



## Kenya National Commission on Human Rights

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### SUBMISSION FOR THE UNIVERSAL PERIODIC REVIEW STAKEHOLDER REPORT

Prepared by the Kenya National Commission on Human Rights

#### Introduction

1. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with A status accreditation. The National Commission was established in 2003 by statute with the mandates of protecting, promoting and monitoring the exercise of human rights in Kenya.
2. We present this submission for consideration as part of the Universal Periodic Review (UPR) Stakeholder Report. The submission includes recommendations of some key steps which in our view the State should take to further ensure respect for, protection and promotion of human rights.
3. The submission is drawn largely from reports and studies which the National Commission has undertaken during the period 2004-2009 in the course of fulfilling its mandates. This work includes investigations reports of violations, advisories made to State organs towards promotion and protection of human rights, assessments of the extent to which the State is fulfilling its human rights obligations, and reports and briefings to international human rights mechanisms such as Treaty Body Committees and Special Procedures.

#### Normative Context<sup>1</sup>

4. Kenya is in the course of reviewing its Constitution, and once a new constitutional dispensation is in place, the framework of rights which Kenyans enjoy will expectedly be broadened to include: explicit protections in the arenas of economic, social and cultural rights; better protection of vulnerable groups; and constitutional entrenchment for the KNCHR.

#### Human Rights Concerns and Recommendations

#### Post election violence

~~6.5.~~ While around 1,113 Kenyans died and over 600,000 others were displaced by the 2007-2008 post-election violence, the recommendations which the KNCHR<sup>2</sup> as well as the Commission to Investigate the Post Election Violence<sup>3</sup> made to ensure accountability regarding alleged perpetrators of the violence, are yet to be implemented. No adequate and effective measures have been taken to tackle the root causes of the violence. The

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<sup>1</sup> Due to limitations of space, this submission does not provide substantive information on matters such as Kenya's legal and constitutional situation which it is assumed will be covered by the State Report.

<sup>2</sup> *On the Brink of the Precipice: A Human Rights Account of Kenya's Post Election Violence*, KNCHR, 2008.

<sup>3</sup> *Report of the Commission of Inquiry into Post Election Violence*, Government Printer: Nairobi, 2008, pages 475-484.

alleged perpetrators of the violence remain unpunished. Not all persons who were displaced by the violence have been settled or resettled or been appropriately compensated. But the State has commendably established a Truth, Justice and Reconciliation Commission as a transitional justice mechanism.

6. We recommend that the State should:

- a. Initiate an effective and credible domestic process for investigating and prosecuting alleged perpetrators of the violence.
- b. Provide internally displaced persons with adequate reparations and establish conditions and means that facilitate their resettlement and reintegration, including by providing adequate basic infrastructure where they are resettled.
- c. Criminalise hate speech in line with Article 20 of the International Covenant on Civil and Political Rights (ICCPR) by passing legislation to protect against incitement to hatred or use of language which prejudices or engenders discrimination on an individual or group, not just on the basis of ethnicity (as provided in Section 13 of the National Cohesion and Integration Act, 2008), but also on other grounds such as gender, religion and disability.

### Right to life and prohibition of torture

~~3.7.~~ We commend the State for commuting from capital sentence to life imprisonment the terms of 4,000 inmates in August 2009. This further confirms Kenya's status as a *de facto* abolitionist country.<sup>4</sup>

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~~4.8.~~ We note that while the Task Force on Police Reforms is due to give its final report and while the Government has appointed a new head of the Police Force, no adequate steps have been taken to implement recommendations from various local<sup>5</sup> and international<sup>6</sup> initiatives to stem extrajudicial killings documented particularly from 2006 to date.

~~a.9.~~ We recommend that the State should:

- a. Legislate abolition of capital punishment via the ongoing constitutional review; and accede to the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty.
- b. Prepare a specific strategy encompassing security forces, provincial administrators and civil society to protect old persons from being lynched on allegations of witchcraft and persons with albinism from being killed for their body parts.

~~7.c.~~ Accede to the Optional Protocol to the Convention Against Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT); and pass legislation to domesticate the Convention against Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as well as OPCAT.

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<sup>4</sup> Kenya National Commission on Human Rights, *Position Paper No. 2 on the Abolition of the Death Penalty*, available at [www.knchr.org/dmdocuments/PositionPaperonDeath.pdf](http://www.knchr.org/dmdocuments/PositionPaperonDeath.pdf); Kenya% E2% 80% 99s+status+as+a+de+facto+abolitionist+state&cd=2&hl=en&ct=clnk&gl=ke

<sup>5</sup> Kenya National Commission on Human Rights, *The Cry of Blood*. Available at [www.knchr.org](http://www.knchr.org)

<sup>6</sup> See UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions Mission to Kenya, 16-25 February 2009, available at [www.unhcr.ch/hurricane.nsf/view01/www.extrajudicialexecutions.org](http://www.unhcr.ch/hurricane.nsf/view01/www.extrajudicialexecutions.org) (last accessed on 7 August 2009)

## Fighting corruption

~~8.10.~~ The National Commission has consistently profiled the fight against corruption as a human rights issue.<sup>7</sup> We even facilitated National Human Rights Institutions to prepare a Continental response against corruption in the 2006 Nairobi Declaration and Action Plan.<sup>8</sup>

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11. While the State cites major progress in its fight against corruption, it has in the main dwelt on structural outcomes such as passing legislation and creating institutions. Anecdotes and research<sup>9</sup> confirm that these initiatives have had minimal impact on reducing the levels of corruption in the country; as a consequence depriving Kenyans the enjoyment of fundamental rights such as to education and access to health-care. This situation is exacerbated by fundamental resource mis-prioritisation, for example, with senior public servants earning disproportionately high emoluments while 46% of Kenyans live below the poverty line; and politicians using public resources to conduct election campaigns.<sup>10</sup>

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~~a.12.~~ We recommend that the State should:

~~e.a.~~ Pass freedom of information legislation to increase levels of accountability by public institutions and by private providers of public services.

b. Undertake judicial reforms as proposed by the [Task Force on Judicial Reforms](#) established by the Government in May 2009 which made recommendations to enhance integrity and punish corruption in the Judiciary.

## Social concerns

13. We commend the State for implementing free primary and subsidized secondary education. The quality of education, however, is doubtful in relation to matters such as teacher-student ratio, adequacy of facilities, and the fact that this policy is not guaranteed in legislation and could be thwarted by political whim.

14. We commend the State for instituting a programme to up-grade informal settlements; but this is still in its nascent stages.

~~11.15.~~ We also note that the majority of Kenyans find it difficult to access health services.

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16. We commend the State for taking specific measures to ensure the right to food for all Kenyans. It has waived duty on maize imports and effected distribution of seeds and fertilizers to farmers. Nonetheless, by mid October 2009, 3.8 million Kenyans continue to face starvation.<sup>11</sup>

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~~a.17.~~ We recommend that the State should:

a. In relation to education:

<sup>7</sup> For example see *Nguzo za Haki*, Issue 3, 2005, KNCHR.

<sup>8</sup> *The Human Rights Dimensions of Corruption: Proceedings of a Regional Conference on Corruption and Human Rights*, March 2006, Nairobi, Kenya, KNCHR

<sup>9</sup> See [Transparency International-Kenya's survey, East African Bribery Index](#) which rated the [Kenya Police the most corrupt institution in East Africa](#), and indicated that Kenya has the highest incidence of corruption in East Africa at 45% compared to Uganda at 34% and Tanzania at 17.8% (available at [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2009/2009\\_07\\_02\\_kenya\\_index](http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index)) ~~Reference for TI-2009 index?~~

Field Code Changed

<sup>10</sup> *Behaving Badly: Deception, chauvinism and Waste during the Referendum Campaign*, KNCHR and KHRC, September 2006.

<sup>11</sup> "Survey shows 3.8 million still in the grip of hunger," Francis Ngige, *The Standard*, Friday October 23, 2009, p.12.

~~b.i.~~ ensure that the minimum acceptable teacher-student ratio of 1-40 is achieved, and establish further milestones for increasing the quality of education;

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~~e.ii.~~ legislate free and compulsory primary education; and

~~d.iii.~~ pass the Special Needs Education Policy to enable children with disabilities to exercise their right to education on an equal basis with their non-disabled peers.<sup>12</sup>

- b. In relation to housing, legislate procedures to ensure that evictions are undertaken humanely in terms of [General Comment No. 7](#) of 1997 of the Committee on Economic, Social and Cultural Rights on the right to housing.
- c. Regarding health, establish a scheme via which all Kenyans may access affordable health care, including reproductive health services.
- d. Regarding maternal mortality, ensure access to family planning services and put in place appropriate measures to reduce death from preventable unsafe abortions.
- e. Regarding the right to food:<sup>13</sup>
  - i. guarantee this right in the Constitution alongside other socio economic rights;<sup>14</sup>
  - ii. finalise harmonization of regulations relating to food security under a single food security legislation; and
  - iii. establish a long term strategy for facilitating vulnerable communities to meet their food requirements and ensure that no Kenyans are denied their basic right to adequate food.

#### Vulnerable groups

18. We consider vulnerable groups in Kenya to include older persons, youth, children, women, persons with disabilities, indigenous peoples and ethnic minorities, sexual minorities, and people living with HIV/AIDS.

19. The State has either passed or is in the process of passing policies and legislation with respect to protection of the rights of these vulnerable groups. Initiatives have been resourced to support women and youth development; and most recently some funding for older persons as well as persons with disabilities has been earmarked.

~~14.20.~~ The status of these groups, however, is undermined by weak implementation of policies and legislation. Women and persons with disabilities remain heavily underrepresented in decision-making bodies as well as in responsible public service positions.

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~~a.21.~~ We recommend that the State should:

- a. Regarding older persons, pass and implement the National Policy on Older Persons [and Ageing](#) as well as the National [Policy on Social Protection](#).<sup>15</sup>

<sup>12</sup> See *Objects of Pity or Individuals with Rights: The Right to Education for Children with Disabilities*, Occasional Report, KNCHR, 2007.

<sup>13</sup> See chapter 2 of *The State of Human Rights Report 2003-2004: Deficits, Critiques and Recommendations*, KNCHR, 2005; also see *The Right to Food: an Assessment of Kenya's Implementation of the Relief Food Programme in 2006*, Occasional Report NO. 2, KNCHR.

<sup>14</sup> *Enhancing and Operationalising Economic, Social and Cultural Rights in the Constitution of Kenya, Position Paper No. 1*, KNCHR, 2006.

- b. **Regarding women:**
- i. **ratify the Protocol on the African Charter on Human and Peoples Rights on the Rights of Women in Africa; and**
  - ii. **Use policy and law to fulfil the 2006 presidential directive for at least 30% women representation in leadership and decision making positions, and enforce party funding provisions in the Political Parties Act linking funding with the level of gender diversity when electing/appointing party office bearers.**
- c. Regarding persons with disabilities:
- i. Finalise domestication of the International Convention on the Rights of Persons with Disabilities;
  - ii. Operationalise the Persons with Disabilities Act, including by establishing concrete measures for securing 5% of all casual, emergency and contractual positions in employment in private and public sectors for persons with disabilities.
- d. Regarding indigenous peoples and ethnic minorities:
- i. enforce the equality of citizenship for all Kenyans regardless of their background, and in particular, ensure that the State's administrative procedures do not consign members of the Nubian and the Galje'el communities into statelessness; and
  - ii. Ensure that no Kenyan is treated in a discriminatory manner in the issuance of citizenship documents such as identity cards, passports or marriage certificates merely on account of their ethnicity.
- e. Regarding sexual minorities:
- i. Legislate that all Kenyans are equal before the law despite their sexual orientation or gender identity and outlaw discrimination on that basis; and
  - ii. Repeal Section 153 (a) and (c) of the Penal Code which criminalises homosexual sex.
- f. [Ensure full implementation of the HIV/AIDS Prevention and Control Act, 2006](#), particularly [provisions on the need for consent on HIV testing, confidentiality of test results and research on HIV/AIDS](#).

## **Conclusion**

22. The State's key human rights priorities during the next four years should include tackling impunity and ensuring institutional and individual accountability to the people of Kenya. Institutional reforms in relation to investigation and prosecution of human rights violations is critical. Kenya's vulnerable groups must be re-engaged by the State as rights-holders who have dignity. Review of the Constitution must be finalised so that Kenyans may have a proper basis and framework for realising sustainable development and a just society.

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<sup>15</sup> *Growing Old in Kenya: Making it a Positive Experience*, KNCHR, 2009.