

# KENYA

## Ending the cycle of impunity

*Impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture.*  
United Nations Special Rapporteur on torture, October 1999<sup>1</sup>

### **Introduction**

Amnesty International is concerned that torture is still being committed by the Kenyan police force and that it continues because of the lack of effective action taken by the government to stamp it out. This report is being issued by Amnesty International as the 26 June 2001 is the UN Day for Victims of Torture, and it is four years since the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was ratified by Kenya. Amnesty International continues to share the concerns expressed by the United Nations (UN) Special Rapporteur on torture following his visit to Kenya in September 1999. Justice in Kenya is arbitrary when dealing with cases of torture by police. The lack of effective action by the government is evidence of its acquiescence in the actions of the police and the failure to respect the rule of law. Those who are victims of police brutality usually are the least able to speak out or bring their case to court. Unless the family of a victim of torture speaks out, or there is pressure from human rights groups, investigations and prosecutions are rare.

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<sup>1</sup> Report of the Special Rapporteur on torture, “*Torture and other cruel, inhuman or degrading treatment or punishment*”, 1 October 1999, A/54/426.

Amnesty International continues to document incidents of torture in Kenya. Although this topic has been the subject of previous Amnesty International publications, the government has consistently failed to put into practice recommendations put forward in these reports over the years.<sup>2</sup> The changes that the government has implemented continue to be of little significance, with minimal lasting impact. Abuses committed by the Kenyan police force continue to be widespread. This report presents ongoing old cases of torture committed by the police within this context. Without effective action to eradicate torture, and bring perpetrators of torture to justice, police will continue to act with impunity. Since the beginning of 2001, Amnesty International has documented numerous cases of ill-treatment by the police. However, the chance of those responsible for torture being prosecuted, despite legal obligations in treaties that Kenya has ratified and national law prohibiting torture, is almost non-existent.<sup>3</sup> Even though the Attorney-General said that police officers who torture suspects will be prosecuted and the Police Commissioner spoke out against torture the practice continues today.<sup>4</sup>

In this report Amnesty International documents several cases of torture that have been inadequately investigated and remain to date unresolved. By describing these cases Amnesty International wishes to focus on the shortcomings in the process which allows impunity to continue and contributes to the continuing attitude of the Kenyan police force towards committing acts of torture. Past cases of torture that are detailed in this report date back many years, and are still being heard today. It is in this context that Amnesty International is focussing on the process which allows impunity to continue using past cases of torture in order to highlight the continuing response towards cases of torture that have been committed by the Kenyan police forces today. An independent expert on impunity, as called for by the UN Commission on Human Rights, could help to ensure that governments uphold their obligations to stamp out torture and bring to justice perpetrators of torture.<sup>5</sup>

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<sup>2</sup> See *Torture, compounded by the denial of medical care*, AI Index: AFR 32/18/95, December 1995; and *Kenya Violations of Human Rights: Communications between Amnesty International and the Government of Kenya*, AI Index: AFR 32/27/97, September 1997.

<sup>3</sup> Kenya ratified the African Charter on Human and Peoples' Rights (ACHPR) in 1992, the International Covenant on Civil and Political Rights (ICCPR) in 1972, and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 21 February 1997. Article 74 (1) of the Constitution of Kenya, which states that "no persons shall be subject to torture or to inhuman or degrading or other treatment." Section 14 (a) (2) and (3) of the Police Act was amended in November 1997 to explicitly prohibit torture, "(2) No police officer shall subject any person to torture or to any other cruel, inhuman or degrading treatment. (3) any police officer who contravenes the provisions of this section shall be guilty of a felony".

<sup>4</sup> *Daily Nation*, 25 April and 28 June 2000.

<sup>5</sup> The Commission on Human Rights in its resolution on the promotion and protection of human rights states in part 10, "Requests the Secretary-General to seek the views of Governments, and intergovernmental and non-governmental organisations on the issue of the possible appointment of an independent expert charged with examining all aspects of the issues of impunity of perpetrators of human

Amnesty International has compelling evidence that many acts of torture committed by the police are not investigated. Investigations which do take place are inadequate, poorly conducted, and lengthy. The majority of cases that are describe in this report were brought forward at the family's insistence. It is clear that many of the families felt there was a lack of support by the authorities in their attempts to bring perpetrators of torture to justice. For example, even the most basic documentary evidence needed to substantiate claims that torture has been committed by police, such as the Medical Examination Report (P3 form), is not widely accessible to victims of torture. Many cases can take years to complete and successful prosecutions resulting in an appropriate sentence are rare.

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rights violations, with a view to a decision on this matter at the fifty-eighth session of the Commission".  
E/CN.4/RES/2001/70, 25 April 2001.

Amnesty International remains concerned that the Kenyan government appears to condone torture: in December 1998 Major Marsden Madoka, Minister of State for Internal Security, urged Kenyans to “forget” about the widespread acts of torture committed by the country’s security forces.<sup>6</sup> As far as Amnesty International is aware there has not been a retraction of the statement despite the government’s admission that torture is widespread among Kenya’s security forces. This admission was made by both the Attorney-General and the Commissioner of Police after the report of the Special Rapporteur on torture was released in April 2000. The Attorney-General, Amos Wako, announced soon after the report was released that the government accepted part of the report and would implement some of the recommendations. However, by comparing the recommendations made by the Special Rapporteur and those measures announced by the government, it is clear that very few of the recommendations have been adequately implemented. Out of 17 recommendations from the Special Rapporteur’s report the government has only implemented five, most of which fall under two bills currently awaiting debate in Parliament. The Criminal Law Amendment Bill 2000, published in October 2000, which has already received Cabinet approval, includes the provisions that police who torture suspects will be dismissed and prosecuted for human rights violations, that any laws that allow evidence of confessions made in police custody be repealed, and “confessions made by a person under police detention without the presence of a lawyer should not be admissible against the person”, a specific recommendation from the Special Rapporteur’s report. On 1 October 2000 the government introduced the Kenya National Commission on Human Rights Bill, 2000. Among the bill’s provisions is one which would create an independent body to investigate human rights violations. Amnesty International does not believe that the Kenya National Commission on Human Rights Bill, 2000 goes far enough in strengthening and promoting human rights in Kenya.

### ***Inadequate and lengthy investigations***

#### **The Medical Examination Report**

Investigations of human rights violations by the police remain the responsibility of the police force rather than an independent body and this procedure is fraught with difficulties. It is the duty of the Kenyan government to conduct prompt and impartial investigations, as required by Articles 12 and 13 of CAT, Article 7 of the ICCPR, and as stated by the Human Rights Commission in General Comment No. 20, and the Istanbul Protocol and the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, 1989.

Investigations into allegations of torture cannot be effectively conducted if basic documentary evidence is not available or used by the victims. The Medical Examination Report, or P3 form

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<sup>6</sup> Amnesty International, *KENYA: Government tells Kenyans to “forget” about torture*, AI Index: AFR 32/32/98, December 1998.

as it is more commonly known, is used by victims to detail acts of torture committed against them. The form is only available from police stations and is used as documentary evidence by investigating officers and lawyers to support the prosecution of perpetrators of torture. The P3 form is then used by the lawyers to substantiate claims of torture in cases that come to court.

The P3 form, detailing information about the victim and the alleged torture, is filled out by the police officer requesting the examination and is used by a medical practitioner to record the victim's injuries and their possible cause. This procedure is clearly not working effectively. Amnesty International notes with concern that police have attempted to influence medical reports written by private doctors documenting evidence of torture, frequently harassing or threatening medical practitioners who are willing to treat victims of torture, or have frequently compounded this torture by making it difficult to gain access to victims.

Amnesty International is concerned about the limited availability of the P3 form to victims of torture. P3 forms are only located at police stations, which actively discourages victims of police torture from requesting the form. Fear and intimidation prevent victims from requesting the form from police and often police refuse or are reluctant to give a form to a complainant. This is despite the fact that the Attorney-General took this up with the Commissioner of Police who issued a circular on 28 July 2000 informing police officers that it is the right of every individual who requires a P3 form to be issued with one. The reluctance of the police to make available these forms to the victim and even sometimes to medical practitioners effectively means that crucial evidence is unavailable and makes the prospect of a fair trial even more unlikely. Placing the forms elsewhere, such as hospitals and doctors' surgeries would allow victims of police torture to come forward thereby enabling documentary medical evidence of the injuries to be recorded. This in turn would increase the possibility that complaints would be dealt with and investigated effectively.

On 22 February 1999, Yusuf Anitwani Maina, 73, went to the Mandizini estate in Bungoma, Western Kenya, to collect rent from some of his tenants. At the same time an armed police raid took place on the estate for illegal home breweries. As the crowd attempted to flee from the police, Yusuf Maina fell to the ground and was reportedly beaten about his body and head by the police. After staying in hospital for two days, Yusuf Maina returned home and went to a police station in order to acquire a P3 form. However, he was refused a form and not even allowed to make a statement of the events. After two weeks Yusuf Maina still complained of chest and head pains, and was readmitted to hospital because he was still unable to return to work. On 14 May 1999 Yusuf Anitwani Maina fell into a coma and died. He left a wife, seven children and over 10 other dependents. The post-mortem showed that he had died from a head injury, which was consistent with the injuries he had sustained during the police beating. No investigation has ever been carried out by the police into the beating or as to why Yusuf Maina was denied a P3 form. The law in Kenya provides for instituting an inquest, an inquiry into the circumstances of any death, especially if death is due to suspected torture at the hands of the police or in police or prison custody. As far as Amnesty International is aware an inquest has never been held. Yusuf Anitwani Maina's family instigated civil

proceedings for special damages against the Attorney-General and the two police officers attached to Bungoma Police Station on 8 June 2000 at Bungoma High Court. The case has been heard three times so far, on 8 February 2001, 5 April 2001, 18 April 2001 and is due to be heard next on 30 August 2001. For each hearing the magistrate has been unavailable and as of the time of writing this report none of the police officers involved has been questioned.

### **Difficulty of post-mortems and inquests**

The Criminal Procedure Code (Cap 75) and Laws of Kenya serve as a reference point for investigations into deaths. Investigations into deaths as a result of torture begin with a post-mortem, which can lead to an inquest. Under Kenyan law, judges are not allowed to conduct inquests. Magistrates are empowered to hold inquests, and the only time the Attorney-General may direct a magistrate to hold an inquiry is when death is in police custody, or in a prison, or caused by a prison or police official.<sup>7</sup> At the conclusion of the inquiry, the magistrate may issue arrest warrants, call for further investigations by the Attorney-General in order for a decision to be made on whether there is a case for prosecution, or close the case. When police officers are the accused the case is given to the Chief of Police who recommends whether the police officer should be prosecuted. Often other forms of punishment are used such as transfer to another police station or dismissal without any prosecution occurring.

However, often post-mortems and inquests are not carried out and investigations not undertaken. Cases that Amnesty International has documented, which are continuing to be heard in the courts, have not gone through the appropriate procedures. Often, it seems, that investigations are carried out only after complaints by family and human rights organizations, and then ineffectively.

On 21 February 2000 Adam Dabaso died as a result of the injuries sustained in a police raid on a village. Due to his quick burial and to his family being allegedly intimidated by the police, no post-mortem was ever carried out on Adam Dabaso's body. The raid on 12 February 2000 by a combined force of regular police, the General Service Unit and the military on Gambella village near Isiolo town, claimed to be in search of "illegal arms". As tensions had been high during this time between the Somali and Borana community in Isiolo, Eastern Province, there was an increase in the number of security officials in the area. During the raid they allegedly indiscriminately beat up and tortured the villagers. Six other people suffered serious injuries, including dislocation and burns, allegedly due to police torture. They were Abdi Wariom, Dbaso Roba, Paul Lenges, Sokot Guyo, Asili Adam, and Adan Godo. As far as Amnesty International is aware no investigations have taken place into the allegations of torture and the death of Adam Dabaso.

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<sup>7</sup> Magistrates have no power to supervise or direct the investigation. They have no power to order a post-mortem examination, or to have staff or technical experts to call upon for advice on difficult or complex questions.

It can take years for an inquest to be held and for subsequent court hearings. Even if both a post-mortem and an inquest are held, often there is failure to follow up the results of the inquest.

Isaac Mwaniki Gitari was 38 years old when he died due to torture at the hands of the police. Isaac Gitari's injuries were so severe from the beatings he suffered at Eldoret Police Station on the night of 26 March 1999, that during the night he had to be rushed to hospital. Isaac Gitari slipped into a coma, and died 12 days later on 8 April 1999 without regaining consciousness. Isaac Gitari's family claimed that his physical injuries were not treated properly, and a post-mortem showed that his death was due to "dislocation of the upper cervical vertebra with compression of the spinal cord complicated by brain oedema and broncho pneumonia". The conclusion from the judicial inquest found that Isaac Mwaniki Gitari sustained injuries consistent to that received from the beating by the police officers.

An investigation by the Attorney-General's Office instigated at the family's insistence fell short of what is required for a proper investigation in accordance with international standards. During the inquest in April 2000 a magistrate concluded that two policemen were responsible for Isaac Gitari's torture and subsequent death, that there had been a cover-up of the incident at the police station and that the police witnesses had lied in court. The magistrate ruled that the police officers should be charged with manslaughter. The two police officers were subsequently arrested and charged. A hearing was scheduled for 27 March 2001, but was adjourned to 17 May 2001. The next hearing is scheduled for 10 July 2001.

### **Inadequate prosecutions and delays in cases and lengthy trials**

The police and the Attorney-General demonstrate a serious lack of concern in dealing with cases of torture. It is the state's responsibility through the Attorney-General to prosecute perpetrators of torture. However, because of the difficulty of obtaining a successful prosecution through the Attorney-General's Office and as families of victims cannot instigate criminal proceedings many seek civil redress in the courts through compensation against the alleged perpetrators of torture in an attempt to obtain justice. Yet, many families cannot afford legal counsel to conduct such civil litigation.

Courts hear numerous cases during the course of one day; the same case can be heard a number of times, and not necessarily by the same magistrate. Many times cases are moved to different courts which delays the case further.

Serious concerns have been raised about trials in Kenya and attempts have been made by the authorities to deal with allegations of corruption in the judiciary. However, there is evidence to suggest that not all magistrates take seriously allegations by defendants of torture. Often, crucial files can also be lost or misplaced and documentary evidence, like the P3 form, can go

missing. As a result, allegations of torture will not be raised, unless the defence lawyers retain a copy of the form. Yet very few defendants can afford a lawyer.

In cases where criminal suspects allege in court that they have been tortured, there is what is commonly known as a “trial within a trial”. This is carried out by the magistrate or judge presiding over the case in order to establish whether there is any basis to the allegation. The current practice of a “trial within a trial” does not provide for adequate impartial investigations of torture allegations by an independent body. Nor does it constitute an impartial investigation into an allegation of torture or cruel, inhuman or degrading treatment by an investigating body able to demonstrate its formal independence from the authorities.<sup>8</sup> Some magistrates do not call for investigations into allegations of torture. In this respect, Amnesty International is concerned at the failure of the judges to halt trials or adequately investigate allegations of torture in others.

The Kenya National Commission on Human Rights Bill, 2000 would, if enacted, create an independent body mandated to investigate human rights violations. Although published in October 2000, the bill is yet to be presented in Parliament. Amnesty International, welcomes this move as an independent and impartial Commission could be an important mechanism for strengthening human rights protection. However, it should never replace, nor in any way diminish the safeguards inherent in comprehensive, humane and effective legal standards enforced by an independent, impartial, adequately resourced and accessible judiciary. It is extremely important that the proposed Commission be independent, impartial and adequately resourced so that it could assist in working towards the ending of impunity in Kenya. Amnesty International, in its recommendations to the Attorney-General on the bill, believes that the present draft of the Kenya National Commission on Human Rights Bill, 2000, falls far short of international standards for the independent and impartial functioning of such Commissions and would compromise its ability to act as a check on human rights violations in Kenya.

The Attorney-General’s statement of 19 October 2000 also touched on the point that consultations with the police were continuing to establish an independent mechanism to investigate complaints by members of the public against the police. No mechanism has as yet been established.

It is nine years since Rosemary Nyambura’s death at the hands of police, during which time there has not been a trial. Although she died in 1992 an inquest was only held three years later in July 1995 where the magistrate ruled that four police officers were responsible for her death and should be charged with murder. On 10 May 1992, Rosemary Nyambura returned from a nightclub with a friend. They were stopped by police who demanded to see their identity cards. As Rosemary Nyambura could not produce hers the police reportedly searched

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<sup>8</sup> Amnesty International, *Kenya: Violations of Human Rights - Communications between Amnesty International and the Government of Kenya*, AI Index: AFR 32/27/97, September 1997.

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her and took Ksh 6,000 (US\$ 40 equivalent). Demanding her money back she followed the police officers back to Ruaraka Police Station, near Nairobi, whereupon she was arrested. Rosemary Nyambura was reportedly beaten by up to seven police officers and later the same day she died as a result of her injuries.

The police later alleged that she had committed suicide by hanging, but a post-mortem report indicated that Rosemary Nyambura had died of ruptured kidneys and spleen. Her family demanded an inquiry into the events, but it was well over a year before any investigation began. Four years later, in February 1996, four police officers were charged with her murder and were due to stand trial. As far as Amnesty International is aware, the date of the trial has yet to be announced.

Many of the cases that Amnesty International has documented in this report are at least several years old. Even if police officers are arrested and charged with an offence, the slow process of the justice system often means that trials can be continually adjourned. This lengthy process brings into question the ability of the Attorney-General to prosecute fairly police officers who have been accused of committing torture. As the Convention against Torture states in Article 12, “*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed*”. In Kenya those who have a legal and moral obligation to uphold the law are the very ones who are directly contravening it, thus breeding contempt and a denial of justice for the victims.

Ali Hussein Ali, a 25 year old *matatu* (bus) driver, died from his injuries sustained in Wajir Police Station, North Eastern Province on 8 March 1997. Although he was supposed to be charged with creating a disturbance in a public place, no formal charges were brought against him. His post-mortem revealed that he had died from internal bleeding in the brain and thoracic cavity due to external trauma. On 24 March 1997 three policemen and an army officer were charged with Ali Hussein Ali’s murder but were acquitted in October 1997. In 1998 the Principal Magistrate in the inquest of Ali Hussein Ali ruled that the police officers and army officer involved should “face justice in a court of law for such an inhuman act done by the suspects herein culminating into the death of the deceased”.<sup>9</sup> Almost two years later, the High Court ordered a retrial on 19 July 1999 after Ali Hussein’s family appealed, and the three remaining defendants, as one was shot and killed while being rearrested, were to be brought to trial scheduled on 28 February 2000. There have been many subsequent delays to the start of the trial. Another of the defendants died while undergoing treatment for typhoid at Kenyatta National Hospital: the trial of the remaining two defendants is continuing. Ali Hussein Ali’s family have unsuccessfully petitioned the Attorney-General for an independent

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<sup>9</sup> Ruling of the Principal Magistrate’s Court at Garissa, Inquest No. 1/98, 26 June 1998.

prosecutor as they claim that they have lost confidence in the ability of the office of the Attorney- General to prosecute the trial fairly. On 14 March 2001 two civilians testified before the High Court, and the trial of the two suspects is now to be heard, five years after Ali Hussein Ali was killed, from 24 to 26 July 2001.

## **Conclusion**

Many cases of torture in Kenya can take years to complete. The lack of successful resolution can only reflect the continuing attitudes of the police and the government towards human rights violations. The failure to effectively complete investigations and prosecutions in many cases, some of which have been cited in this report, clearly reflects the complacency of both the government and the Kenyan police force in their attitude towards those who commit human rights violations. Amnesty International believes that the Kenyan police force is able to commit illegal acts with relative impunity. This will continue until there is strong, concerted action on the part of the government to ensure that all acts of torture are stamped out. Only by strengthening human rights awareness within the police force, and developing strong and effective mechanisms and an independent judiciary to deal with cases of torture will past and present cases of human rights violations be dealt with effectively and human rights violators brought to justice.

The government has the duty and obligation to uphold both domestic and international legislation in order to protect its citizens from torture. The unwillingness of the Kenyan government to directly deal with issues of police torture only reinforces widespread belief that violence is accepted and condoned by the government. This lack of action can inevitably contribute to a rise in violence and thus bring about a wider climate of impunity.

## **Recommendations**

### **To the Kenyan government**

All reports of suspected torture should be promptly, thoroughly, independently and impartially investigated in accordance with Kenya's obligations under international law and standards including the CAT, Articles 12 and 13, the ICCPR in Article 7, the Istanbul Protocol, and in cases of death after alleged torture, the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*.

All inquests or post-mortems should be carried out according to national and international standards when there is the need to instigate an inquiry into the circumstances of any death, especially if death is due to suspected torture at the hands of the police or in police or prison custody.

Any allegations of torture should be considered by the presiding magistrate, even in the absence of a complaint by the victim or relatives, and a separate investigation by an independent body should be completed in order to bring to account perpetrators of torture.

Any police officer implicated in acts of torture should immediately be suspended from duty pending a full inquiry. If convicted there should be automatic dismissal from duty, as well enforcement of the sentence imposed by the court.

Trials should be completed with efficacy, without undue delay, and within a reasonable amount of time.

The Attorney-General should immediately implement the recommendations of the Special Rapporteur on torture.

Immediate steps should be taken in order to raise awareness of P3 forms and make them more widely available, particularly in hospitals and clinics to victims of torture.

The government should ensure that doctors are trained in being able to document acts of torture that they are free from harassment and intimidation by police.

Parliament should ensure that the two bills dealing with torture committed by the police are strengthened in order to ensure that perpetrators of human rights violations are brought to justice.

#### **To the international community**

The UN Secretary-General should consider the request of the Commission on Human Rights to appoint an independent expert on impunity.