialized/holistic services for the victim of torture or ill-treatment are available, appropriate and promptly accessible. Examples of these services include psychological support, appropriate medical assistance, legal assistance or legal information on relevant judicial and administrative procedures. The expenses incurred for the medical treatment or professional counselling of a victim shall be charged on the Victims Trust Fund¹⁹⁸. Where the court finds it appropriate, the victim shall be compensated for

¹⁹² Section 13 (4), Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹³ Section 13, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹⁴ Section 2, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹⁵ Prevention of Torture Bill 2014 commentary, Independent Medico-Legal Unit.

¹⁹⁶ Victim Protection Act, No. 17 of 2014.

¹⁹⁷ Section 17, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

¹⁹⁸ Section 20, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

economic or emotional loss, damage of property or physical injury or harm as a result of torture and related offences which shall be effected from the Victims Trust Fund.

Witness protection is also a priority in the Bill meant to protect vulnerable witness. During criminal proceedings, the courts will put in place support structures such as protection covers for such witnesses, giving evidence through intermediaries, camera court sessions etc. A vulnerable witness is recognized as a person who due to age, gender, disability or other special characteristics needs support and protection from a threat or risk which exists on account of his/her being a crucial witness before a court, commission or tribunal¹⁹⁹.

However, the Bill fails to provide for the procedures to be used for the assessment of persons who allege torture and ill treatment. It is my view that Parliament should take steps to adopt the Istanbul Protocol since it provides a set of guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body. It outlines the international standards for effective legal and medical evaluations conducted to investigate allegations of torture and ill treatment. It is meant to train medical practitioners on how to conduct clinical interviews and exams on victims in order to document physical and psychological evidence and adhere to proper ethical guidelines. Such training is also extended to law enforcement as it is deemed necessary to ensure that law enforcement officers not only recognize what torture is but can understand their obligations under international agreements in preventing and investigating torture. The Istanbul protocol was formally endorsed by the UN in 1999 but is a non-binding instrument.

In addition to the above suggestion, it is also my view, that it would be better to exclude the police from the investigative process. This is in line with the extremely poor performance and victim's exposure to reprisal that was reflected in the Independent Medico – Legal Unit National Survey on National Torture. In addition to this, the Istanbul Protocol outlines the fact that investigative procedures into torture by law enforcement are best undertaken by independent investigative bodies. As such, it would be prudent to assign the investigative role to the Kenya National Commission on Human Rights and the Independent Police Oversight Authority in conjunction with the Director of Public Prosecution who have proven to be the most effective, as illustrated in

¹⁹⁹ Section 16, Prevention of Torture Bill, National Assembly Bills No. 47, 2016.

the above. These institutions, whose functions and powers are provided for in chapter three of this paper, are in my opinion sufficiently equipped to handle cases of torture.

Finally the Bill should address the matter of extradition and refoulement with specific regards to matters where torture is a prevailing issue. In this regard, the Robben Island Guidelines would be instructive as it provides that torture should be made an extraditable offence and that the trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards. Furthermore, States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture. With regards to refoulement, it provides that States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture. Finally it provides that States should ensure expeditious consideration of extradition requests to third states, in accordance with international standards.

5.1.2. THE NATIONAL CORONER'S SERVICE BILL, 2013

Due to a lack of a comprehensive formal death investigation system in Kenya, whose responsibility has been in the ambit of the National Police Service, the National Taskforce on Police Reforms noted that the practice of using serving police officers as forensic scientists within the field of criminal investigations has more challenges than benefits. It was further noted by the United Nations Special Rapporteur in Extrajudicial, Summary or Arbitrary Execution Philip Alston that police investigation of murders in Kenya are generally inadequate due to resource, training and capacity constraints²⁰⁰. This was even worse when the police themselves are implicated in the death and thus it was concluded that Police Service in Kenya lacked the will to institute reforms that would improve transparency and accountability required in death investigations²⁰¹. The proposed Bill is meant to provide a legal framework for reporting, investigating and documenting unnatural deaths in Kenya and provide for an independent and accountable system that promotes cooperation between different stakeholder which includes the National Police Service, investigative agencies, the courts, professional and regulatory bodies, other government bodies and authorities and the public in promoting effective death inquiries²⁰².

²⁰⁰ The National Coroners Service Bill 2015 commentary, Independent Medico-Legal Unit.

²⁰¹ The National Coroners Service Bill 2015 commentary, Independent Medico-Legal Unit.

²⁰² The National Coroners Service Bill 2015 commentary, Independent Medico-Legal Unit.

The Bill establishes an independent²⁰³ National Coroners Service and the object of the Act would be to:

“...provide for investigation of reportable deaths in order to determine the identities of the deceased persons, the times and dates of their deaths and the manner and cause of their deaths; and (c) provide for the complementary role of forensic medical science services to the police in handling investigations involving decedent bodies and scene management; (d) to provide for matters relating to exhumation of bodies at the order of the courts and pursuant o other written; (e) to provide for the mandatory requirement to report reportable deaths; (f) to establish the procedures for investigations, by coroners of reportable deaths; (g) to assist in policy formulation by advising the State, by forensic study, on possible measures to help to prevent deaths from similar causes happening; and (h) to facilitate the participation of the coroner at inquests to advise on matters connected with reportable deaths, including matters related to public health or safety and the administration of justice...”²⁰⁴

The above function is to be overseen by the Coroner General. Costs of undertaking a post-mortem or autopsy on reportable deaths shall be borne by the State²⁰⁵.

Where deaths that occur in police custody or military custody or in any other form of custody the officer in charge or any other officer in the area shall immediately report the death to the Coroner and the next of kin²⁰⁶. The report should be made as soon as possible but no later than six hours after death. Once the coroner completes his investigation, he shall furnish a copy of the report to the Independent Police Oversight Authority or any other relevant authority for further action. Since the coroner undertakes medical investigations of deaths suspected to be of a criminal nature, when he finds that the death of the deceased person was occasioned by an act or omission which amounts to an offence, the coroner shall immediately after the investigations forward a copy of the investigation report together with the names and addresses of any witness to the Director of Public Prosecutions and the Inspector General of Police for necessary for legal interventions²⁰⁷. State officers are obligated to cooperate with the National Coroner Service in ensuring the successful

²⁰³ Section 8, National Coroners Service Bill, 2013.

²⁰⁴ Section 3, National Coroners Service Bill, 2013.

²⁰⁵ Section 62, National Coroners Service Bill, 2013.

²⁰⁶ Section 25, National Coroners Service Bill, 2013.

²⁰⁷ Section 28, National Coroners Service Bill, 2013.

performance of the functions of the coroner. A violation of this requirement will be deemed to be in contempt of Parliament and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or a jail term of six months or both.

5.1.3. OTHER RECOMMENDATIONS

In addition to adopting the above two bills with the highlighted amendments, there should also be a move to the adoption of a Manual on Human Rights Training and Torture Prevention for the Police in a bid to improve police respect for human rights and route the culture of torture tolerance that is currently prevalence within the service. This is training that is highly recommended in the Istanbul Protocol²⁰⁸ and a comparative example of a jurisdiction that has recently undertaken such a positive step is Nigeria²⁰⁹. The manual that they have adopted seeks to sensitise officers of the importance of upholding human rights and prohibiting torture in the course of executing their mandate. In addition, it provides officers with an understanding of international human rights instruments. The manual has specific focus on the United Nations Code of Conduct for Law Enforcement Officials and on instruments in relation to torture, cruel, inhuman and degrading treatment or punishment. Supported by international donors and civil society groups in Nigeria, the manual has been adopted for use in all police training colleges as part of the police reform and to address concerns about police misconduct²¹⁰.

Furthermore, there should be steps taken by the State to provide civic education to communities with regards to their legal rights with regards to freedom from torture. This should be undertaken in conjunction with the judiciary, national human rights bodies, civil society organizations, non-governmental organizations, education institutions, religious organizations and the media. This would ensure that victims of torture not only know the legal processes and redresses that they are entitled to but have access to support structures that can aid them through the healing process. It would also further deter overt perpetration of torture in various communities as they would be sensitised to their rights.

²⁰⁸ Istanbul Protocol, 1999.

²⁰⁹ Manual on Human Rights Training and Torture Prevention for the Police Nigeria, 2014.

²¹⁰ Amnesty International, *You Have Signed Your Death Warrant' Torture and Other Ill Treatment by Nigeria's Special Anti-Robbery Squad (SARS)*, 2016.

5.2. CONCLUSION

In conducting research on whether Kenya has effectively executed its international obligations to prohibit torture and other cruel, inhuman or degrading treatment or punishment, I have been guided by the theoretical view that mankind is ruled by the hedonistic principle of pursuit of pleasure and avoidance of pain and that this could be used to rehabilitate criminal behaviour through the diligent implementation of the law. It is with specific regard to this deterrent and rehabilitative purpose of law that I have approached this study and provided the hypothesis that the prohibition and prevention of torture is best achieved through the legislation of national statutes that domesticate Kenya's international obligations and thus prevent torture in Kenya.

In order to prove the above hypothesis, in chapter three, I undertake to demonstrate the legal status that the prohibition of torture enjoys on the international stage, the obligations that Kenya has undertaken with regards to it and finally, how these obligations have been provided for within the country's domestic legal framework. As such international legal instruments that are instructive on the prohibition on torture such as the UN CAT, the Robben Island Guidelines and African Resolution 105 of 2007 were discussed in detail. Furthermore it was demonstrated how the prohibition on torture has come to be part of *jus cogens*. In discussing the application of these instruments in Kenya, it has been demonstrated that the international laws on the prohibition of torture form part of a certain group of treaties that are non-self-executing and are thus in need of domestication in Kenya. The current laws and institutions in Kenya that are currently in place were then highlighted. This is in line with the hypothesis posited in chapter one of this research paper which stated that it was necessary to domesticate Kenya's international obligations.

In chapter four, I highlighted the various legal gaps that existed in Kenya's legal anti-torture framework. These included a lack of a comprehensive definition, the non-criminalization of torture in Kenya, the failure to take into account the adverse mental repercussions that torture victims suffer, the non-existence of rehabilitative remedies, the lack of a dedicated mechanisms for reparations for victims of torture and the omission of measures relating to extradition and refoulement with specific regards to matters where torture is a prevailing issue. Systemic issues regarding the culture of torture tolerance in national security organs were also identified. This

proves that the hypothesis put forth in chapter one of this research paper was indeed accurate in determining that there did exist various gaps in Kenya's legal anti-torture framework.

In the recommendations found in this chapter, I analysed the Prevention of Torture Bill and highlighted the commendable measures provided for to aid in the prevention of torture. This included the inclusion of; a comprehensive definition in accordance with the UN CAT, the criminalization of torture in Kenya and the various levels of liabilities with penalties being provided in both cases where the victim survives or dies, the protection of officials who refuse to participate in torture, the provision of a procedure for reporting torture and related offences for persons alleging that an offence has been committed, the introduction of a Victim Impact Statement, the establishment of the Victims Trust Fund through the Victims Protection, the establishment of means to obtain redress, an enforceable right to adequate and the prioritization of witness protection. However, the Bill fails to provide for the procedures to be used for the assessment of persons who allege torture and ill treatment. But this may be remedied with the adoption of measures suggested in the Istanbul Protocol that provide a set of guidelines for the assessment of persons who allege torture and ill treatment. The Bill also fails to address the matter of extradition and refoulement with specific regards to matters where torture is a prevailing issue and thus the adoption of the Robben Island Guidelines provisions on them would be helpful.

With regards to addressing the systemic issues that exist such as the culture of torture tolerance in national security organs that has contributed to the extremely poor performance of the police investigative process and victim's exposure to reprisal, it is recommended that the police be excluded from the investigative process. This is supported by the Istanbul Protocol which outlines the fact that investigative procedures into torture by law enforcement are best undertaken by independent investigative bodies which in Kenya's case include the Kenya National Commission on Human Rights and the Independent Police Oversight Authority who work in cooperation with the Director of Public Prosecution. These institutions have already proven to be the most effective institutions in investigating acts of torture and effectively prosecuting them while actively protecting victims. This move can further be bolstered by the passing of the National Coroners Bill which would safeguard the integrity of investigations of deaths caused by torture.

Furthermore, it is recommended that the culture of torture tolerance in the National Police Service may further be reduced by the adoption of a Manual on Human Rights Training and Torture

Prevention for the Police similar to that adopted in Nigeria. Such a manual should incorporate provisions contained in the United Nations Code of Conduct for Law Enforcement Officials and in instruments in relation to torture, cruel, inhuman and degrading treatment or punishment. Such training should be made mandatory for all police officers. Lastly, it is recommended that steps should be taken by the State to provide civic education to communities with regards to their legal rights relating to freedom from torture. This should be undertaken in conjunction with the judiciary, national human rights bodies, civil society organizations, non-governmental organizations, education institutions, religious organizations and the media.

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