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COMMITTEE AGAINST TORTURE

41st session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)*

OF THE 854th MEETING

Held at the Palais Wilson, Geneva,
on Friday 14 November 2008 at 10 AM

Chairperson: Mr. GROSSMAN

SUMMARY

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (*continued*)

Initial report of Kenya (*continued*)

* The summary record of the second part (closed) of the meeting appears as document CAT/C/SR.854/Add.1.

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The meeting was called to order at 10 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION (Agenda item 5) (*continued*)

Initial report of Kenya (CAT/C/KEN/1) (*continued*)

1. *At the invitation of the Chairperson, the members of the delegation of Kenya resumed their places at the Committee table.*

2. Mrs. MOHAMED (Kenya) recalled that the initial report of Kenya had been drafted in accordance with the general guidelines concerning the form and content of periodic reports to be submitted by states parties under article 19 of the Convention. All the ministries concerned in applying the Convention had participated in its preparation, and the National Commission on Human Rights and several nongovernmental organizations had also been fully involved in the process. Kenya regretted that it was not yet able to submit its basic document to the Committee, although that document was almost completed.

3. Mr. KIHWAGA (Kenya) confirmed that the Convention had not been incorporated into Kenyan domestic law. Recognizing the problem posed by the inability of the courts to apply the definition of torture set forth in the first article of the Convention, the government had included recommendations in the National Action Plan for Human Rights whereby all international human rights instruments, including the Convention against Torture, should be transposed into domestic law. Parliament would be asked in the near future to consider draft legislation with provisions flowing directly from the Convention. The age of criminal responsibility, currently eight years, could thereby be raised, and this issue would in any case be duly examined in the process of preparing the national human rights strategy.

4. Mr. KIRAITHE (Kenya) said that complaints of torture filed against police officers had to be reflected in a written report and that any person who showed evidence of injury, whether severe or light, would be examined immediately by a physician. The official in receipt of a complaint of torture was required to inform his superior, who must undertake a preliminary investigation. If there were grounds to believe that a serious criminal violation had been committed, the matter would be transmitted to the Attorney General. In light of the evidence produced, the Attorney General could begin prosecution before the courts. Any police officer accused of an act of torture was systematically suspended from duty for the duration of the procedure. In less severe cases, the officer could be disciplined through a number of penalties ranging from a simple letter of warning to dismissal. In 2007, disciplinary procedures were undertaken against 224 police officers; the delegation was not able however to indicate how many of those cases involved torture. With respect to persons detained by the special police units, the Police Act and the code of criminal procedure required that any person arrested and detained by the police on suspicion of having committed a violation was to be placed in detention at the site of the violation or the arrest. The prisoner could however be moved for purposes of the investigation and, given the size of the country, this could require long trips. In any case, any person arrested had to be brought before a judge within 24 hours of his arrest. Moreover, detention records were kept, and they were required to contain information on the State of health of any person arrested.

5. With respect to the obligation to ensure that the competent authorities conducted an immediate and impartial investigation whenever there were reasonable

grounds to believe that an act of torture had been committed, it must be recalled that, pursuant to the Police Act, any complaint of torture against a police officer must give rise to an investigation. Aware of its obligations under the Convention, Kenya recognized that it still faced a challenge in ensuring prompt handling of complaints regardless of their nature. However, with the establishment of an independent police oversight body, Kenya had demonstrated its intention to promote impartial inquiries and would now be in a better position to fulfil its obligations in this regard.

6. The special task force responsible for investigating human rights violations in the wake of the December 2007 elections was paying particular attention to all cases of rape, including those allegedly committed by police officers. With the assistance of various NGOs, it was working to identify the perpetrators of those acts. It was regularly asked to submit reports including the list of police officers suspected of unlawful acts. Police officers were also liable to disciplinary sanctions for acts that, while reprehensible, were not sufficiently grave to be prosecuted through the courts. Moreover, the special task force was to make recommendations on measures the police could take to ensure better respect for women's rights in the context of police operations. The Committee should recognize that, in general, Kenya was striving to draw lessons from recent events.

7. The police oversight board comprised a representative of the clergy, two representatives of civil society organizations, a representative of the business world, and two experts on police issues who were not on active duty. The board had two assistant secretaries, one a police official and the other an administration official. Kenya recognized that it was facing difficulties in applying the ban on torture enshrined in article 83 of its constitution. Acts of torture were sometimes committed by police officers seeking to extract confessions. However, the situation had changed since 2003, when the courts stopped considering confessions as conclusive elements of proof. Confessions could no longer be presented by themselves as conclusive proof, and judges now had to consider the circumstances under which they were obtained. Enforcement of the ban on torture had also posed problems in isolated regions where the nearest court might be a day's journey away by road, and it was also difficult in police stations that had only one or two officers. It must be recognized moreover that Kenya currently had no special procedure for handling acts of torture committed by officials. Establishment of a complaints mechanism could however be contemplated in the context of current reforms to the police structure. With respect to corruption, this remained a challenge for Kenya, for it was a phenomenon deeply rooted in society. Important efforts were being made, however, to ensure that guilty police officers would face disciplinary sanctions, imposed either by the national anticorruption commission or by the courts. The delegation regretted that it had no data available on this question; it assured the Committee, however, that a great number of disciplinary and criminal sanctions had been imposed.

8. With respect to the violence reported during the operations at Mount Elgon and Matari, the authorities were taking very seriously the reports submitted by various NGOs. They considered, however, that some of the allegations were excessive, in particular those relating to the alleged number of cases of enforced disappearance. The Committee should recognize that allegations of severe human rights violations, if properly substantiated, were followed by investigation and prosecution.

9. Mr. MACGOYE (Kenya) reported that 44,816 persons were currently under detention in Kenyan prisons; of these, 18,327 were awaiting trial and 26,489 had been convicted. Of those in pre-trial detention, 991 (including 507 women) faced the death penalty. Of those already convicted, 22,044 (including 825 women) had been found guilty of relatively minor infractions, while 3,610 (including 61 women) had been sentenced to death. As to measures to combat prison overcrowding, they relied largely on the application of substitute penalties, a route that the State party had not yet sufficiently explored. Consideration was also being given to allowing prison directors to refuse admission for persons awaiting trial, in order to force the authorities to find alternatives to imprisonment. It should also be noted that the competent services were now studying the files of persons sentenced to more than seven years in prison, including those condemned to life imprisonment and to the death penalty. Some of those cases would be submitted to the President for a possible pardon.

10. The permanent directorate of prison inspection regularly fielded senior officials of the penitentiary administration to the prisons to verify that the conditions of detention, and in particular hygiene conditions, were up to standard. Prisoners must be informed, upon their arrival at prison or their admission to a provisional detention centre, of their right to appeal the decision affecting them. The penitentiary administration had created partnerships with NGOs to help speed prisoners' access to justice. In addition, under the Prisons Act, prisoners could have their penalty commuted or they could be granted early release for good conduct. Finally, Kenya was in the process of building five new penitentiaries, and the capacity of existing prisons had been improved with the construction of several cells and a new wing.

11. In response to allegations that individuals had been denied access to prisons, Mr. MacGoye said that visitors other than next of kin must obtain prior authorization from the penitentiary administration and that, to date, no individual or group of persons with such authorization had been refused access to the prisons during regular visiting hours. Magistrates were required to visit the prisons regularly, but it had to be admitted that they rarely fulfilled that obligation. Under the Prisons Act, inspecting judges could visit the prisons at any moment and have face-to-face interviews with prisoners, after which they could record any comments in the visitors' registry so that prison management would take appropriate measures.

12. Internal prison regulations required that, when a prison staff member was accused of mistreatment or torture, that person must be suspended at half pay until the internal investigation was concluded. The Prisons Act guaranteed the right of prisoners to be examined by a physician but, in practice, this right was not respected, as there were only five physicians to cover all the penitentiaries in the country. In theory, all prisoners should undergo a medical examination upon arrival, upon any transfer, and prior to their release. Prisoners had access to a physician of their choice only by decision of a court or with the authorization of the prison administration director. Those who required specialized care were transferred to the nearest hospital. Prison staff received training in human rights, through programs offered in collaboration with NGOs. Finally, a code of conduct and a manual on the application of human rights standards in the penitentiary system, also prepared in collaboration with NGOs, had been distributed to prison staff.

13. The Prisons Act prohibited prison staff from provoking a prisoner deliberately or from using force without authority from the prison director, and persons violating this prohibition were liable to punishment. In order to prevent inter-prisoner violence, prison officials attempted to separate vulnerable prisoners from potentially dangerous prisoners, but this was not always possible in light of inadequate prison capacity. In principle, prisoners who feared for their safety could be transferred to another unit or even to another prison. As well, guards could be transferred to another prison if there were complaints against them. Prisoners who considered themselves victims of a violation could demand to see a public official, a magistrate, or the prison administration director. In cases where persons were afraid to file a complaint while they were in prison, they could do so during their appearance before a tribunal and, if they claimed to have been tortured, an investigation would be opened. Moreover, the prisons had internal tribunals where prisoners were represented, and those tribunals could try guards who violated regulations and impose disciplinary penalties on them. Finally, prisoners who needed crutches for mobility were interned in a hospital or care facility, or else placed in individual cells, for security reasons.

14. Mrs. NJAU-KIMANI (Kenya) said, in response to questions about the independence of the judiciary, that the Constitution guaranteed security of tenure for judges but that, if a judge were accused of failing in his professional duty, the President of the Republic would appoint a tribunal to open an investigation, after which the tribunal could if necessary recommend the removal of the judge in question. There was ongoing debate as to whether the tribunals should be required to sign programme contracts. Whatever the case, the government had clearly indicated that the reform of the tribunals would proceed, within the broader framework of judicial reforms that were intended primarily to improve people's access to the courts, to restore public trust in the justice system, and to resolve the problem of prison overcrowding, in particular by avoiding resort to police custody or preventive detention wherever possible.

15. With respect to compensating the victims of criminal violations, Mrs. Njau-Kimani noted that in 2003 the code of criminal procedure was supplemented with the addition of article 175, which provided that in criminal cases, particularly those involving torture, the court could order the guilty party to pay compensation to the victim in an amount equal to the damages and interest that a civil court would grant, thereby relieving the victim of the burden of seeking reparations through the civil courts. This was a very important aspect, as the costs of justice were very high in Kenya. Another new provision added to the code of criminal procedure allowed the victim's next of kin to seek reparations for the repercussions that the torture or mistreatment suffered by the victim or the victim's death had had on their lives.

16. With respect to the case of the two human rights defenders cited by members of the Committee, Mrs. NJAU-KIMANI reported that Mr. Wafula Buke had been arrested for organizing an unauthorized demonstration, and that Mr. Okoiti Omtata had been arrested and held in police detention for three days for disturbing the peace, but that both persons have been released.

17. Mrs. MWANGI (Kenya) said that the country was currently applying a national plan to eradicate female genital mutilation, and that efforts in this direction were being monitored by a multisectoral team that included NGO representatives.

Among the legislative amendments to combat cultural practices harmful to children, attention should be drawn to adoption of article 14 of the 2001 Children's Act, which protected juveniles from harmful traditional practices including female genital mutilation, early marriage and other customs. In 2006, the government had promulgated the law on sexual offences and the Attorney General had constituted a special multisectoral task force headed by an appeals court judge to monitor enforcement of that law. This task force was to formulate proposals for further amendments to the law, to prepare a strategic framework and guidelines for its enforcement, and to conduct awareness campaigns about female genital information. Consistent with the task force recommendations, the Attorney General published in October 2008 two regulations to strengthen enforcement of the law; one of those regulations called for creating a database with the genetic profile of all persons convicted of sexual violence. In 2006 the Attorney General published a manual on the procedures to be followed in the prosecution of sexual crimes, prepared in collaboration with a regional NGO, Women, Law and Development in Africa (WiLDAF). That document was useful not only to prosecutors but also to members of the police, the judiciary, and prison establishments, and it served as the basis for awareness raising activities about the problem of sexual violence.

18. Four draft bills relating to women's rights had been awaiting adoption since 1999. Those bills dealt respectively with: equal opportunities; the family, in particular family violence; marriage (harmonization of the five matrimonial regimes now existing in Kenya); and the property sharing regime. These bills had been the subject of lengthy consultations, after which the National Law Reform Commission had submitted them to the Attorney General for approval. They were expected to be adopted in the near future.

19. Mr. IRINGO (Kenya) said that there was a close connection between property rights and human rights violations. The country's economy was heavily dependent on farming and livestock, and competition for fertile land was fierce. The unequal access to land accorded different ethnic groups was the result of policies practised at a time when the country was dominated by colonists who appropriated to themselves entire territories, obliging population groups to resettle in other regions where they were not well received by the local population. When Kenya became independent, the property system established by the colonial administration was officially abolished, but some politicians continued to draw distinctions between ethnic groups in terms of access to land, in order to derive personal advantages. For example, during the riots following the 2007 elections, militiamen of the Sabaot Land Defense Force (SLDF), with the support of politicians from the Mount Elgon region, used their land claims as a pretext for the displacement of more than 3000 civilians. To prevent the recurrence of such troubles and to offer assistance to the victims of mass forced displacements, the coalition government was preparing a comprehensive land reform policy. Finding a solution to the land problem was in fact one of the priorities of the peace plan, for it was essential to the country's peace and stability.

20. Mrs. MWANGI (Kenya) recalled that in 2006 the government had promulgated the Refugees Act, article 18 of which provided that foreigners could not be returned to a country where they would be at risk of persecution because of race, religion, political opinions or other reasons, or where their physical integrity or their life could be threatened. While the risk of torture was not expressly cited in the provisions of that article, it could be considered a reason for not expelling a person

to another country, recognizing that torture constituted an attack on physical integrity.

21. Mrs. MOHAMED (Kenya) noted that since the 1960s Kenya had welcomed successive waves of refugees driven from Rwanda, Eritrea, Ethiopia, Sudan and Somalia, and that all these refugees had been thoroughly integrated into Kenyan society. Nevertheless, problems had arisen with the arrival of the latest wave of refugees fleeing the conflict in Somalia, and the government had been obliged to impose stricter controls to deny entry to any combatant posing a danger to Kenya's internal security. In a very exceptional way, this had slowed the admission process considerably.

22. Mrs. SVEAASS (Rapporteur for Kenya) confirmed that Kenya was known for its hospitality, and that it was therefore all the more important for the government to be forthcoming about extraditions that might have violated article 3. Such a stance would demonstrate Kenya's willingness to remedy not only the abuses and injustices of the past, but also more recent errors. On this point, it was important to note that adopting a precise definition of torture was also essential when it came to extradition. Moreover, the State party had in this context invoked reasons of national security, but without specifying whether it had adopted an action plan in this area or had assessed the terrorist threat, as many other states had done to justify their reinforcement of security measures.

23. The Committee welcomed the judicial reform undertaken by the State party as well as the various draft bills under study. It wished to know, however, what schedule was planned for implementing the National Human Rights Plan. It also appreciated the adoption of the land reform policy. It recognized the great difficulties facing the State party in this area, and hoped that finding solutions would remain an absolute priority. Finally, it noted with satisfaction that suspects must now be turned over to the justice system within 24 hours, and that this rule was being increasingly respected in practice.

24. Women's access to justice remained a subject of grave concern. It was particularly important that people on the "front line" be sensitized to women's rights and to the problems they faced in having those rights respected. One NGO noted, for example, that article 38 of the draft law on sexual violence could be used to take action against plaintiffs. Yet training for State officials was not the only priority. It was also important to inform people, for if they did not know their rights they could not exercise them. Information reported by the National Commission on Human Rights was supposed to be posted in police stations, but this was apparently not done everywhere. Moreover, it would be useful to publicize the sanctions imposed on police officers, as a way of dissuading mistreatment and encouraging victims to file complaints. Details on the sanctions would also be welcome, for it did not seem that many police officers had been tried and convicted. In the case of prison staff, reassignment to another prison was not a satisfactory measure. When it came to inspections by the Human Rights Commission, these seemed to be conducted fairly regularly in the prisons, but much less frequently in the police stations.

25. Finally, the delegation was asked to comment on reports that several human rights militants had recently been kidnapped in a restaurant and subjected to ill-treatment.

26. Mr. WANG Xuexian (Co-rapporteur for Kenya) welcomed the State party's determination to clarify the violence that occurred at Mount Elgon and elsewhere, insisting that acts of this kind demanded immediate and exhaustive investigation. Generally speaking, the State party should do its best to investigate immediately any allegation of violence, despite the problems this could pose, and even if certain allegations might seem groundless.

27. Details on legal assistance would be welcome, as the very high levels of bail and legal fees remained one of the main causes of prison overcrowding. Moreover, it had been claimed that the prisons were now subject to public oversight, but it was unclear whether this was an official measure inscribed in law. Finally, the delegation was asked to comment on reports that persons in preventive detention were receiving half rations on the grounds that they were not working, in contrast to convicted prisoners.

28. The land issue was a major political, social and economic problem that affected not only Kenya but all of Africa, and that must be resolved with the greatest urgency. While this question was not part of its mandate, the Committee had an interest in the issue in as much as the situations it generated were a source of violations of the Convention.

29. Mr. MARIÑO MENÉNDEZ noted that Kenya interpreted the principle of non-refoulement in light of refugee law, which was much more restrictive than the protection of asylum in general, and especially the protection accorded in article 3 of the Convention, which sought to protect all persons against torture, even if they were criminals. It would be important therefore to have details on legal assistance, which must be available not only to prisoners but also to the victims of torture who would not necessarily be in detention, and also to know whether the laws of the State party guaranteed foreign prisoners the right of access to the consular authorities of their country.

30. It was also noted that an official could not invoke higher orders to justify an illegal act, but it seemed that those who violated this rule knowingly were rarely punished. Further details on this point would be welcome. Finally, the State party was urged to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, as this would allow it to investigate all disappearance is more readily, without having to determine whether the next of kin had filed a complaint.

31. Mrs. GAER noted that many questions remained unanswered. For example, much had been said about violence in all kinds of contexts and yet, according to NGOs, most cases of mistreatment or torture involved prisoners: 59% of prisoners reported that they had witnessed the mistreatment of fellow prisoners, and 83% said that they themselves had been beaten. In other words, these acts were committed by officials and the State party therefore was in a position to do much more about them, and indeed its obligations under the Convention were very clear on this point. In the face of these widespread practices, one might ask whether the State party was really determined to take steps to put an end to the situation, which was moreover aggravated by impunity and non-use of the recourse open to victims.

32. According to a statement from the Attorney General recently published in the press, the investigations conducted by the Waki Commission did not meet the conditions required for prosecuting and convicting the suspects. The delegation was

invited to provide explanations on this point. It was also asked to indicate whether the State party was planning to amend the Children's Act, which had set the age of criminal responsibility at only eight years. Finally, the Committee was still awaiting information on a number of well-documented cases annexed to the reports submitted by NGOs, in particular 17 cases of torture that were still pending before the courts and 44 deaths in detention or police custody, 39 of which related to persons under the age of 40.

33. The Chairperson recalled that the question of confessions extorted under torture was also important. Such concessions could not be accepted in court, even if corroborated by other evidence.

34. Mrs. MOHAMED (Kenya) said she would attempt a response to some of the questions posed by the Committee, while others would be answered in writing. She explained that the permanent complaints review committee was created in June 2007 to enhance the effectiveness of the public service, but also to relieve the burden on the courts. Its mandate was to investigate all complaints against officials in any public agency (abuse of power, corruption, unethical conduct, unjustified delay in handling cases, mismanagement, incompetence etc.). It consisted of a president, an executive secretary and four members, and was serviced by a large secretariat. The ultimate objective was to convert it into a true Mediation Office. The national legal aid and awareness program had been in existence for only a few months, and at the moment consisted of six pilot projects underway in regions where particular needs had been identified. In addition to providing legal aid to impoverished individuals, it was intended to strengthen awareness raising activities among vulnerable groups, women in particular.

35. The Information Service was assisting in preparation of a policy for ensuring the country's security, which had been subject to repeated terrorist attacks (in Nairobi and Mombasa, and subsequently against the United States Embassy in Nairobi) and to numerous threats, to the point where the security services were on constant alert. The deteriorating situation in neighbouring Somalia and the ongoing attacks there had sparked a massive inflow of refugees, and Kenya was forced to address the problems posed while ensuring that national security interests did not take a backseat to the country's international obligations. The delegation asked the Committee for understanding on this point, recognizing that these questions were in fact of international and not merely domestic priority. Kenya was also receiving a great deal of support from other countries and from international organizations that had had to deal with the same problems, and in particular from United Nations agencies that were well aware of the threats posed by terrorism.

36. With respect to the Waki report, the investigating commission itself had recognized that it did not have sufficient evidence, and for this reason it recommended the establishment of a tribunal to establish the facts and prosecute the guilty parties. As to the 17 cases and 44 names cited in an annex to the NGO reports, Mrs. Mohamed admitted that she had learned of these only the day before, at the same time as the Committee members. She intended to proceed systematically to investigate each name mentioned and to provide the Committee with the information gathered.

37. Mrs. NJAU-KIMANI (Kenya) reported that the government had instituted a national legal aid and awareness program, launched with a pilot process under the control of the authorities. That program should facilitate the design of a national

training and legal aid program based on an appropriate legislative framework. This would take place in the context of judicial reforms and should facilitate access to justice, in particular for poor and vulnerable individuals who were often unaware of their rights. It must be borne in mind that a portion of the population was illiterate, poor and very mistrustful of institutions.

38. Mrs. MOHAMED (Kenya) said that all the questions left unanswered by the delegation would be covered in written responses addressed to the Committee, and that the Committee would also be kept informed of the outcomes of the reforms under way, and the evolving human rights situation. She noted that police officers, like all other public officials, were accountable for their acts and their omissions. She also noted the recommendation for Kenya to ratify the Convention on the Protection of All Persons from Enforced Disappearance. Finally, with respect to the holdovers from colonization that were still felt not only in Kenya but in many other countries once colonized by the British, who were now partners and friends, the Kenyan government was firmly determined to deal with this question more comprehensively than it had done to date.

39. The CHAIRPERSON thanked the delegation and hoped that the dialogue thus begun would continue.

40. Mr. WANG Xuexian congratulated Kenya for its efforts over the years on behalf of refugees arriving from neighbouring countries, and expressed the view that the entire international community was indebted to it on this point.

41. *The delegation of Kenya withdrew.*

The first part (public) of the session ended at 12:15.