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PREVENTION OF TORTURE ACT

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SCHEDULE

NO. 12 OF 2017

PREVENTION OF TORTURE ACT

[Date of assent: 13th April, 2017.]

[Date of commencement: 20th April, 2017.]

AN ACT of Parliament to give effect to Article 25(a) and 29(d) of the Constitution and to the principles of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment; and for connected purposes

[Act No. 12 of 2017.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Prevention of Torture Act, 2016 and shall come into operation upon publication in the Gazette.

2. Interpretation

In this Act, unless the context otherwise requires —

"Board" means the Board of Trustees appointed under section 30 of the Victims Protection Act, 2014 (No. 17 of 2014);

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to justice;

"Commission" means the Kenya National Commission on Human Rights established under section 3 of the Kenya National Commission on Human Rights Act, 2011 (No. 14 of 2011);

"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;

"public officer" means a public officer as defined under Article 260 of the Constitution;

"torture" has the meaning assigned to it in section 4;

"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; and

"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.

3. Application of the Act

This Act shall apply to the offences of torture and other cruel, inhuman or degrading treatment or punishment where —

- (a) the alleged offender is a citizen of Kenya;
- (b) the alleged offender is resident in Kenya;
- (c) the offence was committed —
 - (i) in any territory under the control or jurisdiction of Kenya;
 - (ii) on board a vessel flying the Kenyan flag registered in Kenya at the time the offence is committed;
 - (iii) on board an aircraft operated by the Government of Kenya, or a body in which the Government of Kenya holds a controlling interest, or which is owned or operated by a body corporate in Kenya;
- (d) the victim is a citizen of Kenya; or
- (e) the offence is committed by a person who is present in or expected to be present in Kenya or in a territory under the control or jurisdiction of Kenya.

PART II – CRIMES OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

4. Torture

For the purposes of this Act, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person —

- (a) for the purposes of —
 - (i) obtaining information or a confession from him or her or any other person;
 - (ii) punishing him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or
 - (iii) intimidating or coercing him or her or any other person to do, or to refrain from doing, anything; or
- (b) for any reason based on discrimination of any kind;

when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public officer or a person acting on behalf of a public officer, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

5. Offence of torture

(1) Any person who tortures another person commits an offence and shall be liable, on conviction, to imprisonment for a term not exceeding twenty five years.

(2) If as a result of torture referred to under subsection (1) the victim dies, the person is liable, on conviction, to imprisonment for life.

6. No justification for torture

(1) No exceptional circumstances, including —

- (a) a state of war or a threat of war;
- (b) internal political instability; or
- (c) a public emergency,

may be invoked as justification of torture or cruel, inhuman or degrading treatment or punishment.

(2) An order from a superior officer or a public authority may not be invoked as justification for torture or cruel, inhuman or degrading treatment or punishment.

(3) A person shall not be held liable to disciplinary action or criminal prosecution only on account of refusing to obey an order from a superior officer or public authority to commit, aid or abet in the torture or cruel, inhuman or degrading treatment or punishment or an offence under this Act.

7. Offence of cruel, inhuman or degrading treatment or punishment

A person who —

- (a) commits or induces another person to commit cruel, inhuman or degrading treatment or punishment; or
- (b) cooperates in the execution of cruel, inhuman and degrading treatment or punishment,

commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding fifteen years or both.

8. Aiding and Abetting

A person who attempts, aids, abets, counsels, procures or conspires with another person to commit an offence under this Act commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding fifteen years or both.

9. Offence of using information obtained through torture

(1) Any information, confession or admission obtained from a person by means of torture or cruel, inhuman or degrading treatment or punishment is inadmissible evidence in any proceedings.

(2) A person who knowingly uses information which is obtained through torture or cruel, inhuman or degrading treatment or punishment commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding seven years or to both.

(3) Despite subsections (1) and (2), any information, confession or admission obtained by means of torture or cruel, inhuman or degrading treatment may be admitted against a person accused of torture or cruel, inhuman or degrading treatment as evidence that the information, confession or admission was obtained by torture or cruel, inhuman or degrading treatment.

10. No immunity or amnesty

There shall be no immunity or amnesty granted to a person accused of the offence of torture or cruel, inhuman or degrading treatment or punishment.

11. Sentencing

(1) In sentencing a person convicted for an offence under this Act, the court shall take into consideration the severity of the act of torture or cruel, inhuman or degrading treatment or punishment.

(2) The assessment of the level of severity of an offence shall depend on all the circumstances of the case, including —

- (a) the duration of the treatment or punishment;
- (b) the duration of the physical and mental effects of the treatment or punishment; and
- (c) the victim's sex, religion, age and state of health.

PART III – POWERS AND FUNCTIONS OF THE COMMISSION**12. Powers and functions of the Commission**

(1) The functions and powers of the Commission shall be to —

- (a) investigate alleged violations of the provisions of this Act upon receipt of a complaint or on its own initiative;
- (b) promote the right to freedom from torture and cruel, inhuman and degrading treatment and punishment pursuant to the provisions of the Constitution and this Act;
- (c) call for information from a public entity or private body to facilitate monitoring of compliance with the provisions of this Act;
- (d) monitor the compliance by the State with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment.
- (e) 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;
- (f) recommend effective measures for prevention of torture and cruel, inhuman and degrading treatment and punishment;
- (g) create awareness among the public on their right to freedom from torture and cruel, inhuman and degrading treatment or punishment, by means of continuing civic awareness programs, symposia, publications and other means as may be determined by the Commission;
- (h) receive reports from public entities with respect to the implementation of this Act, 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;
- (i) advise the Government on matters relating to the prevention of torture and cruel, inhuman and degrading treatment and punishment by public and private agencies;
- (j) 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;
- (k) 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; and

(l) perform other functions as may be determined by the Cabinet Secretary in consultation with the National Assembly.

(2) The Commission shall have all powers necessary for the performance of its functions under this Act.

(3) In the performance of its functions under this Act, the Commission shall be guided by the national values and principles of governance as set out in Article 10 of the Constitution.

PART IV – REMEDY FOR VICTIMS AND TRIAL OF OFFENDERS

13. Procedure for reporting and registration of offences under this Act

(1) A person alleging that an offence under this Act has been committed, may complain to —

- (a) the National Police Service;
- (b) the Commission; or
- (c) any other relevant institution.

(2) Where a complaint is made under subsection (1), the institution shall —

- (a) reduce the complaint into writing; and
- (b) forward the matter to the police or other investigating authorities for investigation.

(3) A police officer shall receive a complaint of an offence under this Act and forward it, without delay, to the Officer-in-charge of the police station in whose jurisdiction the offence has taken place for initiating investigations.

(4) Upon receipt of the complaint referred to in subsection (3), the Officer-in-charge of the police station shall immediately forward the complaint to the Directorate of Criminal Investigation which shall investigate the offence without delay.

(5) Despite anything in the Criminal Procedure Code (Cap. 75) as to reporting and investigation of crimes, whenever a complaint of torture or other cruel, inhuman or degrading treatment or punishment is received, the person receiving the complaint shall register it in writing.

(6) Where an allegation of torture is made in respect of a police officer, the procedures for investigation provided for under section 87 of the National Police Service Act (Cap. 84) and sections 25, 26, 27, 28 and 29 of the Independent Policing Oversight Authority Act, 2011 (No. 35 of 2011) shall apply.

(7) Where a complaint regarding an offence under this Act is reported to a court or raised in the process of a trial, the court shall record the complaint and order investigation immediately and order submission of an investigation report within seven days of the court's order.

(8) An order for investigation by the court shall include medical and psychological assessment of harm suffered by the alleged victim.

(9) The investigating authority shall —

- (a) protect any complainant and witness from intimidation and reprisals during the course of investigations; and
- (b) ensure their physical and psychological integrity before, during and after the proceedings.

14. Procedure of investigation

Subject to section 13(5), an offence under this Act shall be investigated in accordance with the provisions of the Criminal Procedure Code (Cap. 75).

15. Victim impact statement.

The prosecution in criminal proceedings relating to an offence under this Act, may adduce evidence relating to the circumstances surrounding the commission of an offence and the impact of the offence under this Act upon a victim —

- (a) in order to prove that an offence was committed; and
- (b) for purposes of imposing an appropriate sentence, that relates to the extent of the harm suffered by the victim.

16. Vulnerable witness

(1) A court, in criminal proceedings involving the alleged commission of an act of torture or other cruel, inhuman or degrading treatment or punishment, may declare a witness, other than the accused, who is to give evidence in the proceedings a vulnerable witness if the witness is —

- (a) the alleged victim in the proceedings pending before the court;
- (b) a child; or
- (c) a person with a mental disability;
- (d) a person who is under protection by the Witness Protection Agency established under section 3A of the Witness Protection Act.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1), declare any witness, other than the accused, a vulnerable witness if in the court's opinion the witness is likely to be vulnerable on account of —

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of the witness.

(4) Upon declaration of a person as a vulnerable witness in accordance with this section, the court shall, subject to the provisions of subsection (5), direct that the witness be protected by one or more of the following measures —

- (a) allowing the witness to give evidence under the protective cover of a witness protection box;
- (b) directing that the witness shall give evidence through an intermediary;

- (c) directing that the proceedings may not take place in open court;
- (d) prohibiting the publication of the identity of the witness or of the family of the witness, including the publication of information that may lead to the identification of the witness or the family of the witness; or
- (e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3) be appointed in respect of the witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for the failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, the intermediary may —

- (a) convey the general purport of any question to the relevant witness;
- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including —

- (a) any views expressed by the witness, but the court shall accord the views the weight it considers appropriate in view of the age of the witness and maturity;
- (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the dignity of the witness and safety and protect the witness from trauma; and
- (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) A court may at anytime, on its own initiative or upon the request of the prosecution, revoke or vary a direction given in terms of subsection (4), and the court shall, if the revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) A person, including a juristic person, who publishes information in contravention of this section or contrary to any direction or authority under this section or who reveals the identity of a witness in any manner in contravention of a direction under this section, commits an offence and is liable, on conviction, to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years

and in any other case to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.

(12) A juristic person convicted of an offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of an offence under this Act who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

17. Remedies

(1) A victim of an act of torture or other cruel, inhuman or degrading treatment or punishment shall obtain redress and shall have an enforceable right to —

- (a) adequate reparation, including restitution;
- (b) adequate compensation; and
- (c) rehabilitation.

(2) In the event of the death of the victim as a result of an act of torture or other cruel, inhuman or degrading treatment or punishment, the victim's dependants shall be entitled to reparation.

(3) Where a person is convicted of an offence under this Act, the court may, on its own motion or on the application of the victim, order the person to make restitution or compensate the victim for —

- (a) the costs of medical and psychological treatment; and
- (b) any other relief that the court may consider just.

18. Civil action

Despite any criminal proceedings instituted under this Act or any order made under section 17 as to restitution or compensation, a person may institute civil proceedings for compensation.

19. Medical treatment and counselling of victim

(1) A court may at anytime, at the request of a victim of torture or cruel, inhuman or degrading treatment or an intermediary, grant an order for the treatment or counselling of a victim of torture or cruel, inhuman or degrading treatment or punishment.

(2) The expenses incurred for the treatment or professional counselling of a victim granted under this section shall be charged on the Victim Protection Trust Fund established under section 27 of the Victim Protection Act, 2014 (No. 17 of 2014).

(3) All medical records relating to treatment pursuant to subsection (1) are the property of the victim and shall only be used as evidence before any court with regard to any offence under this Act pursuant to the prior and informed consent of the victim.

20. Transfer of detainees

(1) A person having lawful custody of a prisoner or detainee shall not transfer or release the prisoner or detainee, to any place if there are reasonable grounds to believe that the prisoner or detainee is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

(2) Subsection (1) applies to a prisoner or detainee in the custody of a public officer irrespective of the —

- (a) citizenship of the prisoner or detainee;
- (b) location in which the prisoner or detainee is being held in custody or control; or
- (c) location in which or to which the transfer or release is to take place or has taken place.

21. Restriction on extradition or deportation

(1) Torture is an extraditable offence.

(2) 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.

(3) 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 under subsection (2), the court shall take into account all factors including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the state seeking extradition of the person.

(4) Where a person is not extradited as a consequence of the provisions of this section, the person shall be prosecuted in Kenya.

22. Assistance to communicate with representative

(1) A person who is in custody in respect of an offence that is alleged to have been committed under this Act shall be assisted by the detaining authority to communicate with —

- (a) a family member;
- (b) the nearest representative of the person; or
- (c) the State of which the person is a national.

(2) If the person in custody is stateless, the person shall be assisted by the detaining authority to communicate with the representative of the State where the person usually resides.

PART V – MISCELLANEOUS PROVISIONS

23. Regulations

The Cabinet Secretary may, in consultation with the Board, make regulations for the administration of the Victim Protection Trust Fund in relation to the implementation of this Act.

24. General penalty

A person who commits an offence under this Act for which a penalty is not prescribed, shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.

25. Commission to submit annual report to National Assembly

(1) The Commission shall submit an annual report to the National Assembly and may, at any time submit special reports to the Cabinet Secretary on any matter relating to its functions.

(2) The annual report submitted by the Commission under sub-section (1) shall include an overall assessment of Government's performance with regard to prevention of torture and cruel, inhumane and degrading treatment during the period under review by the Commission.

(3) The Cabinet Secretary shall every year be required to report to the National Assembly, steps which the government has taken in implementing the recommendations made by the Commission.

26. Amendment of Cap. 76

The Extradition (Contiguous and Foreign Countries) Act (Cap. 76) is amended in the Schedule by inserting the following new words immediately before the words "criminal homicides and similar offences" —

"offences of torture and other cruel, inhuman or degrading treatment or punishment".

27. Amendment of Cap. 77

The Extradition (Commonwealth Countries) Act (Cap. 77) is amended in the Schedule by inserting the following new item immediately after item 32 —

"offences of torture and other cruel, inhuman or degrading treatment or punishment".

28. Amendment of Cap. 128

The Chiefs Act (Cap. 128) is amended by repealing section 20.

29. Amendment of No. 8 of 1999

(1) The Environmental Management and Coordination Act, 1999 (No. 8 of 1999) is amended in section 129 by deleting subsection (4) and substituting therefor the following new subsections —

(4) Upon any appeal to the Tribunal under this section, the Tribunal may if satisfied —

- (a) upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
- (b) upon application by any party, review any orders made under paragraph(a).

(5) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (4) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issues fresh orders maintaining the status quo in accordance with subsection (4)(a).

30. Limitation of actions

(1) Despite the provisions of the Limitation of Actions Act (Cap. 22), an action for reparation under this Act in respect of an act of torture or cruel, inhuman or degrading treatment or punishment or death caused by an act of torture or cruel, inhuman or degrading treatment or punishment may be brought at any time within the period of six years beginning with the date when it first became reasonably practicable for the person concerned to bring an action.

(2) Despite the limitation of proceedings against the Government as provided in the Government Proceedings Act (Cap. 40) and the Public Authorities Limitation Act (Cap. 39), an action for damages or claim against the government or any public

body in respect of an act of torture or cruel, inhuman or degrading treatment or punishment or death caused by an act of torture or cruel, inhuman or degrading treatment or punishment may be brought at any time within the period of six years beginning with the date when it first became reasonably practicable for the person concerned to bring an action.

31. Conflict of laws

Where there is a conflict between the provisions of this Act and the provisions of any other law in regard to the crimes of torture or cruel, inhuman or degrading treatment or punishment, the provisions of this Act shall prevail.

SCHEDULE

[Section 4.]

Acts constituting torture include but are not limited to—

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;
- (g) being tied or forced to assume a fixed and stressful body position;
- (h) rape and sexual abuse, including the insertion of foreign bodies into the sexual organs or rectum or electrical torture of the genitals;
- (i) mutilation including amputation of parts of the body such as the genitalia, ears and tongue;
- (j) dental torture or forced extraction of the teeth;
- (k) harmful exposure to elements such as sunlight and extreme cold;
- (l) administration of drugs to induce confession or reduce mental competence;
- (m) the use of drugs to induce extreme pain or certain symptoms of diseases;
- (n) the use of plastic bags and other materials placed over a victim's head with the intention to asphyxiate;
- (o) other forms of deliberate and aggravated cruel, inhuman or degrading pharmacological treatment or punishment; or

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;
 - (e) confining a victim in a solitary cell against their will without regard to their security;
 - (f) prolonged interrogation of a victim so as to deny the victim normal length of sleep or rest;
 - (g) maltreating a member of a victim's family;
 - (h) witnessing of torture sessions by a victim's family or relative;
 - (i) denial of sleep or rest;
 - (j) simulation of killing;
 - (k) subjecting a victim to noise that is —
 - (i) intense;
 - (ii) repetitive; or
 - (i) prolonged;
 - (l) 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; or
 - (m) any other act that degrades a victim.
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