

SIMPLIFIED VERSION OF THE PREVENTION OF TORTURE ACT 2017



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Independent Medico-Legal Unit
A World free from Torture, Violence and Discrimination

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FOREWORD

The Independent Medico-Legal Unit (IMLU) is a governance, health and human rights nonprofit organization, whose vision is *A World Free from Torture, Violence and discrimination*. Our work is underpinned by a holistic approach involving litigation, medical and psychosocial rehabilitation of survivors of torture, monitoring government adherence to its human rights obligations and advocacy for policy, legal and institutional reforms. Over the last two decades we have assisted over 5,000 victims of torture, cruel, degrading and inhuman treatment through the support of our national networks of professionals: doctors, trauma counsellors, lawyers, human rights monitors and journalists.

The Act was first drafted in 2010 by a multi-stakeholder team led by IMLU and International Commission Jurist (ICJ) -Kenya Chapter. The 7 year journey to the Act was arduous and painstaking and brought together diverse technical expertise including legal and other experts within government agencies, parliament, the Attorney General and civil society. This was to secure the political good will to have the bill successfully go through the legislative

process. Thanks to the tenacity and the hard work of those who championed the bill, including victims/survivors of torture and their families. In November 2016, the Attorney General presented a government version of the Bill to the Cabinet, setting the stage for the new law to go through parliament as a government bill and enacted on 13th April 2017 as the Prevention of Torture Act 2017.

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DEFINITION OF TERMS OF IMPORTANT TERMS

“Cruel, inhuman and degrading treatment or punishment” includes a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a public officer or a person acting on behalf of a public officer against a person under their custody, causing suffering, gross humiliation or degradation to the person;

“Intermediary” means a person authorized by a court, on account of their expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children’s officer or social worker;

Victim” means a person subjected to torture or cruel, inhuman or degrading treatment or punishment or any other person who has suffered harm as a result of an act of torture or cruel, inhuman and degrading treatment or punishment;

“Victim impact statement” 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.



INTRODUCTION

1.1 What is the status of torture?

The practice of torture is widespread even in countries where it is illegal. Rather than respecting the rule of law through zero-tolerance of torture, governments persistently and routinely lie about it to their own people and to the world. In 2014 Amnesty International Conducted a survey on the prevalence of torture around the world, 44 percent of 21,000 respondents from 21 countries feared they would risk being tortured in police custody. Amnesty found evidence of torture in 79 countries, all of whom were part of the 155 countries that ratified the UN Convention Against Torture.

In Kenya, The National Torture Prevalence Survey conducted by the IMLU in 2016, revealed that **30.3%** of Kenyans had undergone torture, cruel, inhuman or degrading treatment or punishment between 2011 and 2016. The report further revealed that: The **key drivers** of torture in Kenya include, but not limited to: Lack of awareness on fundamental rights by citizens (34.7%); Ignorance on part of

perpetrators about human rights (30.2%); Poverty (26.4%); and Weak enforcement of the law on torture (24.3%). The **perpetrators** of torture include: Regular police, Administration Police, Local chiefs, among others. Some of the recommendations from the report include; the need to create systems both at the national and county where the victims can be able to access reparations and redress and the need for collaboration between the state and non-state actors in eradicating the vice through sensitization forums and facilitating access to justice for survivors of torture.

1.2 What is the importance of the Prevention of Torture Act 2017?

Before the Prevention of Torture Act 2017 there were no laws in place which clearly defined and criminalized torture, provided penalties on torture, cruel, inhuman and degrading treatment in Kenya. Further there were no provisions for reparation and rehabilitation for victims of torture. The Prevention of Torture Act 2017 was passed into law to address the following gaps:-

- a) The existing laws presumed that only members of the National Police Service, the Kenya Defense Forces, and National Intelligence Service are responsible for perpetuating acts of torture. The Prevention of Torture Act 2017 prohibits all public officers (any state officer or any person who holds a public office) from engaging in acts or torture;
- b) Affirm the fact that acts of torture or cruel, inhuman or degrading treatment or punishment are not justifiable under any circumstances;
- c) A person who has been charged with the crime of torture or cruel ,inhuman and degrading treatment and punishment cannot say that they were following orders from their seniors therefore the courts should not find him guilty of these crimes i.e. they cannot use this as an excuse in court
- d) It addresses the inconsistencies of the penalties imposed on the perpetrators of torture in the different laws. The Act now provides that in case there are inconsistencies between this Act and the existing laws, the Prevention of Torture Act will prevail.

- e) The Act provides a list of acts that constitute torture and cruel, inhuman and degrading treatment. However we need to note that the list in the Act is not exhaustive meaning that other actions not listed can constitute torture;
- f) It provides for remedies available to a victim of torture which include compensation, rehabilitation and restitution which were previously not available. This means that in awarding damages to a victim of torture, the court will have to go beyond simply ordering that victims receive financial compensation;
- g) It provides that torture is an extraditable offence. This means that Kenya has a duty to transport a foreigner to their home country to be charged and tried for crimes of torture. It also means that Kenya has a duty to charge and try Kenyans who have committed the crimes of torture or cruel ,inhuman and degrading treatment in other countries ;
- h) A person who commits the crimes of torture and cruel, inhuman and degrading treatment can be ordered by a court to cater for the medical and psychological costs of the victim.

1.3 What are the objectives of the Act?

- i. Criminalizes torture and cruel, inhuman and degrading treatment and punishment;
- ii. Provides for the prevention and prohibition of torture and cruel, inhuman and degrading treatment or punishment;
- iii. Provides for the reparations for victims of torture and cruel, inhuman and degrading treatment or punishment; and
- iv. Provides for the implementation of Article 25(a) and 29(d) of the Constitution (which prohibits torture and guarantees right to freedom and security) and provisions of the Convention against Torture (Its purpose is to prevent and eradicate the use of torture and other cruel, inhuman or degrading treatment or punishment and to ensure accountability for acts of torture).

2

2 CRIMES OF TORTURE AND CRUEL, INHUMAN, DEGRADING TREATMENT AND PUNISHMENT

2.1 What is torture?

The Prevention of Torture Act 2017 defines torture as an action resulting in severe pain or suffering inflicted on a person deliberately. It could be physical or psychological and is done for a specific reason. These reasons are:-

- a. To acquire information from the person.

For example a person who is suspected to belong to a criminal gang is tortured so that he or she can confess whereabouts of his or her accomplices;

- b. To get a confession from a person for crime committed *e.g. a person who is arrested on suspicion of being a robber is tortured for him or her to admit to having committed the crime;*

- c. To punish a person for a crime committed or is about to be committed *e.g. a Kenya Forest*

Officer tortures an old lady who he or she finds carrying firewood from the forest;

- d. To threaten or force a person or a third party to do something or refrain from doing something *e.g. a small scale trader or hawker is subjected to torture for failing or refusing to give a County Law Enforcement officer a bribe of a certain amount.*
- e. Where the reason for the torture is purely based on the bias that a public officer holds against a certain group of people *e.g. based on their religious beliefs, political affiliation or ethnicity etc.*

An act qualifies as torture if it is inflicted by a public officer. The public officer can:

- Commit the torture him or herself;
- Permit ordinary citizens to torture another person *e.g. where a prison officer tells inmates to beat up another prisoner to teach us him or her a lesson and be aware that torture is being committed by private citizens against other citizens but does nothing about it. This is referred to as acquiescence e.g. a*

criminal gang is collecting protection fees from shop owners in a certain area and if anyone doesn't comply they get beaten up. The community has reported to the local administration but no action is taken. In this case the local administration will be held responsible for the torture.

2.2 What are the penalties for committing the offence of torture?

A person found guilty for committing the offence of torture will serve a jail term of not more than **twenty-five (25) years**. In the unfortunate incident that the victim dies as a result of the torture, the person will be **jailed for life** once found guilty;

2.3 What are the penalties for committing the offence of cruel, inhuman or degrading treatment or punishment?

If found guilty by the court, the person will serve a jail term of not more than fifteen **(15) years** or pay a fine of **not more than one million shillings (Kshs 1,000,000.00) or both;**

2.4 Is there a justification for committing torture, cruel, inhuman and degrading treatment?

The Act provides that there is no justification for torture, cruel, inhuman and degrading treatment. A state of emergency, war or where there is a threat to war or internal political instability cannot be used to justify use of torture in the country.

2.5 Will I be committing an offense if I attempt, aid, abet, counsel, procure or conspire to commit an offence of torture, cruel, inhuman and degrading treatment?

Yes. If found guilty by the Court you will be jailed for not more than fifteen (15) years or pay a fine of not more than one million shillings (Kshs 1,000,000.00) or both;

2.6 What happens if a Confession or information is obtained through torture, cruel, inhuman or degrading treatment or punishment?

This confession or information cannot be used as evidence in Court. A person who knowingly uses this information if found guilty by the Court will be jailed for **not more than seven (7) years or pay a fine of not more than five hundred thousand shillings (Kshs 500, 000.00)** or both.

However, the confession or information obtained can however be used as evidence against the person who committed the crimes of torture or cruel, inhuman and degrading treatment and punishment.

2.7 Does the Act provide for Immunity or amnesty for perpetrators of torture?

No Amnesty or immunity is available for perpetrators of torture.

3

REMEDIES FOR VICTIMS AND TRIAL OF OFFENDERS

3.1 What is the process of making a complaint of torture?

(1) Which Institutions can a person record a complaint?

- a) The Police Station;
- b) The Kenya National Commission for Human Rights (KNCHR);
- c) The Independent Policing Oversight Authority (IPOA);
- d) The Courts;
- e) Any other institution including Non-Governmental Organizations (NGOs) like IMLU.

(2) Must all complaints be written down?

Yes, regardless of the institution where a complainant has made his or her complaint. Once written down, the complaint should be forwarded to an institution

that conducts investigations such as the police, IPOA and KNCHR.

(3) What is the procedure of processing a complaint at the police station?

The police officer at the reporting desk once he or she has received a complaint, must ensure that the complaint is recorded in writing. The officer should then forward the case to the Officer Commanding the Station (the OCS). The OCS may need to facilitate other processes that are important for investigations e.g. issue the victim with a P3 form in case they have suffered physical injuries, Post Rape Care forms in the case of sexual violations and facilitate the conduct of a post mortem examination in case a death occurred.

The OCS is required to immediately forward the case to the Directorate of Criminal Investigations. The Directorate of Criminal Investigations is then required to investigate the complaint without delay.

(4) What is the role of the Independent Policing Oversight Authority (IPOA) in investigating cases of torture?

The Independent Policing Oversight Authority will receive reports and investigate cases where the

suspect is a police officer or an ancillary officer an example is a prison officer doing policing duties e.g. providing security in a polling station during elections.

(5) What happens when a complaint of torture is raised in court?

The court shall record the complaint and order investigation immediately; and order that the investigation report be submitted within seven (7) days of the court making the order.

(6) Can the court order for a medical examination and psychological assessment?

The court will require that part of the investigation to be conducted must include a medical examination and psychological assessment to help establish the harm suffered by the victim.

(7) Do the institutions conducting investigations offer protection to the victims?

The organization or institution that is conducting investigations has the duty to protect the victim or any witness from being intimidated or threatened by the suspect or agents of the suspect.

3.2 What is Victim impact statement?

In the course of the court case, the prosecutor may present evidence (proof) to show the circumstances under which the crime took place. The prosecutor may also need to show the impact that the crime has had on the victim by presenting to the court the victim impact statement.

The victim impact statement will help the court:
- to prove that the crime actually took place; and
understand the kind of harm suffered by the victim
hence give the suitable jail term to the accused person.

3.3 Who is a vulnerable witness?

This is a witness who the court may decide is at risk for whatever reason who may be: The victim; a child; a person with mental disability; a person placed under witness protection by the Witness Protection Agency.

3.4 When can a court declare a witness vulnerable?

The Court can **on its own, upon being requested by the prosecution or at the request of a witness declare that a person is a vulnerable witness.**

In deciding whether or not to declare someone a vulnerable witness, the court will consider the following factors:

- i. Age;*
- ii. Intellectual, psychological or physical impairment;*
- iii. Trauma; Cultural differences;*
- iv. The possibility of intimidation;*
- v. Race;*
- vi. Religion;*
- vii. Language;*
- viii. The relationship of the witness to any party to the proceedings;*
- ix. The nature of the subject matter of the evidence and*
- x. Any other factor the court considers relevant*

3.5 What does the Court consider when putting in place measures to protect the vulnerable witness?

In deciding which the measures to be taken so as to protect a vulnerable witness, the Court will consider:-

1. Any views expressed by the witness;

2. Any views expressed by a knowledgeable person who is knows or has dealt with the witness;
3. The need to protect the dignity and safety of the witness;
4. The need to protect the witness from trauma; and
5. Whether the protective measures will hinder any other party involved in the case such as the accused from effectively engaging the witness such as questioning him or her.

A court may at any time, on its own initiative or upon the request of the prosecution, cancel or make changes to an order regarding a vulnerable witness. The Court should however give the reasons for varying or revocation.

An accused person cannot be found guilty purely on the evidence by the intermediary. The evidence must be supported by other witnesses and or documents such as medical assessment report, psychological assessment report, post mortem report, etc.

3.6 Does a person commit an offense if they publish information of the vulnerable witness?

A person who publishes information about the witness, to an extent that the identity of the witness is revealed contrary to the orders of the Court if found guilty will be jailed for **a maximum of three(3) years** or pay a fine of **not less than two hundred thousand shillings** Kshs 200,000 or both. If the witness in question is a child i.e. a person under 18 years then such a person will be jailed for a maximum of **three (3) years** or pay a fine **of not less than Kshs 50,000** or both. If the publisher is a company /an organization/ institution then they will be required to pay a fine of Kshs 1,000,000.

3.7 Can the person accused of the crime of torture or cruel, inhuman, degrading treatment or punishment question a vulnerable witness?

In a criminal case where the person is charged with the crime of torture or cruel, inhuman, degrading treatment or punishment doesn't have a lawyer representing him or her, he or she will direct the questions to the court and then the court will proceed to state the questions to the vulnerable witness accurately.

4

WHAT ARE THE REMEDIES A VICTIM OF TORTURE IS ENTITLED TO?

A victim of torture or cruel, inhuman or degrading treatment has the right to file their case in court. He or she has the right to the following remedies:

- a) **Restitution**- this is where the court orders that the victim(s) be as much as possible be returned to the position he or she was in before the violation took place;
- b) **Adequate compensation**- this is the monetary award that the victim(s) receive for the loss or injury they suffered;
- c) **Rehabilitation** includes psychosocial interventions, medical treatment, legal aid and social services designed to assist victims recover from loss, injury or damage suffered as a consequence of the offence.

In the event the victim dies, the victim's family members have the right to file a case in Court. Where the accused person is found guilty, the Court may either on its own or at the request of the victim, order the accused person to pay for the costs of medical or psychological treatment.

4.1 Can a victim file a civil case while the criminal case is ongoing?

The victim can file a civil case to claim damages from the accused persons even when the criminal case is still ongoing.

4.2 Can the victim request for treatment for injuries resulting from torture or cruel, inhuman or degrading treatment?

A victim or an intermediary, can request the Court to make an order for treatment which includes both medical and psychological. The costs for treating the victim will be from the Victim Protection Trust Fund created by **Section 27 of the Victims Protection Act 2014**. All medical records relating to treatment belong to the victim and shall only be used as evidence before any court with the prior and informed permission from the victim.

4.3 How are prisoners or detainees protected from torture or cruel, inhuman or degrading treatment?

A person in charge of a prisoner or a detainee shall not release or transfer a prisoner to a country where the prisoner is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment. This applies irrespective of; the citizenship of the prisoner or detainee, location where the prisoner or detainee is being held or location to which the release or transfer was to take place.

4.4 What are the restrictions on extradition in regards to torture or cruel, inhuman or degrading treatment?

Extradition is when an accused person is taken to another country to stand trial. A person shall not be expelled, returned or extradited to another country where there is reason to believe that the person is in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. When determining whether there is reason to believe that a person has been tortured or is in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment, the court will consider the human rights record of the

State seeking for a person to be transferred to their country. Where a person is not extradited because he or she is likely to be tortured or treated in a cruel, inhuman or degrading manner, then he will stand trial in Kenya.

4.5 Does a suspect have the right to communicate with the state for acts of torture or cruel, inhuman or degrading treatment perpetrated against him?

A person who is suspected to have committed any crime under the Prevention of Torture Act has the right to communicate with his or her family, nearest representative or the State for which he or she is a national in case the person is a foreigner. In the case of a stateless person, he or she will be assisted to communicate with the representative of the State where the person usually resides.

5

THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

5.1 What is the role of the Kenya National Commission on Human Rights in implementation of the Act?

The Kenya National Commission on Human Rights has been given a key role under the Act that include prevention and response to torture and cruel, inhuman and degrading treatment or punishment as follows:

1. Prevention of Torture

- a) Recommend effective measures for prevention of torture and cruel, inhuman and degrading treatment and punishment;
- b) Create awareness among the public on their right to freedom from torture and cruel, inhuman and degrading treatment or punishment;
- c) Receive reports from public entities with respect to the implementation of this Act;

- d) Advise the Government on matters relating to the prevention of torture and cruel, inhuman and degrading treatment and punishment by public and private agencies; work with enforcement agencies towards the promotion of compliance with international best practices on prevention of torture and cruel, inhuman and degrading treatment and punishment;
- e) Liaise with public entities on the implementation of the right to freedom from torture and cruel, inhuman and degrading treatment or punishment by public and private agencies;
- f) Perform other functions as may be determined by the Cabinet Secretary in consultation with the National Assembly.

2. Response to Torture

- g) Investigate cases of torture or cruel, inhuman, degrading treatment or punishment by its own motion or a upon a person filing a complaint with them;

- h) Call for information from a public entity or private body to facilitate monitoring of compliance with the provisions of this Act;
- i) Monitor the compliance by the State with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment;
- j) Issue summons or other orders requiring the attendance of any person before the Commission or the production of any document or record required by the Commission;
- k) Assess and act on the reports with a view to assessing the violation of the right to freedom from torture and cruel, inhuman and degrading treatment and punishment;

5.2 What are the forms of torture covered under this law?

The list below is however not exhaustive

1. Physical torture, which includes—
 - a) Systematic beating, head banging, punching, kicking, striking with truncheons, rifle butts, jumping on the stomach;

- b) Gunshots;
- c) Food deprivation or forcible feeding with spoiled food, animal or human excreta or other food not normally eaten by a victim;
- d) Electric shocks;
- e) Cigarette burning, burning by electrical heated rods, hot oil, acid, by rubbing of pepper or other spices or acids or other chemical substances on mucous membranes;
- f) The submersion of a victim's head in water or water polluted with excrement, urine, vomit or blood; being tied or forced to assume a fixed and stressful body position;
- g) Rape and sexual abuse, including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of the genitals;
- h) Mutilation including amputation of parts of the body such as the genitalia, ears and tongue;
- i) Dental torture or forced extraction of the teeth; harmful exposure to elements such as sunlight and extreme cold;

- j) Administration of drugs to induce confession or reduce mental competence;
- k) The use of drugs to induce extreme pain or certain symptoms of diseases;
- l) The use of plastic bags and other materials placed over a victim's head with the intention to asphyxiate;
- m) Other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment.

2. Mental or psychological torture including—

- a) Blindfolding or placing a material or hood over a victim's head;
- b) Threatening a victim or a victim's family with bodily harm, execution or other wrongful acts;
- c) Confining a victim incommunicado, in a secret detention place or other form of detention;
- d) Confining a victim in a solitary cell or a cell put up in public place; confining a victim in a solitary cell against their will without regard to their security;

- e) Prolonged interrogation of a victim so as to deny the victim normal length of sleep or rest;
- f) Maltreating a member of a victim's family;
- g) Witnessing of torture sessions by a victim's family or relative; denial of sleep or rest;
- h) Simulation of killing; subjecting a victim to noise that is- intense;
- i) Repetitive; or prolonged shame infliction such as stripping a victim naked, parading a victim in a public place, shaving a victim's head or putting a mark on the victim's body against the victim's will;
- j) Or any other act that degrades a person.

**WHERE CAN A VICTIM REPORT TORTURE AND
CRUEL, INHUMAN, DEGRADING TREATMENT OR
PUNISHMENT?**

National Police Service

Jogoo House 'A',
Taifa Road
Tel +254-020-2221969
P.O.Box 44249 - 00100
Nairobi, Kenya

The Independent Medico-Legal Unit

69 Mokoyeti West Road off Lang'ata Rd
P. O. Box 16035-00509 | Galleria | Nairobi
Tel: +254-2-4456048/9, 4450598, 4441833, 0724
256 800
Email: medico@imlu.org
Mobile App: 'RIPOTI'
Website: www.imlu.org

Kenya Human Rights Commission

Gitanga Road opp. Valley Arcade Shopping Center
P.O Box 41079-00100, Nairobi, Kenya
Mobile 0722264497 or 0733629034
Email: admin@khrc.or.ke
Website: [www. Khrc.or.ke](http://www.Khrc.or.ke)

Mathare Social Justice Centre

Email: matharesocialjusticecentre@gmail.com

The National Coalition of Human Rights Defenders- Kenya

P.O Box 26309-00100

Nairobi, Kenya

Mobile: +254-712632390 or +254716200100

Email: info@hrdcoalition.org

Website: <https://hrdcoalition.org>

The Independent Policing Oversight Authority

Head office:

1st Ngong Avenue, ACK Garden Annex

2nd floor P.O. Box 23035 – 00100

Nairobi, Kenya

Tel: 254 20 490 6000

E-mail: info@ipoa.go.ke or complaints@ipoa.go.ke

Website: <http://www.ipoa.go.ke>

Garissa County Office:

IPOA House, Off Kismayu Road behind Texas Petrol Station

P.O Box 1261-70100

Tel: 0777040400

Email:garissa@ipoa.go.ke

Mombasa County Office:

Jubilee Insurance Building (Arcade) along Moi Avenue

P.O Box 99758-80107

Tel: 0799019998

Email: mombasa@ipoa.go.ke

Kisumu County Office:

Central Square Building, Opposite Barclays Bank

P.O Box 3560-40100

Tel: 0799862244

Email:kisumu@ipoa.go.ke

Kakamega County Office;

Daroon Foundation Trust Building, Opposite Nala Hospital

P.O Box 1642-50100

Tel:020-440 3549

Email: kakamega@ipoa.go.ke

**Eldoret Office: Kerio Valley Development Authority
Annex Plaza**

P.O Box 109-30100

Tel 020-4403548

Email: eldoret2ipoa.go.ke

Nakuru County Office:

Assumption Centre 5th Floor Opposite St. Paul
University

P.O Box 2400-20100

Tel: 020-4401076

Email: nakuru@ipoa.go.ke

Nyeri County Office:

County Mall Next to Veterinary Department and
behind Baden Powell

P.O Box 30-10100

Tel 020-2004664

Email: nyeri@ipoa.go.ke

Meru County Office:

Union Place Meru Makutano Junction Opp Kenya Prisons

P.O Box 203-60200

Tel:020-201 7237

Email:meru@ipoa.go.ke

Any police station around the country or call the following police hotlines 999/112/911

The Kenya National Commission on Human Rights

1st Floor, CVS Plaza,
Kasuku Road off Lenana Road
P.O Box 74359-00200

Nairobi, Kenya

Email:haki@knchr.org

or

complaint@knchr.org

 22359

 0800-720-627

 www.knchr.org



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