



Kenya National Commission on Human Rights

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Kenya National Commission on Human Rights

Report to the Human Rights Committee to inform its Review of Kenya's Third Periodic Report on implementation of the Provisions of the International Covenant on Civil and Political Rights

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Introduction

1. The Kenya National Commission on Human Rights (KNCHR) submits this report to the Human Rights Committee in relation to the Kenyan Government's third Periodic Report under the International Covenant on Civil and Political Rights (ICCPR).
2. KNCHR is an independent Human Rights Institution with 'A status' accreditation. The National Commission was established in 2002 by statute with the mandates of protecting, promoting and monitoring the exercise of human rights in Kenya. Through the Constitution of Kenya 2010, the KNCHR was transformed into a constitutional Commission and re-established by the KNCHR Act, 2011, which clarified its constitutional mandate.
3. Pursuant to the KNCHR Act (No.14 of 2011), the Commission was mandated to act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights.
4. The Commission presents this report to the Human Rights Committee (HRC), in fulfillment of its constitutional and statutory obligations, to advise the HRC of efforts towards implementation of the ICCPR, the key concerns and key challenges in implementing this Covenant in Kenya.
5. The overall conclusion is that almost all provisions of the Covenant have been re-produced in the Kenyan Constitution. Moreover, the covenant as a whole forms part of Kenya's laws. However, poor implementation, conflicting laws and general lack of understanding of the implication of the Covenant's provisions are likely to pose challenges in realizing benefits under the Covenant.

Contextual Background

6. Kenya's third periodic report was submitted to the Committee on 19th August 2010, just before the 2010 constitution was promulgated. The 2010 constitution brought with it major changes to the country's systems and structures, which happened after submission of the State report. The effect of this is most of the issues in the State report belong to the old constitutional order.

Political Structure

7. The general political structure has changed and Kenya has adopted a bicameral parliament under the 2010 Constitution; The Country will now have Parliament composed of the National Assembly and the Senate. The Constitution has also brought with it a two-level devolved system of Government, national and county.

Extent to which human rights treaties have been domesticated

8. Before the 2010 constitution was adopted, Kenya was a dualist state, requiring implementing legislation before any ratified treaty could have the force of law nationally. Kenya passed implementing legislation for some treaties (Notably the Convention on the Rights of the Child – Through the Children's Act 2001, The Rome Statute (Through International Crimes Act 2009), but the overall effect was lack of unification as any treaty could be implemented through a series of laws. There was no specific domestic legislation for implementation of the ICCPR, though some of its provisions were reflected in various pieces of legislation.
9. The 2010 Constitution transformed Kenya from a dualist to a monist State by providing that all treaties ratified by Kenya would form part of the law of Kenya.¹ This means that there is

¹ Art. 2(6) of Kenya's 2010 Constitution, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>

no longer need for implementing legislation and international treaties can now be invoked before the courts, tribunals and administrative authorities in the Republic. However, Article 2(5) and 2(6) of the Constitution has to be given full effect and clarity through legislation. This is more so since Article 21(4) of the constitution requires the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. This means that where a treaty is non-self execution, requisite legislation has to be passed particularly for human rights treaties. These provisions must however be clarified through legislation.

10. Kenya is currently in the process of developing a Ratification of Treaties Law which will clarify the process and effect of treaty ratification. The Bill has gone through the second reading in Parliament and its enactment into law is awaited. Since future ratification of treaties, as well as establishing structures for effective implementation, depend on this law, the Committee should recommend to the State to ensure this law is in place as soon as possible; preferably before the next General election so that the new government does not begin on an unsure footing as far as international obligations are concerned.

Implementation of Concluding Observations on Kenya's Second Periodic Report

11. During the consideration of Kenya's second Periodic Report, the Committee made several observations. This Section gives an assessment of what steps have been taken by the state in implementing these concluding observations.

The State should take appropriate measures to allow the Covenant rights to be invoked in the domestic courts.

12. Many provisions of the Covenant have found expression in the Constitution of Kenya 2010, particularly the Bill of rights, which borrows heavily from the Covenant, in most cases, infusing the provisions of the covenant word for word in the Bill of rights. However, the Constitution, while it lays a theoretical framework, still requires practical steps and large-scale legal and institutional reforms for its provisions to become effective. It is one thing to

have the rights protected constitutionally, but yet another to ensure they are realized and are enforceable in the courts.

13. Article 2(6) of the Constitution which makes ratified treaties part of Kenya's law also allows for the Covenant as a whole to become part of Kenya's law, so that even its provisions which have not been incorporated into the constitution are still enforceable domestically. Citizens have indeed began taking advantage of Article 2(6) of the constitution. In *Re the matter of Zipporah Wambui Mathara (2010)* eKLR, the Court declared that provisions of Kenya's Civil Procedure Code were in conflict with Article 11 of the ICCPR which prohibits imprisonment for inability to pay civil debt. The Court went on to directly apply Article 11 of the ICCPR, noting that Article 2(6) of the constitution made the Covenant part of Kenya's law. While this is a bold and progressive step, it is important for the State to ensure that domestic laws which conflict with the Covenant are reviewed to achieve uniformity. Further, Judicial Officers should be sufficiently trained in provisions of the Covenant and international treaties so that they are able to refer to and apply them.

14. The Committee should therefore recommend to the state a review of its laws and policies to ensure the national laws conform to international treaties and training of Judicial Officers on application of international instruments.

The State should ensure that all individuals subject to its jurisdiction have equal access to judicial and other remedies

15. The Constitution now obligates the state to ensure access to justice for all persons (Article 48). The Chief Justice is also constitutionally mandated to make rules waiving fees for the court proceedings in implementation of the rights and fundamental freedoms (Article 22). Substantial reforms have been carried out in the Judiciary as part of implementation of constitutional provisions, particularly through vetting of all Judicial Officers, establishment of the Supreme Court, restructuring of the judicial system and streamlining of Court processes. These processes have helped restore some faith in the judiciary. It is hoped that the vetting process will leave Kenyan's with a corruption-free, competent and effective Judiciary. However, there are still various categories of persons who are as yet unable to access any form of justice in Kenya. Access to justice has been particularly elusive for

vulnerable and poor communities, among others, due to prohibitive legal costs and complexity of judicial procedures. Judicial services are also concentrated in urban centers and cities, leaving the rural poor without formal structures of justice, unless they travel many kilometers away to access the courts. Further, the government has not educated and sensitized Kenyans on their legal rights and majority of the population do not know their legal rights and the forms of redress available in instances of violation. As yet, there is no effective legal aid program in place. The National legal Aid and Awareness program (NALEAP) launched in 2007 has been largely ineffective due to lack of adequate budget. This program is still at pilot stage five years after establishment, a clear demonstration of the government's lack of commitment to facilitating access to justice.

16. Practically, there is a lot of lethargy in pursuing justice of the poor and vulnerable communities. The victims of 2007 Post-Election violence remain without any measure of justice as the state has not sought accountability from the perpetrators of the violence. In 2011, the Director of Public Prosecutions set up a task-force to review 5,000 criminal cases arising from the post-election violence; but it is still unclear whether this initiative will result in accountability for victims of the election violence. Further, the Government has not put in place a reparations formula and many Internally Displaced People (IDPs) have continued to languish in camps.
17. The problem is compounded as it is not only victims of 2007 post- election violence who have been left without any measure of justice but as well victims of ethnic clashes (1992 and 1997), victims of extra-judicial killings and thousands of victims of human rights violations. Many citizens feel that justice is but an alien term, unattainable in the country. While the government set up a Truth, Justice and Reconciliation Commission (TJRC), whose report is awaited in May 2012, some sectors of the community have criticized the TJRC for concentrating on Truth and reconciliation at the expense of justice.
18. In this regard, the State should:
 - Ensure that by the end of 2012, there is no Kenyan living in the IDP camps.
 - Put in place an appropriate comprehensive reparations mechanism targeting immediate and long term needs of the victims of 2007 post-election violence as well as victims of historical human rights violations.

- Ensure prosecution of perpetrators of post-election violence so that the gap on impunity is closed before the next general election.
- Co-operate fully with the International Criminal Court in the prosecution of the four Kenyans against whom charges have been confirmed.
- Increase budgetary funding for the National Legal Aid Awareness Program to enhance access to justice for the vulnerable and poor communities.

The State party should take urgent measures to address the absence of constitutional protection against discrimination in relation to women and gender disparities, and intensify its efforts to ensure their protection, whether through the National Commission on Gender and Development or otherwise. The draft bill that would eliminate inequality of spouses with regard to marriage, divorce, devolution of property and other rights should be adopted without delay. The State party should prohibit polygamous marriages.

19. The Constitution now establishes a framework through which non-discrimination and gender parity is advanced. It asserts equal rights of women and men to equal treatment and equal opportunities in political, economic, cultural and social spheres (Article 27 (1-3) and requires state organs and public offices to take measures, including affirmative action to address past systemic discrimination suffered by vulnerable groups including women. Equal citizenship rights are guaranteed and women can now transfer citizenship to their children whether born in foreign countries or born to foreign fathers (Article 14(1)). In composition of the National Assembly, 47 seats are reserved for women. A further 16 seats are reserved for nomination of women by political parties to the Senate. Women are also given opportunity to participate in leadership through county elections. The constitution further limits membership of any gender in elective and appointive public bodies by capping membership at two thirds (Article 81 (b)). It further guarantees representation of women in public bodies by ensuring equal access by women and men in public service to opportunities for appointment, training and advancement at all levels of public service (Article 232). These provisions are meant to ensure women and men occupy positions of leadership in public offices.

20. The constitution also provides for equal rights of women and men at the time of marriage, during the marriage and at the dissolution of the marriage (Article 45). The Bills giving

effect to these constitutional provisions are yet to be enacted. Polygamous marriages are however retained in the draft bills. This is because it has been recognized that outlawing polygamy would not be possible since for Muslims, it is faith based doctrine. Further, it is widely practiced in various communities in Kenya. As such, the country has made the choice to retain and protect women and girls in polygamous marriages by addressing challenges, for instance by legislating on equitable distribution of resources within such families and also, for purposes of succession, recognizing all wives, former wives and all children.

- The recommendation is that the State to ensure full implementation of constitutional provisions relating to women's rights, in order to correct the historical discrimination and enable women to claim their rights on an equal basis with men.
- Further, noting that the Family Bills have been pending since 2005, the State should undertake to urgently, and in any event within the next one year, ensure that the Bills are passed into law.

The State should increase efforts to combat the practice of FGM including through prohibition of FGM for adults, and, in particular, step up the awareness campaign launched by the Ministry of Gender, Sports, Culture and Social Services.

21. Significant progress has been made in this regard, most notably through enactment of the Prohibition of Female Genital Mutilation Act in 2011². The Act criminalizes FGM, provides sanctions and establishes an anti-FGM Board with the core mandate of designing, supervising and co-ordinating public awareness programmes against the practice of FGM.

22. Further, the National Action Plan for the Abandonment of FGM (2008-2012), developed by the Ministry of Gender, Children and Social Services, and in co-operation with the National Committee on Abandonment of Female Genital Mutilation (NACAF) is currently being implemented.

23. However, despite these legal and institutional efforts, FGM is still widespread in some communities in Kenya and justification for the continuity of the practice includes cultural

² Act No. 32 of 2011, available at <http://www.kenyalaw.org/klr/index.php?id=651>

purity, virginity, control of libido and cultural identity.³ In addition, family honour and social expectations play a powerful role in perpetuating the practice, making it extremely difficult for individual families, as well as individual girls and women, to stop the practice on their own account. To effectively combat FGM:

- The state should carry out awareness creation to sensitize the communities practicing FGM communities about the law.
- The state should also ensure prosecution of perpetrators to deter this harmful cultural practice.
- The state should, through the law enforcement officers, ensure immediate action of any reported incidences of FGM ,in accordance with the Anti-FGM law, 2011.

The State should consider abolishing the death penalty de jure and acceding to the second optional protocol to the Covenant. The death penalty should be removed from the books for crimes that do not meet the requirements of Article 6, paragraph 2 and all death sentences of all those on death row whose final appeals have been exhausted are commuted.

24. The death penalty has remained on Kenya’s statute books and people have continued to be sentenced to death despite advice from international⁴ and national processes.⁵ This is an area where the State is yet to take leadership in educating the public with a view to changing perceptions on the death penalty.

25. In 2009, after the commutation of 4,000 death sentences to life imprisonment, the President issued a directive to all relevant Government Ministries and departments to conduct empirical studies and engage all stakeholders **urgently**, to determine whether the continued existence of the death penalty in the laws of the land has any value or impact in the fight against crime.⁶ These studies were however not conducted and there was no direction from

³ This emerged from the inquiry on reproductive health carried out by KNCHR in 2011

⁴ When Kenya was reviewed under the Universal Periodic Review mechanism, several recommendations were made to the state to abolish the death penalty and ratify the 2nd Optional Protocol to ICCPR. While initially rejected during the interactive dialogue, eventually, at the adoption of Kenya’s Outcome report, the State indicated it had only totally rejected the recommendation on Sexual Minorities. In principal, this means the state was going to consider abolition of the death penalty.

⁵ Kenya National Commission on Human Rights: Occasional Report on the Abolition of the Death Penalty, 2007. The Commission in this report advised the state to abolish the death penalty.

⁶ See Kenya’s Report to the Human Rights Council, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/110/47/PDF/G1011047.pdf?OpenElement>

the state on the death penalty. The number of people being sentenced to death keeps increasing yet there are no steps towards *de jure* abolition.

26. The confusion in this area has also played out dangerously in the Courts. On 30th July 2010, the Court of Appeal held that the mandatory death penalty is unconstitutional.⁷ The Appeal Judges declared section 204 of the Penal Code (which provides for mandatory death sentence for certain offences) inconsistent with the letter and the spirit of the Constitution to the extent that it provides that the death penalty is the only sentence for murder. A reverse position was adopted by the High Court which held in 2011⁸, that the death penalty was the only one imposable in law for murder and that the Court of Appeal's take on the issue was a significant step in the wrong direction. The Judge in this instance further described the President's commutation of 4,000 death sentences to life imprisonment as utter disregard of his constitutional duty, stating: "*The President should have exercised his cardinal responsibility of signing all the pending death warrants. To fail to exercise a legal duty is an abrogation of trust and breach of duty.*" The Judge wondered why it would be said that the death penalty is cruel and inhuman, stating: "*It is also alleged that death penalty is a cruel and inhuman punishment but what about the loss of life, as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts inhuman treatment. The person who is responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family.*"

27. This confusion in the Courts about the death penalty justifies an urgent need for the State's leadership in education, creating awareness, and taking the bold step to abolish the death penalty and accede to the second Optional Protocol to the Covenant. It is upon the state to provide leadership in this area. Further, the continuance sentencing of people to death row, without carrying out or commuting the sentences, actually creates turmoil for those sentenced to death, as they wait in vain for the sentence to be executed, leading to cruel and inhuman treatment for those on death row.

⁷ Godfrey Ngotho Mutiso vs. Republic, available at http://kenyalaw.org/Downloads_FreeCases/76411.pdf

⁸ Republic vs. Dickson Mwangi Munene and another, available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=29455742084129553480301

The State Party should adopt measures to improve access to family planning services for all women and to review its abortion law with a view to bringing them into conformity with the covenant.

28. With regard to abortion, Article 26(4) of the Constitution provides that the same is not permitted unless the life or health of the mother is in danger, or if permitted by any other written law. While this has remained an emotive issue in Kenya, the Constitution recognizes that there are instances when abortion is necessary, and gives leeway for adoption of laws which are in conformity with the covenant.
 29. In 2011, the KNCHR carried out a public inquiry into allegations of Sexual and Reproductive Health Rights violations in Kenya. The Inquiry established that both men and women are unable to plan their families due to unavailability of family planning services or commodities. Either the family planning services were unavailable within their reach or the preferred method was not offered at the nearest facility. Frequent shortages of various contraceptives denied clients a wide choice of Family planning methods. Further structural barriers and access to information on contraceptives have impeded access to these services..
 30. A Family and Reproductive Health Bill was drafted in 2007, but was never passed into law. The constitution now recognizes the right to healthcare services, including reproductive health care. This provides an opportunity for enactment of a comprehensive legislation on Reproductive Health.
- The State should speedily enact legislation on reproductive health to provide for a legal framework for promotion and protection of reproductive health rights as it seeks to provide an enabling environment where people have the freedom of informed choice on the mode of family planning they want to adopt based on their needs, personal convictions and religious beliefs.

- The State should ensure a wide range of family planning services are available and affordable in health facilities, particularly at the community level. This calls for adequate budgetary allocation to reproductive health services as well as education of citizens on their reproductive health rights.

The State party should take measures to ensure that all those infected with HIV have equal access to treatment.

31. Various efforts have been put in place by the government in the fight against HIV. Kenya has adopted multi-sectoral strategies to respond to HIV, particularly Kenya National HIV and AIDS Strategic Plan (KNASP) I; KNASP II; and currently KNASP III. The KNASP III contains a National Action Plan for the prevention and treatment of HIV.
32. These strategies have resulted in a rapid up -scale of the number of people on Anti-Retroviral drugs. The Most at Risk Populations (MARPs) and vulnerable sub-populations have been specifically targeted for anti-retroviral therapy.
33. However, challenges remain and not everyone who is in need of anti-retroviral drugs are able to get them. Key of these challenges is sustainability of HIV- AIDS Financing. The country has not invested in ARV drugs; Government funding for HIV-AIDs is still very low and the country is highly donor –dependent in this regard. This over-reliance on external funding for ARVs has affected sustainability and accessibility to the drugs, at times leading to a shortage of ARVs.
34. Further, sexual minorities in Kenya face discrimination in accessing HIV/AIDS prevention, care and treatment. While men who have sex with men (MSM) have been identified as part of the Most at Risk Populations (MARPS), the programs run with a lot of constraints due to the fact that homosexuality is illegal in Kenya.
 - The state should therefore commit more funding locally for HIV /AIDS budget and ensure that ARVs are available at the community-level health facilities and are freely accessible to all persons suffering from HIV-AIDs.

- The State should also develop comprehensive guidelines on health rights of LGBTI persons and their access to HIV/AIDS prevention, care and treatment measures.

The State party should promptly investigate reports of unlawful killings by police or law enforcement officers and prosecute those found responsible. The State party should actively pursue the idea of instituting an independent civilian body to investigate complaints filed against the police

35. The second part of these recommendations has been partially implemented through the Constitutional provisions on the establishment of an Independent Policing Oversight Authority (IPOA). An Act of Parliament⁹ establishing the oversight body has already been passed, though its operations will commence in 2013.

36. This notwithstanding, several cases of extra-judicial killings¹⁰ have neither been investigated nor prosecuted. Particularly, investigations into the killing of Oscar Kamau King'ara and John Paul Oulu (Human Rights Activists)¹¹ and Bernard Kiriinya(who provided information to the Kenya National Commission on Human Rights on extra-judicial killings of alleged Mungiki members)¹², and of Francis Nyaruri (a journalist who advocated against corruption in the police force)¹³ and hundreds of many innocent Kenyans¹⁴ killed in cold blood by police officers are still outstanding, years after they were killed or disappeared. Cases of police killing defenseless civilians often go uninvestigated, eroding the already low public confidence in the police force. Even the security forces implicated in the post-election violence (where 405 people died as a result of police shootings)¹⁵ have not been brought to account.

⁹ Independent Policing Oversight Authority Act(No. 35 of 2011) available at

¹⁰ See report of Phillip Alston, Special Rapporteur on Extra- Judicial Killings, available at

¹¹ Killed in Nairobi on 5th March 2009 as they waited in traffic

¹² Killed on 16th October 2008

¹³ Killed on 15th January 2009

¹⁴ See KNCHR, *The Cry of Blood, Report of Extra-Judicial Killings and Disappearances*, 2008, available at http://marsgroupkenya.org/pdfs/2009/03/KNCHR_crimes-against-humanity-extra-judicial-killings-by-kenya-police-exposed.pdf

¹⁵ Report of the Commission of Inquiry into Post-Election Violence (The Waki Report), available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>,pg.331

37. Further, protection of human rights defenders remains a challenge and presently, several potential witnesses to the crimes committed during the post-elections violence are facing harassment and intimidation.

38. Recommendations here are:

- The state should release investigations reports on the deaths of human rights defenders; Oscar King'ara, Paul Oulu, Benard Kiriinya and Francis Nyauri, prosecute those responsible for their deaths and provide redress and reparations to their families.
- The state should investigate and prosecute the security forces involved in committing crimes during the Post-Election violence. A report of the investigations and the action taken should be released to the public.
- The state should take all measures to ensure protection of witnesses, particularly the witnesses of the 2007- post election violence and their families from harassment and intimidation. The Witness Protection Agency should be capacitated to effectively undertake witness protection.
- The state should ensure that the Independent Police Oversight Authority (IPOA) is effective, both in law and in practice, and is adequately resourced to enable it carry out its functions.
- The State should ratify the Convention for the Protection of All Persons from Enforced Disappearances

The State party should ensure that those accused of the capital offence of murder fully benefit from the guarantees of article 9 (3) of the Covenant. It should further guarantee the right of persons in police custody to have access to a lawyer during the initial hours of detention.

39. The Constitution provides for the rights of an arrested person (Article 49) in line with Article 9 of the Covenant and guarantees rights of a fair trial. Article 49(h) further allows an arrested person to be released on bond or bail pending a charge or trial, unless there are compelling reasons not to be released.
40. However, laws which conflict with the constitution have not been repealed, leading to confusion in the Judiciary. For instance in *Republic versus Gerald Irungu*¹⁶, where a person accused of murder applied for bail, the court disregarded the constitutional provisions and guarantees and instead applied the Criminal Procedure Code which prohibited bail for certain category of offences. The court observed that while Section 123(1) and 123(4) of the Criminal Procedure Code, which prohibit the court from giving bail to a person charged with the offence of murder, treason, robbery with violence may be regarded as inconsistent with the Constitution, ***until they are so declared*** they still constitute compelling reasons why an accused person should not be admitted to bond/bail. The Court applied these provisions and denied the person bail, claiming that *'The courts will be failing in their duty if they allowed known killers to strut around in the streets.'*
41. As observed throughout this report, the guarantees in the Covenant can only be effectively applied if understood by law enforcement and judicial officers, hence the urgency of adequate training of the officers on the provisions of the Covenant, otherwise citizens will keep suffering violation of their rights due to lack of information and knowledge by Judicial officers.
42. The state should urgently organize trainings, through the Judicial Training Institute or Kenya National Commission on Human Rights, for all Judicial Officers as well as law enforcement officers on provisions of the Covenant and all other international instruments that the state is a party to, using the General Comments as guidelines on application of the provisions.

The State party should take more effective measures to prevent abuses of police custody, torture and ill-treatment, and should strengthen the training provided to law enforcement personnel in this area. It should ensure that allegations of torture and similar ill-treatment, as well as of deaths in custody, are promptly and thoroughly investigated by an independent body so that perpetrators are brought to justice, and that complaint forms are available from a public body

¹⁶ Criminal Case no. 97 of 2010 , available at http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=96945299480027867718397

other than the police. In particular, High Court judgements in such cases should be enforced without delay. The Committee recommends that the State party provide it with detailed information on complaints filed in connection with such acts and on the disciplinary and criminal sanctions imposed during the past five years. The State party should enforce the law requiring that access to places of detention be given to the Kenya National Commission on Human Rights.

43. The Constitution now provides for the right not to be subjected to torture in any manner, whether physical or psychological (Article 29(d)). It further protects against treatment or punishment which is cruel, inhuman or degrading (Article 29(f)). Article 25 of the Constitution goes further to provide for the non-limitation of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment.

44. The National Police Service Act also prohibits police officers from subjecting any person to torture, cruel, inhuman or degrading treatment.¹⁷ The Act provides sanctions for police officers convicted of committing torture, with the offence of torture punishable with a prison term not exceeding 25 years and cruel, inhuman or degrading treatment punishable with a term not exceeding fifteen years. For persons other than police officers, there is as yet no comprehensive legislation in the country which defines torture and provides appropriate sanctions for it. A Prevention of Torture Bill¹⁸, developed to correct this lacuna, is yet to be tabled in Parliament for debate.

45. The Kenya National Commission on Human Rights has continued visiting places of detention and training police and prison officers on human rights. The Independent Policing Oversight Authority has also been given the mandate to conduct inspections of police premises, including detention facilities. The Courts have also begun acknowledging the gravity of torture and are awarding compensation to victims of Torture in civil cases.¹⁹ However, for those tortured while in police detention, it becomes difficult to seek any

¹⁷ Article 95, National Police Service Act, available at

<http://cickenya.org/sites/default/files/Acts/THE%20NATIONAL%20POLICE%20SERVICE%20ACT.pdf>

¹⁸ The Bill was developed through a collaborative effort of Kenya National Commission on Human Rights ('KNCHR'), The Independent Legal Medical Unit, the Kenya Section of the International Commission of Jurists (ICJ-Kenya), and Muslims for Human Rights) in partnership with the and the Ministry of Justice, National Cohesion and Constitutional Affairs ('MOJNCCA')

¹⁹ For instance in April 2010, the High Court awarded KShs.2.5 million in compensation to a victim of torture committed in 1986. See Wachira Weheire vs. The Hon. Attorney-General, available at

http://kenyalaw.org/Downloads_FreeCases/72867.pdf

compensation or redress within the criminal justice system. They are not able to complain (as the complaints are made to the same police officers) hence challenges remain especially in investigation and prosecution of police officers perpetrating torture. Of grave concern is that despite prevalence of torture in the country, not a single police officer has ever been arraigned before the courts and charged with the offence of Torture. There are also no reports of any disciplinary action taken against police and prison staff implicated in torture. Incidences of deaths occurring in custody also go uninvestigated.

46. Recommendations therefore are:

- The State should enact a comprehensive anti-torture law, which defines torture, creates a monitoring mechanism and provides appropriate sanctions for all incidences of torture.
- The state should develop and implement a policy on absolute prohibition of torture, particularly in places of detention and adequately resource the Kenya National Commission on Human Rights and the Independent Police Oversight Authority to monitor instances of Torture in prisons and police stations.
- The state should ensure that each prison in the country has a human rights officer or a paralegal with the specific mandate of documenting torture-related complaints.
- The state should ensure that the Independent Policing Oversight Authority takes up prevention of Torture in police stations as a very serious issue, establishes a database on torture-related complaints and provides quarterly reports on these complaints in order to determine the prevalence of torture in Police Stations. For every incidence of torture, criminal prosecution and punishment should follow.
- Further, an oversight mechanism over prisons should be established, so that as with the case of police officers, prison and correctional services officers are held accountable for torture cases occurring in prisons.
- For every death occurring in prison, an independent inquiry must be conducted and the findings publicized. Any officer found culpable must be punished in accordance with the law.

The State party must guarantee the right of detainees to be treated humanely and with respect for their dignity, in particular their right to live in hygienic facilities and to have access to health care and adequate food. The State party's next periodic report should include detailed information on measures taken to address the problem of prison overcrowding.

47. The Kenyan prisons are extremely over-crowded and prisoners live in pathetic unhygienic conditions. At any given time, the prisons hold over 45,000 inmates against the capacity of 22,000, leading to harsh and life-threatening living conditions. The walk towards penal reforms has been slow and daunting and not much has been achieved particularly with regard to congestion in prisons. The state has had quick wins particularly in its efforts to improve the inmates' diets and to meet their health needs but addressing congestion remains a huge challenge which requires both budgetary commitments as well as structural changes to the criminal justice system.²⁰

48. The Constitution provides that persons who are deprived of their liberty retain the rights set out in the bill of rights, except to the extent that 'any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned'.²¹ It further obliges parliament to enact legislation providing for the humane treatment of persons detained, held in custody or imprisoned; such legislation should take into account international human rights instruments. So far, this legislation has not been enacted with the effect that Article 51(3) of the constitution is yet to be made operational. While a theoretical basis exists, the practice remains negatively different.²²

49. In the implementation of the constitution, the state should not forget the rights of those in detention and should ensure speedy enactment of requisite legislation under Article 51(3) as well as adequate budgetary allocation to penal reforms, with the specific aim of easing congestion in prisons and bringing prison conditions to the Standard Minimum Rules for the Treatment of Prisoners.

²⁰ Part of the overcrowding is caused by a snail-paced justice system so that most people find themselves in detention as they await for conclusion of their trials or appeals.

²¹ Article 51(1), Constitution of Kenya (2010).

²² For more information on Kenyan Prisons, See KNCHR, 2011, *A true Measure of Society; An Account of the status of human rights in Kenyan Prisons*.

The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.

50. This recommendation has not been implemented. The state has continued conducting forced evictions and demolitions, rendering thousands of Kenyans homeless, many times without warning. The issue impacts heavily on the right to housing, which while now a constitutionally-recognized right, is yet to have any real meaning to Kenyan citizens. The evictions and demolitions are often carried out without any policy, notice or appropriate procedure and in total disregard of the human rights of those affected by these evictions.

51. While draft guidelines on evictions were developed some four years back, they have never been adopted. Since there has been no attempt to adopt these guidelines, the State should now put a moratorium on evictions and demolitions until such a time that clear guidelines, policy and legislation will be in place.

The State party is urged to raise the minimum age of criminal responsibility.

52. This recommendation has not been implemented. During Kenya's UPR review, the State was also urged to raise the minimum age of criminal responsibility and bring it in line with international standards. A number of civil society organizations²³ have taken the initiative to work on a Child Justice Bill which proposes to increase the age of criminal responsibility from 8 years to 12 years as well as establishment of a separate legal system for children who are in conflict with the law through the establishment of a one stop child justice centre. The State should support this bill and ensure its enactment into law and also amend the Penal Code to increase the minimum age of criminal responsibility from 8 years to 12 years.

²³ Led by The CRADLE and Law Society of Kenya

The State party should adopt specific anti-trafficking legislation, including for the protection of the human rights of victims, and actively investigate and prosecute trafficking offences. It should implement policy across Government for the eradication of trafficking and for the provision of support to victims of trafficking.

53. In October 2010, a Counter-trafficking in Person's Act²⁴ was passed into law. It defines various trafficking offences (as well as child trafficking) and provides sanctions. The Act proposes a National Advisory Committee against Trafficking in Persons and establishes a National Assistance Trust Fund for Victims of Trafficking in Persons. However, knowledge of the Act amongst the laws enforcement officers and the public in general is low and no successful prosecutions have taken place for trafficking offences under the Act. The state should make this Act fully operational by creating the Advisory Body and the Trust Fund and create awareness of the Act amongst the Public and Law enforcement officers.

The State party should intensify its efforts to combat and reduce the incidence of child labour.

54. Article 53 (1) (d) of the constitution protects children from hazardous and exploitative labour. The Children Act also protects children from economic exploitation that interferes with their education. Even though the employment Act outlaws the worst forms of child labour, child labour still persists, fuelled by extreme poverty and lack of understanding and enforcement of children's rights. In 2009, a National Policy on Child Labour was drafted but has never been adopted by Parliament. There is also no reliable or accurate data from which one can determine the prevalence of child labour in Kenya.

The state should undertake concerted awareness raising on the rights of the child and develop a policy framework for intervention to curb child labour. The state should also make available accurate data on child labour in Kenya to influence intervention strategies.

²⁴ Act No. 8 of 2010, available at <http://www.kenyalaw.org/klr/index.php?id=652>

The State party is urged to repeal section 162 of the Penal Code.

55. This recommendation has not been implemented. The state has been emphatic that it would not decriminalize homosexuality due to cultural considerations. Because homosexuality is outlawed, LGBTIs continue to suffer discrimination and even threats to their lives on account of sexual orientation. In this regard:

- The State should therefore ensure that all persons in Kenya, including LGBTIs are accorded the necessary protection and are able to access all rights under the Covenant without any fear or discrimination.
- The State should also promote tolerance and understanding towards sexual minorities and condemn attacks against their lives by the public.
- The state should also recognize inter-sex persons in Kenya, establish a database on the same and develop policies which will enable this vulnerable group access the rights under the Covenant and particularly develop separate incarceration facilities for intersex persons so that they are not held in the same facilities as men or women.

Article 20 - Prohibition of propaganda of war, incitement to discrimination, hostility or violence.

Despite the dire effects of hate speech which drove the country to the brink of war in 2007, stern action is yet to be undertaken by the state in prohibiting such speech and prosecuting perpetrators of hate speech. The National Cohesion and Integration Commission (NCIC) has been mandated to investigate instances of hate speech and recommend prosecutions, however the law on hate speech is limiting, particularly in defining what constitutes hate speech. This impedes any meaningful investigations and prosecution. Given the gravity of this issue, a single comprehensive law prohibiting propaganda of war, incitement to discrimination, hostility or violence is urgently required, particularly as the country prepares for another general election.

CONCLUSION.

While tremendous efforts have been made to incorporate the Covenant's provisions into the Kenyan Constitution and other laws, there is still a wide gap between theory and practice. There is a general lack of understanding amongst law enforcement officers and even judicial officials on the meaning of the various provisions of the Covenant. Without this understanding, it becomes difficult for the citizens to benefit from the Covenant's provisions. The need for training, awareness creation and sensitization on the provisions of the Covenant is as such urgent. Further, laws which conflict with provisions of the Covenant ought to be repealed in order to create uniformity and allow for enforceability of the Covenant's provisions.