

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - THIRD SESSION - 2024
PUBLIC PETITIONS COMMITTEE

REPORT ON-

PUBLIC PETITION NO. 8 of 2023 REGARDING ENACTMENT OF LEGISLATION TO
CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED
DISAPPEARANCE BY DR. ANNETTE MBOGHO

APRIL 2024

*Approved
Cross
11/04/24.*

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 11 APR 2024	DAY: Thursday
TABLED BY:	Hon. Janet Simeoni (Chairperson, Public Petitions Committee)
CLERK-AT THE-TABLE:	Shiboko

Clerk's Chambers
Directorate of Legislative & Procedural Services

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LIST OF ABBREVIATIONS AND ACRONYMS

AP	-	Administration Police
ATPU	-	Anti-Terrorism Police Unit
BPU	-	Border Patrol Unit
CSO	-	Civil Society Organization
DCI	-	Directorate of Criminal Investigations
GSU	-	General Service Unit
HURIA	-	Human Rights Agenda
IMLU	-	Independent Medico Legal Unit
IPOA	-	Independent Policing Oversight Authority
KDF	-	Kenya Defence Forces
KFS	-	Kenya Forest Service
KNBS	-	Kenya National Bureau of Statistics
KNCHR	-	Kenya National Commission on Human Rights
KPR	-	Kenya Police Reserve
KWS	-	Kenya Wildlife Service
NGO	-	Non-Governmental Organisation
NIS	-	National Intelligence Service
NPS	-	National Police Service
ODPP	-	Office of the Director of Public Prosecutions
RDU	-	Rapid Deployment Unit
VPF	-	Victims Protection Fund

CHAIRPERSON'S FORWARD

On behalf of the Public Petitions Committee and pursuant to the provisions of Standing Order 227, it is my pleasant privilege and honour to present this House the Report of the Public Petitions Committee regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance. The Petition was presented to the House pursuant to Standing Order No. 225 (2) (b) by the Honourable Speaker on behalf of Dr. Annette Mbogho, the Executive Director of Kituo Cha Sheria Legal Advice Centre.

The Petitioner prayed that the House enacts laws that would expressly criminalize and prescribe penalties for the crime of enforced disappearance. The Petitioner stated that the current laws were silent on the extent of prosecuting the crime of enforced disappearance thus the courts were faced with challenges in adjudicating such cases which were also connected to extrajudicial killings.

In consideration of the Petition, the Committee collected the views of various human rights organizations specialized in the subject matter as well as the Kenya National Commission on Human Rights who all emphasized the timeliness and need to enact the said legislation and fast tracking of the International Convention for the Protection of All Persons from Enforced Disappearance.

The Committee observed that Kenya was among the States that were signatories to the International Convention for the Protection of All Persons from Enforced Disappearance but has not taken steps to ratify the Convention and recognise the crime of enforced disappearance in its legislation. Further, a stand-alone law may be enacted or certain laws can be reviewed to criminalize enforced disappearance. The laws that would need to be reviewed include the Penal Code, Cap 63, the Criminal Procedure Code Cap 75, the Persons Deprived of Liberty Act, 2014, the Prevention from Torture Act 2017, the National Coroners Service Act 2017 and any other relevant law.

On the proposal for the National Assembly to enact legislative provisions to criminalise and prescribe penalties for the crime of enforced disappearance, the Committee recommends that the country's legal framework should be reviewed to incorporate the crime of enforced disappearance.

The Committee is thankful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support offered during the consideration of the Petition. The Chairperson expresses gratitude to the Members of the Committee and the Secretariat for their devotion and commitment to duty during the consideration of the Petition.

On behalf of the Committee and pursuant to the provisions of Standing Order 199, I now wish to table the report before the House.



for
HON. NIMROD MBITHUKA MBAI, M.P.
CHAIRPERSON, PUBLIC PETITIONS COMMITTEE

Date: 11-04-2024

PART I

PREFACE

1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEE

The Public Petitions Committee is established under the provisions of Standing Order 208A with the following terms of reference:

- a) considering all public petitions tabled in the House;
- b) making such recommendations as may be appropriate with respect to the prayers sought in the petitions;
- c) recommending whether the findings arising from consideration of a petition should be debated; and
- d) advising the House and reporting on all public petitions committed to it.

1.2 COMMITTEE MEMBERSHIP

The Public Petitions Committee was constituted in October 2022 and comprises the following Members:

Chairperson

Hon. Nimrod Mbithuka Mbai, M.P.
Kitui East Constituency
United Democratic Alliance (UDA)

Vice Chairperson

Hon. Janet Jepkemboi Sitienei, M.P.
Turbo Constituency
United Democratic Alliance (UDA)

Hon. Patrick Makau King'ola, M.P.
Mavoko Constituency
**Wiper Democratic Movement-Kenya
(WDM-K)**

Hon. Edith Vethi Nyenze, M.P.
Kitui West Constituency
**Wiper Democratic Movement-Kenya
(WDM-K)**

Hon. Ernest Kivai Ogesi Kagesi, M.P.
Vihiga Constituency
Amani National Congress (ANC)

Hon. Maisori Marwa Kitayama, M.P.
Kuria East Constituency
United Democratic Alliance (UDA)

Hon. Joshua Chepyegon Kandie, M.P.
Baringo Central Constituency
United Democratic Alliance (UDA)

Hon. John Walter Owino, M.P.
Awendo Constituency
Orange Democratic Movement (ODM)

Hon. Bernard Muriuki Nebart, M.P.
Mbeere South Constituency
Independent

Hon. Bidu Mohamed Tubi, M.P.
Isiolo South
Jubilee Party (JP)

Hon. Caleb Mutiso Mule, M.P.
Machakos Town Constituency
Maendeleo Chap Chap Party (MCCP)

Hon. John Bwire Okano, M.P.
Taveta Constituency
**Wiper Democratic Movement-Kenya
(WDM-K)**

Hon. Peter Mbogho Shake, M.P.
Mwatate Constituency
Jubilee Party (JP)

Hon. Sloya Clement Logova, M.P.
Sabatia Constituency
United Democratic Alliance (UDA)

Hon. Suzanne Ndunge Kiamba, M.P.
Makueni Constituency
**Wiper Democratic Movement-Kenya
(WDM-K)**

1.3 COMMITTEE SECRETARIAT

The Public Petitions Committee is facilitated members of the secretariat:

Lead Clerk
Mr. Ahmed Kadhi
Senior Clerk Assistant

Ms. Anne Shibuko
First Clerk Assistant

Mr. Willis Obiero
Clerk Assistant III

Ms. Patricia Gichane
Legal Counsel II

Ms. Roselyne Njuki
Principal Serjeant-at-Arms

Mr. Calvin Karungo
Media Relations Officer III

Ms. Miriam Modo
First Clerk Assistant

Mr. Shadrack Omondi
Legal Counsel II

Mr. Martin Sigei
Research Officer III

Mr. Paul Shana
Sergeant at Arms

Mr. Peter Muteithia
Audio Officer

PART II

PUBLIC PETITION NO. 8 OF 2023 ENACTMENT OF LEGISLATION TO CRIMINALIZE AND PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

1.4 INTRODUCTION

1. Public Petition No. 8 of 2023 regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance was presented by the Honourable Speaker on Tuesday, 7th March, 2023 on behalf of Dr. Annette Mbogoh, the Executive Director of Kituo Cha Sheria Legal Advice Centre.
2. The Petitioner stated that Kituo Cha Sheria Legal Advice Centre had worked closely with victims of cases of extra-judicial killings and disappearances in the country since 2007 and documented a total of 1201 killings and 272 enforced disappearances with most of the incidences having occurred in the hands of police and other security agencies.
3. The Petitioner also claimed that in 2021, Kenya reported approximately 43 cases of disappearances of persons who were last seen in police custody or who were abducted by persons believed to be police officers.
4. The Petitioner highlighted northern and coast regions as being the hotspots for incidences of enforced disappearance as a way of counter-terrorism operations and cited an incident where 20 dead bodies were allegedly retrieved from River Yala.
5. According to the Petitioner, there was no legal remedy to hold suspects of the crime of enforced disappearance accountable for forcibly disappearing victims whose whereabouts remained unknown.

1.5 PETITIONER'S PRAYER

The Petitioners prayed that the National Assembly through the Public Petitions Committee—

6. The National Assembly enacts laws that would expressly criminalize and prescribe penalties for the crime of enforced disappearance.

PART III

STAKEHOLDERS' SUBMISSIONS ON THE PETITION

1.6 SUBMISSIONS BY THE PETITIONER

Dr. Annette Mbogoh, the Executive Director of Kituo Cha Sheria Legal Advice Centre appeared before the Committee on Tuesday 18th April, 2023 and submitted as follows—

7. Kituo Cha Sheria Legal Advice Center was one of the oldest and most experienced non-governmental and human rights organization in East, Central and the Horn of Africa having been established in July 1973 to enhance access to justice for poor, indigent and marginalized communities in Kenya. The objectives and mission of the organization was to set and shape the national and regional agenda on human rights issues including environmental, economic and socio-cultural rights issues as well as monitor implementation by the State of provisions of human and people's rights.
8. In the execution of its mandate, the organization had established that the matter of enforced disappearances and extrajudicial killings were prominent and disturbing within the country. That according to statistics from Missing Voices compiled from 2007, 1349 persons were victims of extrajudicial killings and 256 cases of enforced disappearances were documented. Majority of the cases were attributed to the police.
9. The laws were silent on the extent of prosecuting the crime of enforced disappearance thus the courts were faced with challenges in adjudicating such cases.
10. That enforced disappearances were commonly occurring alongside extrajudicial killings hence tarnishing the fabric of law enforcement and the rule of law in the country. Unresolved extrajudicial killings and enforced disappearances were becoming a concern to every citizen.
11. In 2017, during the prolonged and contested general elections, the Human Rights Watch documented that the police and armed gangs killed more than 100 people. At least 67 people were killed during the first round of voting, most of them were either shot or beaten to death by police. In 2018 alone, Kenyan human rights groups documented at least 267 cases of extrajudicial killings by police. The Independent Medico Legal Unit (IMLU), a Nairobi based NGO that worked on police accountability, documented 152 extrajudicial killings by police. Further, investigatory reports by the Kenya National Commission for Human Rights (KNCHR)

implicated security agencies in enforced disappearances, brutality and extrajudicial killings.

12. That there was failure and neglect to institute adequate investigations on extrajudicial killings and enforced disappearances and the state of affairs was exacerbated by the absence of specific legislation criminalizing enforced disappearance. The absence of such provisions hence provided a leeway for inadequate investigations and prosecution of enforced disappearance cases.
13. The international instruments reaffirmed the illegal nature of enforced disappearance under international law and required that enforced disappearance be classified as a crime under national criminal law.
14. In Africa, Burkina Faso, Senegal and Tunisia had criminalized enforced disappearance while Kenya had only signed the instrument pending ratification.
15. That a key element of the crime of enforced disappearance in the International Crimes Act was that it must be committed in a systematic and widespread fashion. As such, where the high standard set in the International Crimes Act were not fulfilled, perpetrators of the crime of enforced disappearance may lack criminal responsibility.
16. The distinction of enforced disappearances from the various offences linked to it was that it was perpetrated by the State and or its agents and persons of authorization, with support and acquiescence of the State. Since the State may decline to acknowledge the deprivation of the liberty and or concealment of the fate of the disappeared person, a stand-alone law was necessary to adequately address the crime.

1.7 SUBMISSIONS BY THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

The Chairperson, Kenya National Commission on Human Rights (KNCHR) Ms. Roselene Odede appeared before the Committee on Wednesday, 26th October, 2023 and submitted as follows—

Background

17. The Petition requesting the National Assembly to enact legislation to criminalize and prescribe penalties for the crime of enforced disappearance was welcome and timely as the legal framework in Kenya lacked a precise definition of enforced disappearance as a distinct criminal offence. The Penal Code (Cap. 63) did not recognize the crime of enforced disappearance, rather, it prohibited kidnapping and abduction. Kidnapping or abduction however did not capture all the complexities involved in enforced disappearances.

18. Enforced disappearance was a grievous act that violated the whole spectrum of the Bill of Rights for the victims, their families, and communities. It was a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.
19. Prioritization of the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance by the Republic of Kenya was key in addressing the issue of enforced disappearance. The Convention was adopted by the General Assembly in its Resolution 61/177 of 2006 and came into force on 23rd December 2010. It was the first universally legally binding human rights instrument concerning enforced disappearance. Notably, Kenya signed the Convention on 6th February, 2007, but was yet to ratify it.
20. The Convention enjoined all state parties to ensure that enforced disappearance constituted an offence under its criminal law. The Convention would ensure the prevention of the gruesome accountability and justice for victims when they do occur.

Justification

21. The Petitioner correctly pointed out, that there was a high trend of enforced disappearances and extra-judicial killings in the country. The status was confirmed by the past and ongoing investigations and documentation which the Commission had painstakingly carried out over the recent years.
22. There were various reports by the Commission documenting violation of enforced disappearance published on its website. That since 2007, KNCHR had documented over 1800 cases of extrajudicial killings and enforced disappearances attributed to the Kenyan Security Forces. For example, in the past five years, the Commission handled 592 cases of extrajudicial killings and 82 cases of enforced disappearance between 2019 and 2023. However, the data was not comprehensive owing to the covert nature that the crimes were committed and the fact that there was no centralised database for the offences (by both State and non-state actors) hence many of these crimes were unreported.
23. The Shakahola forest horror in which more than 400 bodies were discovered and nearly 100 survivors rescued was arguably connected to the crime enforced disappearance.
24. The Commission had established that enforced disappearance and extrajudicial killings involved various units of our security agencies including Kenya Défense Forces (KDF), National Intelligence Service (NIS), Kenya Wildlife Services (KWS), Kenya Forest Services (KFS) and various units of the National Police Service (NPS) including the Criminal Investigations Directorate, Anti-Terrorism Police Unit

(ATPU), Kenya Police Reserve (KPR), Administration Police (AP), Rapid Deployment Unit (RDU) of the AP, Border Patrol Unit (BPU) and the General Service Unit (GSU).

25. The Constitution mandated the State to pursue security, in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms.
26. About 70 States had ratified to the **International Convention for the Protection of All Persons from Enforced Disappearance** while 43 States had signed it. Some of the African countries had ratified the Convention and taken steps to recognise the criminalised enforced disappearance in their domestic laws included Morocco, Benin, Malawi, and the Gambia.

Recognition of Crime of enforced disappearance

The National Assembly needed to amend the existing legislation, more specifically the Penal Code to provide for the various issues in line with regional and international standards as follows:

27. Provide a clear definition of enforced disappearance in criminal law. Such definition should be aligned to the International Convention for the Protection of All Persons from Enforced Disappearance, which considered enforced disappearance to be, "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".
28. Absolute prohibition of the crime of enforced disappearance. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification for enforced disappearance (Article 1(2)).
29. Provide for appropriate penalties which consider the extreme seriousness of enforced disappearance (Article 7(1)).
30. The right for victims of enforced disappearance to obtain reparation and prompt, fair and adequate compensation (Article 24).
31. Command responsibility. That no order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance (Article 6(2)).

32. The duty of State authorities to undertake prompt and impartial investigation where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, even if there has been no formal complaint (Article 12).
33. Express protection of vulnerable groups including human rights defenders and those who work on extrajudicial, journalists and others who are at risk of the gruesome vice.
34. Enforced disappearance as an extraditable offence in any extradition treaty (Article 13).

Proposals by KNCHR

35. The Executive and Legislature to initiate and expedite the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance.
36. The National Assembly expedites the enactment or amendment of legislation to explicitly criminalise enforced disappearance within the national legal framework.
37. The National Security Council to expedite the development and implementation of a National Security Policy in compliance of the Constitution and international rights instruments.
38. The State to expedite the full operationalization of the National Coroners Service Act, 2017.
39. To expedite the full operationalisation of the Prevention of Torture Act, 2017 including developing rules and regulations under the Act.
40. The National Assembly amends the Kenya National Commission on Human Rights Act, 2011 to expressly provide for the Commission to perform its function as provided under Article 59(2)(d) including unfettered access to all places of detention whether public or private consistent with its mandate, recommendations by treaty bodies to Kenya and international best practices.
41. Strengthen investigative and prosecutorial capacities (ODPP, NPS) to ensure effective legal action against perpetrators of enforced disappearance and extrajudicial killings.
42. Prioritize the protection and support of human rights defenders working on cases of enforced disappearance and police killings, including collaboration with relevant government agencies. Relatedly, Kenya to adopt the Human Rights Defenders Protection Policy.

43. The National Assembly reviews the Prevention of Torture Act, 2017 to enable KNCHR to have direct powers of conducting investigations and forwarding file to ODPP for prosecution without requiring the intermediary approach with DCI or NPS to reduce fear of reprisal by relatives or the victims of such torture and victim apathy in pursuing redress.
44. Allocate increased adequate budgetary resources to the KNCHR to enhance its capacity to perform its work including investigations on enforced disappearances.
45. Full operationalisation of the multi-agency team on extrajudicial killings and enforced disappearances with representation from various government bodies to enhance coordination and collaboration in addressing enforced disappearance and related human rights violations.
46. Adopt a holistic government approach to offer comprehensive training programs for law enforcement officers, focusing on human rights, arrest procedures, and the responsible use of firearms.
47. The Attorney General expedites the operationalisation of the Victims Protection Trust Fund Regulations to facilitate compensation for victims and their families.
48. The Kenya National Bureau of Statistics (KNBS) in conjunction with the KNCHR to enhance the collection, collation and reporting of accurate official data on enforced disappearances in line with the agreed framework.
49. The Committee considers the findings and recommendations contained in the Senate Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya (October 2021) by the Standing Committee on Justice, Legal Affairs and Human Rights Committee.

1.8 SUBMISSIONS BY MUSLIMS FOR HUMAN RIGHTS (MUHURI)

The Executive Director of MUHURI Mr. Francis Auma appeared for the Committee on Tuesday, 31st October, 2023 and submitted as follows—

50. The organisation had documented many cases of enforced disappearance and sought court orders for habeas corpus. There have been about 12 cases of enforced disappearance in the last 12 years and most of the cases were carried out by ATPU.
51. There was need for a legislature to cover for the gaps regarding enforced disappearance to assist the victims even through restoration and redress.

1.9 SUBMISSIONS BY HUMAN RIGHTS AGENDA (HURIA)

The Executive Director of HURIA, Mr. Yusuf Lule, appeared before the Committee on Tuesday, 31st October, 2023 and submitted as follows—

52. HURIA supported the Petitioner's prayers and the need for a legislation to criminalise and prescribe penalties for the crime of enforced disappearance which was long overdue but timely if there was political goodwill.
53. The government had acknowledged the twin problem of enforced disappearance and extrajudicial killings and committed to ratifying and domesticating the International Convention for the Protection of all Persons from Enforced Disappearance ending all forms of extra judicial execution by security services. Further, amending the National Coroners Service Act, 2017 to establish the Coroners General Office and a special tribunal for gross human rights violation and enforced disappearances.
54. In view of the commitments and the unending crimes against the Kenyan people, the Petition was a beginning of a national conversation on the issues of enforced disappearance and extra judicial killings.
55. That for over 50 cases of enforced disappearance and extra judicial killings were documented by HURIA since 2016 in Kwale County. HURIA made submissions to KNCHR during a public inquiry on the status of security in the Coast region and also the Senate Standing Committee on Justice and Legal and Human Rights Affairs.
56. The occurrence and impact of the crime of enforced disappearance warranted the need for enactment of the said legislation. Further, HURIA had made various observations in its interactions with the cases of enforced disappearance. In a forum conducted on 17th October 2017 to receive and document cases of enforced disappearance and extra judicial executions in Kwale County, families of the victims submitted through questionnaires where about 11 cases of enforced disappearances and 9 killings were reported. After the analysis, HURIA noted as follows—
 - i. On many occasions, incidences of extrajudicial killings began as enforced disappearance hence making the two a twin problem.
 - ii. All the victims registered were Muslim men of Digo ethnic origin, 68 per cent of whom were above the ages of 35 years, 84 per cent were married men with at least two children and most of the claimants were women either married to the victims or daughters and sisters left with the bigger responsibility to fend for their families.

- iii. Most of the victims were in informal employment such as bodaboda operation, fish mongering, fruit vending, teaching in madrassa and farming.
- iv. Most of the killings happen between 7 p.m. and midnight within the area of Ukunda where majority of the victims' bodies were found with bullets.
- v. In the case of disappearances, the claimants alleged that a white Pro box car was mainly used and most of the abductions were carried out during the day. Msambweni Sub County was most affected by the incidences.
- vi. The claimants revealed that 65 per cent of the cases were reported to the police with no appropriate action taken. Most of the abducted victims were later killed and buried within a day as per the Muslim tradition thus hindering the undertaking of autopsies which could have revealed more evidence of the crime.
- vii. Most of the abduction of victims were done during the day by persons who had firearms and handcuffs pointing to the belief that they were law enforcement officers in the country.
- viii. The main target of the victims were youths between the ages of 25 and 35 years who were alleged to be recruiters of terrorist organisations while others were returnees who came back from Somalia.

57. From the observations, HURIA made the following recommendations—

- i. Implementation of the recommendations by the Civil Society Organisations (CSOs) during the Senate Standing Committee on Justice and Legal and Human Rights Affairs that visited parts of the country.
- ii. The Inspector General of Police be held accountable for the loss of the lives of many Kenyans since 2008 to date.
- iii. The families of victims found dead or abducted be compensated for the loss of lives and atrocities they have gone through. Despite the Victims Protection Act, the Victims Protection Fund (VPF) has not been operationalised.

1.10 SUBMISSIONS BY HAKI AFRICA

The Executive Director, Mr. Hussein Khalid appeared before the Committee on Tuesday, 31st October, 2023 and submitted as follows—

58. It was almost impossible to investigate and deal with the cases of enforced disappearances without encapsulating extrajudicial killings. In most instances, victims of enforced disappearances ended up dead hence extremely challenging to

only legislate on enforced disappearance without extrajudicial killings which was a major problem nationally.

59. From the various cases documented by various human rights organisations, there was a hallmark of torture. Any legislation on enforced disappearance and extrajudicial killings should refer to the Prevention of Torture Act to cover for victims who have been disappeared and later found alive and those found dead. There was need for a broader definition of enforced disappearance for the two types of victims.
60. In many cases, the perpetrators were security officers who also conducted the investigations. The responsibility to investigate should not be bestowed on police to build faith that such cases would be conclusively investigated. The mandate should be handed over to Independent Policing Oversight Authority (IPOA) to deal with any suspicion of enforced disappearance. The IPOA only dealt with National Police Service (NPS) yet other security agencies also engaged in enforced disappearances. For instance, the (KDF) were notorious for engaging in enforced disappearance especially in Northern Kenya. The KWS were mentioned many times in their dealing with suspected poachers and KFS while dealing with illegal charcoal sellers were equally mentioned.
61. There should be transition in application of the legislation. Over 700 cases of enforced disappearance have been documented by HAKI Africa in the last ten years. The cases needed to be factored in considering there was no statute of limitation in criminal law hence the need for a provision that would consider cases that happened in the past.
62. While Article 29 of the Constitution put the responsibility for protection of life on government, there was no legislation to ensure the government and its agencies were accountable to its people in the event of enforced disappearance and extrajudicial killings. Whenever the suspects were the same state agencies, the accountability was not clear.
63. The abductions in enforced disappearance are made during the day hence ruling out the possibility of criminals engaging in the act as criminals have different motivations such as ransom and revenge which can be observed if that was the case.

HAKI Africa further submitted some of the effects of the absence of the legislation to criminalize and prescribe penalties for the crime of enforced disappearance as follows—

64. Enforced disappearances had disrupted the normal lives of many families including the status of marriages. Women victims could not establish whether they

were married to their disappeared husbands or not thereby affecting determination in legal requirements of marriages.

65. There were children under guardianship because their parents' status was unknown whether alive or dead thereby affecting certain roles played by parents which could not be played by guardians making them to miss out on programs such as school bursaries.
66. Succession and property ownership had been destabilized as properties registered in the name of a disappeared husband could not be managed by the wives due to legal requirements of the husband's presence. This had led to loss of property in some cases because of the absence of the husbands and the unclear marital status.
67. The families of the victims of enforced disappearance could not pursue legal compensation because enforced disappearance had not been criminalised.

1.11 SUBMISSIONS BY SEMA UKWELI

Mr. Boniface Mwangi, Executive Director, Sema Ukweli appeared on Tuesday, 31st October, 2023 and submitted as follows—

68. The Petition was important and timely as the government had promised to deal with the issues of enforced disappearance and extrajudicial killings. Therefore, there was need for the legislation to deal with the matter.
69. The legislation on enforced disappearance needed not to only punish the junior officers who engage in enforced disappearance but also the senior officers who give the orders for such disappearances. The entire security service needed to be accountable NIS.
70. One of the justifications by the police to engage in enforced disappearance of suspected criminals was that whenever they take suspects to court, they are not convicted. There was need to relook at the Penal Code to find a way of dealing with suspects of heinous crimes so that the police do not take the law into their hands.

1.12 SUBMISSIONS BY ATTORNEY GENERAL

The Attorney General vide a letter REF: DOJ/LJM/2/173 Vol 1 dated 26th September 2023 submitted on the Petition as follows—

71. Enforced disappearance refers to the practice of secret abduction and detention of individuals by state authorities or organizations acting with their consent, support, or acquiescence. The person is taken against their will often without any legal order or due process.

72. The official definition of enforced disappearance is found in the International Convention for the Protection of All Persons from Enforced Disappearance. This definition is comprehensive and captures all of the essential elements of enforced disappearance, including—
- i. The involvement of state agents or persons acting with the authorization, support, or acquiescence of the state;
 - ii. The deprivation of liberty of the victim; and
 - iii. The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the victim.
73. This definition was also important because it recognized that enforced disappearance was a serious human rights violation. It was a crime against humanity when it was committed on a widespread or systematic basis.
74. It was important to note that Kenya was not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance. However, the definition of enforced disappearance in the Convention was widely accepted and was used by international human rights organizations to document and investigate cases of enforced disappearance.
75. Enforced disappearances were considered grave crimes violating several human rights including the right to life, liberty and security of the person, the prohibition of torture and the right to a fair trial. International law including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention for the Protection of All Persons from Enforced Disappearance categorically condemn enforced disappearances and demand accountability for those responsible.
76. Disappearance had traumatic effect on the victim who was removed from the protection of the law, frequently subjected to torture and was in constant fear for their lives as well as to their families who were uncertain about the individual's fate or whereabouts, wondering and waiting sometimes for years for news that may never come.
77. There has been concern in Kenya about the prevalence of enforced disappearances. Various national, regional and international organizations have decried the practice. However, the lack of accountability and the failure to bring the perpetrators to book have been a major concern in addressing the menace in Kenya.
78. One prominent case was the disappearance of human rights lawyer, Willie Kimani, his client Josphat Mwenda and their taxi driver Joseph Muiruri in 2016. They were prosecuting an alleged case of police brutality when they went missing. Their bodies were later found in a river showing signs of torture.

79. In October 2021, the Senate Standing Committee on Justice, Legal Affairs and Human Rights published a report titled *'Inquiry into extrajudicial killings and enforced disappearances in Kenya'*. Various stakeholders including state and non-state actors submitted feedback to the Senate Committee. The submissions from the Kenya National Commission on Human Rights (KNCHR) stated that for the period 2013-2022, the Commission together with its partners had documented 1,040 cases of Extra-Judicial Killings and enforced disappearances attributed to security agencies. According to their report, the majority of the victims (Over 80%) were young male adults aged 15-35 years. The Independent Policing Oversight Authority (IPOA) submitted that between October 2018 and February 2020 they received 210 cases of deaths arising out of police action in form of death while in police custody or enforced disappearance cases.

80. The Senate Committee noted that—

“The issue of the extrajudicial killings and enforced disappearances in Kenya has been of grave concern both prior to and following the promulgation of the Constitution of Kenya”.

81. A preliminary review of the legal framework in Kenya on enforced disappearances revealed that:

- i. There is currently no definition of the term "enforced disappearance" in Kenyan law.
- ii. There is no national legislation that criminalizes or penalizes enforced disappearances.
- iii. There are no effective measures in place to prevent enforced disappearances.

82. As a result, offenders are currently prosecuted under a range of related offences including kidnapping or abductions, false imprisonment, torture, and cruel inhuman treatment. However, these offences did not adequately reflect the gravity and specific nature of enforced disappearance which is a separate and complex crime.

83. In order to address these shortcomings, several areas of interventions have been outlined. These are:

- i. the need for a clear and concise definition of enforced disappearance in Kenyan law;
- ii. the importance of criminalizing enforced disappearance with appropriate prevent enforced penalties; the need for effective measures disappearances, such as strengthening civilian oversight of the security forces and ensuring that all allegations of enforced disappearance are promptly and effectively investigate; and

iii. The need for mechanisms to investigate and prosecute cases of enforced disappearance, as well as to provide support and reparations to victims and their families.

84. The Attorney General of Kenya has established a Multi-Agency Committee to review the laws and policies that protect people from extrajudicial killings and enforced disappearances. The Committee includes representatives from the following key stakeholders—

- i. Office of the Attorney General and Department of Justice;
- ii. Ministry of Interior and Coordination of National Government;
- iii. National Police Service;
- iv. Independent Policing Oversight Authority (IPOA);
- v. Office of the Director of Public Prosecutions (ODPP);
- vi. Kenya National Commission on Human Rights (KNCHR); and
- vii. Judiciary.

85. The Multi-Agency Committee is responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya. Their goal is to identify any gaps in the current laws and policies and to make sure that Kenya's laws are in line with international standards.

86. This framework is expected to include the following key elements—

- i. A clear and concise definition of enforced disappearance;
- ii. The criminalization of enforced disappearance with appropriate penalties;
- iii. Effective measures for the prevention of enforced disappearances;
- iv. Mechanisms for the investigation and prosecution of enforced disappearances; and
- v. Victim support and reparation measures.

87. The establishment of the Multi-Agency Committee was a positive step towards addressing the issue of enforced disappearances in Kenya. The Attorney General or his representative will chair the Multi Agency Committee.

88. The Multi-Agency Committee shall—

- i. Undertake a thorough analysis and review of relevant policies, laws and administrative measures for the protection against enforced disappearance and extrajudicial killings with a view to identifying gaps and incorporating the crime into the Kenyan legislative framework in line with international Standards;
- ii. Identify gaps which from a legal perspective might hinder the incorporation of the crime of Enforced Disappearance in the national legislation; and
- iii. Coordinate and collaborate with all relevant stakeholders involved in the custody or treatment of any person deprived of liberty;
- iv. Provide a platform to identify and address common challenges inter alia, providing inter-agency technical guidance through the development of standards and tools to prevent and respond to cases of extrajudicial killings and enforced disappearances;
- v. To conduct a comparative study with other jurisdictions that have in place legislation addressing crime of enforced disappearance with a view to developing a legal framework to address the issue;

- vi. Draft recommended amendments to existing provisions in the legislation aiming at mainstreaming enforced disappearance in the legal framework;
 - vii. To develop a matrix of legislation that needs amendment and prepare the relevant legislative drafting instructions;
 - viii. Coordinate policy & advocacy initiatives and provide capacity building and awareness raising on the International Legal Instruments on Protection from Enforced Disappearance;
 - ix. Develop a database for synthesizing and administering data on investigations, prosecution, and conviction of cases of extrajudicial killings, enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment; and
 - x. Provide leadership and guidance on the eventual ratification process of the International Convention for the Protection of all Persons from Enforced Disappearance.
89. The Multi Agency Committee has six (6) months within which to finalise its work and give recommendations including legislative proposals to incorporate the offence of enforced disappearance into Kenya's legislative framework.

PART IV

COMMITTEE OBSERVATIONS

Having collected the views from the various stakeholders, the Committee made the following observations, that—

90. The increased cases of enforced disappearances have affected and destabilized the lives of the victims as well as their relative as documented by various human rights organizations.
91. Kenya was among the States that were signatories to the International Convention for the Protection of All Persons from Enforced Disappearance but has not taken steps to ratify the Convention and recognise the crime of enforced disappearance in its legislation.
92. The Kenyan Constitution Article 2(6) provides that ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’. However, since Kenya has not ratified the treaty, the petitioner prays for the enactment of a law to criminalize and prescribe penalties for the crime of enforced disappearances. Therefore, there is no effective legal remedy available through law to hold suspects accountable for victims of enforced disappearance whose whereabouts remain unknown or denied.
93. The petitioner is thus seeking the application of the convention through legislation of a local law that adheres to the Convention on the protection of all persons from enforced disappearance.
94. The Attorney-General established a Multi-Agency Committee responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya. The committee is to identify any gaps in the current laws and policies and to make sure that Kenya’s laws are in line with international standards.

PART FIVE

ANALYSIS OF ISSUES FOR DETERMINATION AS PER THE PRAYERS IN THE PETITION

95. Arising from the findings and observations, the Committee makes determination on prayers sought in the Petition as follows—

Prayer No. 1: *The National Assembly enacts legislative provisions that will expressly criminalize and prescribe penalties for the crime of enforced disappearance.*

96. The Committee notes that—


- a) There is need to review present laws to recommend amendments to existing provisions in the legislation in order to mainstream enforced disappearance in the legal framework;
- b) Presently offenders are currently prosecuted under a range of related offences including kidnapping or abductions, false imprisonment, torture and cruel inhuman treatment. However, these offences do not adequately reflect the gravity and specific nature of enforced disappearance which is a separate and complex crime.
- c) That a statute stand-alone law may be enacted or certain laws can be reviewed to criminalize enforced disappearance. The laws that would need to be reviewed include the Penal Code, Cap 63, the Criminal Procedure Code Cap 75, the Persons Deprived of Liberty Act, 2014, the Prevention from Torture Act 2017, the National Coroners Service Act 2017 and any other relevant law.

PART SIX


COMMITTEE RECOMMENDATIONS

Pursuant to the provisions of Standing Order 227, the Committee recommends that—

97. On the proposal for the National Assembly to enact legislative provisions to criminalise and prescribe penalties for the crime of enforced disappearance, the country's legal framework should be reviewed to incorporate the crime of enforced disappearance. In the alternative, the National Assembly enacts a stand-alone law on Protection of Persons from Enforced Disappearance to safeguard against human rights violations by the state and state agencies.
98. In the alternative, the Multi-Agency Committee lead by the Office of Attorney General and Department of Justice responsible for developing a comprehensive legal and policy framework for the prevention, investigation, and prosecution of enforced disappearances in Kenya, fast-tracks the finalization of its work and submits a report to the National Assembly.
99. That in its report, the Multi-Agency Committee should identify any gaps in Kenya's legal framework and upon conclusion of the said report, the Office of Attorney General and Department of Justice to review the statute book and propose necessary amendments to the House to ensure it conforms to international standards especially the International Convention for the Protection of All Persons from Enforced Disappearance.

Signal:  11-04-2024 Date: 11-4-2024

THE HON. NIMROD MITHOKA MBA, M.D
CHAIRPERSON, PUBLIC PETITIONS COMMITTEE

 THE NATIONAL ASSEMBLY PAPERS LAID	
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ANNEXURES

- Annex 1: Adoption List
- Annex 2: Public Petition No. 08 of 2023 regarding Enactment of Legislation to Criminalize and Prescribe Penalties for the Crime of Enforced Disappearance
- Annex 3: Letter REF: DOJ/LJM/2/173 Vol 1 dated 26th September 2023 by the Office of the Attorney-General & Department of Justice
- Annex 4: Minutes of the 13th Sitting of 2023 held on Tuesday, April 18 2023
- Annex 5: Minutes of the 71st Sitting of 2023 held on Wednesday, October 26, 2023
- Annex 6: Minutes of the 72nd Sitting of 2023 held on Tuesday, October 31, 2023
- Annex 7: Minutes of the 19th Sitting of 2024 held on 27th March 2024



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - THIRD SESSION - 2024
PUBLIC PETITIONS COMMITTEE

ADOPTION SCHEDULE OF THE REPORT ON CONSIDERATION OF PUBLIC PETITION
NO. 08 OF 2023 REGARDING ENACTMENT OF LEGISLATION TO CRIMINALIZE AND
PRESCRIBE PENALTIES FOR THE CRIME OF ENFORCED DISAPPEARANCE

DATE.....25-03-2024

We the undersigned Honourable Members of the Public Petitions Committee, do hereby affix our signatures to this Report on the Consideration of **Public Petition No. 8 of 2023 regarding enactment of legislation to criminalize and prescribe penalties for the crime of enforced disappearance** to confirm our approval and confirm its accuracy, validity and authenticity: -

S/NO	NAME	SIGNATURE
1.	Hon. Nimrod Mbithuka Mbai, M.P. Chairperson	
2.	Hon. Janet Jepkemboi Sitienei, M.P. Vice Chairperson	
3.	Hon. Patrick Makau King'ola, M.P.	
4.	Hon. Edith Vethi Nyenze, M.P.	
5.	Hon. Ernest Ogesi Kivai, M.P.	
6.	Hon. John Walter Owino, M.P.	
7.	Hon. Joshua Chepyegon Kandie, M.P.	
8.	Hon. Maisori Marwa Kitayama, M.P.	
9.	Hon. Bernard Muriuki Nebart, M.P.	
10.	Hon. Bidu Mohamed Tubi, M.P.	
11.	Hon. Caleb Mutiso Mule, M.P.	
12.	Hon. John Bwire Okano, M.P.	
13.	Hon. Peter Mbogho Shake, M.P.	
14.	Hon. Sloya Clement Logova, M.P.	
15.	Hon. Suzanne Ndunge Kiamba, M.P.	