

Universal Periodic Review

**Annual Progress Report
22nd September 2011- 21st September 2012**

**An Assessment By Stakeholders Of Government's
Performance In Implementation
of UPR Recommendations**

**Nairobi, Kenya
September 2012**

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ACRONYMS AND ABBREVIATIONS

ACHPR	- African Commission on Human and Peoples' Rights
APRM	- African Peer Review Mechanism
ASAL	- Arid and Semi-Arid Lands
AU	- African Union
CEMIRIDE	- Centre for Minority Rights and Development
CESVI	- Cooperazione e Sviluppo
CIC	- Commission for the Implementation of the New Constitution
CIPEV	- Commission of Inquiry into the Post Election Violence
CISP	- Comitato Internazionale Per Lo
DPP	- Director of Public Prosecutions
FGM	- Female Genital Mutilation
FOI	- Freedom of Information
HRC	- Human Rights Council
ICJ – Kenya	- International Commission of Jurist – Kenya
IDPs	- Internally Displaced Persons
ILO	- International Labour Organization
IMLU	- Independent Medico-Legal Unit
JSC	- Judicial Service Commission
KHRC	- Kenya Human Rights Commission
KLR	- Kenya Law Report
KNCHR	- Kenya National Commission on Human Rights
KNH	- Kenyatta National Hospital
KSC-UPR	- Kenya Stakeholders Coalition on the Universal Periodic Review
MOJNCCA	- Ministry of Justice, National Cohesion and Constitutional Affairs
MRC	- Mombasa Republican Council
MUHURI	- Muslims for Human Rights
OHCHR	- Office of the High Commissioner for Human Rights
OP-CAT	- Optional Protocol to the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment ('OP-CAT')
OP-CEDAW	- Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women
OP- ICESCR	- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
PEV	- Post-Election Violence
PWD	- Persons with Disabilities
RCK	- Refugee Consortium of Kenya
SDLF	- Sabaot Land Defence Force
TEA	- Transgender Education and Advocacy

- TJRC - Truth, Justice and Reconciliation Commission
- UPR - Universal Periodic Review
- UN - United Nations

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ACKNOWLEDGEMENTS

The Kenya Stakeholders Coalition for the UPR (KSC-UPR) would like to acknowledge the efforts of the cluster conveners for leading their various clusters in providing the information and data which went into this report. The Coalition is grateful to Hellen Mutella (EACHRights), Esther Waweru and Monica Kareithi (both from the Kenya Human Rights Commission), Enricah Dullo and Sofia Rajab (both from the CRADLE), Diana Watila (The Independent Medico-Legal Unit) Michael Tiampati (PDNK), Mary Frances Lukera (FIDA-Kenya), and Henry Maina (Article 19) for the reports they provided on behalf of their clusters.

Special thanks go to the review team for their tireless efforts in collating all the information into this report. This team comprised of Monicah Kareithi (Kenya Human Rights Commission), Enricah Dullo (The CRADLE), Rufus Karanja (Refugee Consortium of Kenya -RCK), Hellen Mutella (EachRights), Diana Watilla (IMLU), Anthony Oluoch (GALCK) and Antonina Okuta (KNCHR).

The Coalition is grateful to Enricah Dullo (CRADLE) for editing this report and to Antonina Okuta and Winfrida Moraa (KNCHR) for co-ordinating the process of developing the report. The Coalition also expresses gratitude to Commissioner Lawrence Mute for his continued leadership in the UPR process.

Finally, the Coalition would like to thank the KNCHR, CRADLE and ARTICLE 19-Kenya for providing the necessary resources which enabled the coalition to meet at various points to work on this report.

EXECUTIVE SUMMARY

September 2012 marks exactly two years since Kenya was reviewed by the United Nations Human Rights Council under the Universal Periodic Review process (UPR). This report has been prepared by the Kenya Stakeholder's Coalition for the UPR (KSC-UPR) to provide an assessment of the State's performance in implementing the UPR recommendations.

The importance of this report is that it assesses the State at the mid-term point, with only two years left before the second review. At this point therefore, the Stakeholder's expectations were that implementation of the over 150 recommendations accepted by the State would have at least reached the 50% mark. The assessment however reveals that this is not the case and overall implementation remains at the below average mark.

The review of Kenya under the UPR took place at the same time that the country was undergoing a constitutional review process. Understandably, the focus subsequently shifted to implementation of the constitution and many people thought that this implementation would be the panacea for realization of many of the UPR recommendations. The reality however proved different as implementation of the constitutional provisions was faced by several hurdles and challenges, which also impeded implementation of the UPR recommendations.

In this year's assessment, the stakeholders also analyzed recommendations from other UN and Regional mechanisms (treaty bodies, *Special Rapporteurs*) and linked them to the UPR recommendations. This was done to demonstrate that often times similar recommendations made by these bodies on specific issues, hence the need for implementation so that these recommendations do not keep coming up every time Kenya is up for review before an international or regional mechanism.

The report records thematic assessments based on the following issues: 1) Access to Justice; 2) Transitional Justice; 3) Protection of Human Rights Defenders and Witnesses; 4) Freedom of Expression and Access to Information; 5) The Death Penalty; 6) Torture and Ill-treatment; 7) The Rights of the Child; 8) Women's Rights; 9) The Rights of Minorities and Indigenous peoples; 10) Sexual Orientation and Gender Identity; 11) The Rights of Persons with Disabilities; 12) Economic and Social Rights; and 13) Ratification of international instruments.

Under each theme, the State's performance was marked as red, yellow or green. Red denotes an area where there is little or no attempt to implement; green denotes an area where implementation has been on track and yellow denotes an area where there is at least half the effort to implement.

Under **access to justice**, the stakeholder's assessment is that judicial reforms are still on track. New appointments to the Judiciary have been carried out in a transparent manner. The vetting process of Judges and Magistrates who were in office before the promulgation of the 2010 Constitution is underway

and there are a lot of reform initiatives in the Judiciary. The score in this regard is green. The same cannot however be said of police reforms, which have almost ground to a halt. The latter finding is as a result of the laws relating to police reforms which are yet to be operationalized. There has been a delay in agreeing on the members of the National Police Service Commission and as such the police reforms that the Commission is expected to spearhead have not been effected. The Inspector General of Police has also not yet been appointed. The civil society has been working on a vetting tool for police to be adopted by government. So far there is very little progress on police reforms attracting a red mark.

On **transitional justice**, the progress has been at the international level, with charges of crimes against humanity being confirmed against four Kenyans by the International Criminal Court. The Trials are set to begin in April 2013. There have been some developments at the domestic level, but which do not point out to an intention to seek justice for PEV victims. First, in the wake of confirmation of charges against the four accused persons, the State appointed a panel to advise it on how to deal with the ICC matters. The report of this panel was not made public. Secondly, a task force was formed to look into some 6081 case files related to PEV.¹ The interim report of this task force reveals that majority of the PEV victims may never get justice for lack of evidence in their cases. According to the interim report, there have only been 24 convictions and three acquittals out of the 6,081 cases that were presented to the task force by the police. 1,500 cases are pending and 2,411 suspects had not been identified in the 4,408 files reviewed so far.² The concern at the moment is that due to the poor investigations done by the police and the weak evidence produced to support the prosecution of some of the cases, it will be difficult to get convictions. All efforts to establish a local mechanism did not bear fruit and it now seems, five years after the violence that very little will be done to get justice for the PEV victims.

Further, a lasting solution is yet to be found for the thousands of Internally Displaced Persons (IDPs), including IDPs from past clashes (1992 and 1997) and IDPs from other causes such as natural disasters, forest evictees and development induced displacement. The Truth, Justice and Reconciliation Commission (TJRC) has also had several challenges, seeking one extension after the other instead of delivering its report. The longer this Commission takes, the more the public loses faith in this process. Transitional justice is becoming a mirage and three years later, not a single progress report has been released to the public by the TJRC. Stakeholder's concern is that the TJRC could very well become part of the historical injustices and therefore gives the State a strong red for its failure on transitional justice.

On **protection of human rights defenders (HRDs), and witnesses** there has been no progress on the investigation into the deaths of Oscar King'ara and Paul Oulu, two HRDs who were killed in 2009. The drumbeats for investigations of these murders will not die down unless credible investigations are carried out and action taken against those responsible for their deaths. A red mark is given in this regard.

¹ The Task force was established on 9 February 2012 and was mandated to undertake a country wide review and evaluation of all post-election related cases pending under investigations and those under trial. It was also to review any report, publication and judicial decisions relevant to PEV with a view to ascertaining whether additional suspects should be investigated.

² <http://www.capitalfm.co.ke/news/2012/08/dpp-assures-poll-victims-of-justice-despite-probe-snog/>

Recommendations touching on **freedom of expression** and **access to information** are also yet to be implemented and a Freedom of Information Bill is yet to be tabled in Parliament, despite the Government's commitment that it would enact a Freedom of Information Law by the end of 2010. We find that little has been done so far to resolve the pending cases of harassment and attacks on journalists, again attracting a red mark.

The Government is also yet to abolish the **death penalty *de jure***, although a moratorium still exists on its application. Varying decisions from the Courts have led to further confusion. A recent survey by KNCHR of death row inmates showed that the death sentence actually leads to torture and inhuman and degrading treatment and punishment. There is notable will on the part of the State to move towards abolition, but such will is not followed by actions. The stakeholders gave a score of yellow but warned that this is likely to move back to red unless the State backs the political will with concrete actions.

We note recommendations around **protection from torture and ill-treatment** will largely depend on enactment of a comprehensive anti-torture legislation. This is yet to happen, though a draft Prevention of Torture Bill has been developed. Of particular importance is the ratification of the Optional Protocol to the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment ('OP-CAT') which will enable more effective monitoring of places of detention. This ratification is yet to happen. The report however notes positively the drafting of the Coroner's Bill, which, if passed into law, will create the office of the Coroner. This will greatly improve the investigation of deaths resulting from torture and extra-judicial executions as well as forced disappearances. A red score is given in this regard.

On the **rights of the child**, we find that the Government has not made much progress towards implementation of the UPR recommendations. The age of criminal responsibility has not been increased from eight to ten as was anticipated. However, note is made of the fact that a Child Justice Bill that seeks to increase the age of criminal responsibility from eight to twelve years, among other provisions was drafted. This Bill has now been merged with the Children Act, 2001 (Amendment Bill) upon the recommendation of the Ministry of Gender, Children and Social Development. Sadly, there has been no progress on the Amendment Bill, a government led process, since it was shelved in 2010. Enrolment of children in school, particularly those with special needs, is yet to increase and girls from poor households still miss out on school as they cannot afford sanitary towels. However, there are several efforts in restructuring the education sector hence a yellow score in this area.

On **women's rights**, positive developments include the enactment of the Prohibition of Female Genital Mutilation Act, which was passed in 2011. Its effectiveness in combating FGM is yet to be determined. The Matrimonial Property Bill, the Protection against Domestic Violence Bill and the Marriage Bill are however, yet to be enacted into law. Implementing the 2/3rds gender rule has also become challenging as some appointments seem to have been carried out without bearing this Constitutional requirement in mind. Overall, there has been some progress towards the realization of women's rights hence a yellow score, but which could quickly turn to red unless the gains are safeguarded.

On the **rights of minorities and indigenous peoples**, there was no progress in implementation of the recommendations. The *Endorois* decision of the African Commission remained unimplemented as did the constitutional provisions regarding the rights of minorities. Legislative and administrative implementation remains a challenge. In fact the prevailing situation of minorities in Kenya is increased vulnerability. The State scored a red mark in this category.

On **sexual orientation**, the State scored a strong red for its refusal to take any steps to protect sexual minorities. The State also failed to enact a comprehensive anti – discrimination law that recognize sexual orientation and gender identity as a prohibited ground for discrimination. The State in its 3rd report and response to the Human Rights Committee stated that the Country would not take any steps towards the decriminalization of consensual same sex practices.

On the **rights of persons with disabilities**, again there were efforts to implement particularly through improvement and enhancement of the cash transfer programs and establishment of a data base on employment of PWDs. However, a lot still remains to be done. The State scored a yellow in this regard.

On **Economic, Social and Cultural Rights** there were mixed scores with the State scoring a yellow for its efforts to restructure the education sector and similarly for the various initiatives to increase access to water for various sectors of the population. However, the score on the right to food is and will remain a red, for the reason that as long as any single person dies from hunger, all efforts become negligible.

Below is a summary of the stakeholders rating of the State on implementation:

Access to Justice – Judicial Reforms	●
Police Reforms	●
Transitional Justice	●
Protection of human rights defenders	●
Freedom of Expression and Access to Information	●
The Death Penalty	●
Torture and ill-treatment	●
Children’s rights	●
Women’s Rights	●
Rights of minorities and indigenous Peoples	●
Sexual Orientation	●
Rights of Persons with Disabilities	●
Economic, Social and Cultural Rights	
Right to Food	●
Right to Water	●
Right to Education	●
Ratification of International Instruments	●



1 ACCESS TO JUSTICE

1.1 Judicial Reforms

Within the year under review, stakeholders expected effective implementation of constitutional provisions regarding judicial reforms. In particular, that a transparent and effective vetting process for judicial officers should be undertaken and an effective and transparent Judicial Service Commission should be made operational.

Similar recommendations had also been made by the *Special Rapporteur* on EJE (Phillip Alston)³ which included:

- Undertaking of radical surgery in the judiciary to terminate the tenure of the majority of the existing judges and replace them with competent and non-corrupt appointees.
- Judicial appointment procedures should be made more transparent, and all appointments made following a merits-based review of the appointee.
- The Judicial Service Commission should create a complaints-procedure on judicial conduct
- The reduction of corruption and incompetence in the judiciary

1.2 Progress on Implementation

In the period under review, a new Chief Justice, Deputy Chief Justice⁴, Chief Registrar, High Court registrar, Supreme and High Court judges were appointed. The appointments were carried out through a competitive and transparent process and in some cases; the interviews were broadcast live on national television ensuring public participation.

The Vetting of Judges and Magistrates Act was also passed into law and a Board to vet judicial officers constituted. The vetting process began on 23rd February 2012. So far the Court of Appeal judges have been vetted (with five being asked to vacate office) (include their names in a footnote). The Board is currently vetting the High Court Judges. (Include in a footnote the names of the three fallen High Court Judges) Of concern are the amendments passed by Parliament on 20th June 2012 to Section 23(1) and (2) of Vetting of Judges and Magistrates Act moving the vetting of judges and magistrates to the Judicial Service Commission (JSC). This move is bound to tear away at the public confidence in judicial reforms because the vetting process was constitutionally mandated to a vetting board.

Further, the JSC is a part- time Commission which would take longer to vet the Magistrates. The strongest component of the vetting Board, which has been its impartiality, would also be compromised as some

³ Phillip Alston's Report pursuant to his visit between 16th - 25th February 2009. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf> accessed on 6 August 2012

⁴ The Deputy Chief Justice was subsequently suspended in January 2012 over alleged misconduct and a Tribunal was constituted upon the recommendation of the JSC to investigate the allegations. In August 2012, the Tribunal found Nancy Baraza guilty of gross misconduct and misbehavior, recommending that she be removed from office in. The report of the Tribunal report is available at <http://kenyastockholm.files.wordpress.com/2012/08/final-report-oftribunal-on-dcj.pdf> accessed on 9 August 2012

members of the JSC serve in the Judiciary and are yet to be vetted.

On a positive note, on 31 May 2012 the Judiciary launched a 5-year Judiciary Transformation Framework with a view to provide general principles and goals to be pursued and methods of undertaking the transformation in the Judiciary. Several mechanisms have also been put in place to ease access to services offered such as customer care desks, short message service lines for complaints and M-Pesa⁵ bill to pay traffic fines. The National Council on the Administration of Justice⁶ was also established in the period under review. Its mandate is to ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.⁷

Conclusion

Within the context of UPR recommendations as well as constitutional recommendations, judicial reforms have been on track in the period under review except the interference with the vetting process. The stakeholders gave the State a green score in this regard, signifying an area where implementation is actually happening as expected.

1.3 Police Reforms

Recommendations on police reforms included investigation of instances of extra-judicial killings, punishment of perpetrators and remedies provided to victims.

Also outstanding were the implementation of constitutional provisions and the Ransley Task force recommendations on police reforms.

The *Special Rapporteur* on extra judicial executions had recommended that the State should:

- Promptly investigate and prosecute unlawful killings by police or law enforcement officers.
- Actively pursue the institution of an independent civilian body to investigate complaints made against the police.
- Take more effective measures to prevent abuses of police custody, torture, ill-treatment and strengthen training of law enforcing personnel in this area.
- Facilitate the access to legal assistance; actively pursue the expansion of the legal aid scheme.
- Prevent, investigate and punish police death squad killings.
- Create an internal affairs division within the police force, with an element of autonomy from senior management, composed of police who are specially tasked to investigate complaints against the police

⁵ M-PESA is an innovative mobile transfer solution that enables customers to transfer money. Available at <http://www.safaricom.co.ke/personal/m-pesa/how-to-register/faqs> accessed on 9 August 2012.

⁶ Section 34(1) of the Judicial Service Act, 2011

⁷ Section 35(1) of the Judicial Service Act, 2011

- Establish an independent civilian police oversight body with sufficient resources and power to investigate and institute prosecutions against police responsible for abuses in line with the Waki Commission recommendations for the police.
- Make public the records of all police killings on a monthly basis
- Vet police officers, establish a National Police Service Commission.
- Ensure that compensation is provided to the families of those victims unlawfully killed by the police or other security forces.
- Remove the one-year statutory limitation period on suits for unlawful killings and other serious human rights abuses.

The Human Rights Committee⁸ had also recommended that:

- 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
- The State party should initiate training programs for State security officers and law law enforcement officials which emphasise alternatives to the use of force, including the peaceful settlement of disputes, the understanding of crowd behaviour, and the method of persuasion, negotiation and mediation with a view to limiting the use of force.⁹

1.4 Progress on Implementation

The National Police Service Act and the Independent Policing Oversight Act were enacted into law and the members of Independent Policing Oversight Authority (IPOA) board sworn in.

The IPOA will investigate complaints relating to disciplinary or criminal offences committed by police officers. The Board will also conduct inspections of police premises including detention facilities. This Board can only be effective if adequately resourced. So far, there is already concern since in the 2012-2013 national budget, it was allocated Kes. 96 million instead of the Kes. 300 million it had requested to begin its operations.

Vetting of senior police officers in line with the Constitution is yet to resume after it was halted due to a flawed procedure. Stakeholders are currently working on a vetting tool to ensure the process is carried out in effective and transparent manner that ensures public participation. The National Police Service Commission, which is charged with the mandate to vet all police officers, is yet to be put in place after Parliament rejected the initial names of the Commissioners nominated by the President and Prime Minister.

⁸ Concluding observations of the Human Rights Committee: Kenya, UN document CCPR/CO/83/KEN, 29 April 2005. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.83.KEN.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.83.KEN.En?Opendocument) accessed on 06 August 2012

⁹ Concluding observations of the Human Rights Committee: Kenya, 29th July, 2012, available at <http://www2.ohchr.org/english/bodies/hrc/hrcs105.htm>

Although there have been attempts to hold police officers accountable for various acts of torture and extra judicial executions by charging them in court, desegregated data on prosecution as well as criminal and disciplinary actions taken against the officers is not publicly available. The investigations on the killings of Oscar King'ara and Paul Oulu of the Oscar Foundation are still outstanding. The killing of Musim Cleric, Abud Rogo in September also raised eye brows on extra-judicial executions.

The police have also not been able to contain the rising insecurity particularly amongst various ethnic groups. The Tana delta incidents,¹⁰ where more than 100 people lost their lives within one month, demonstrated that the police force is still inefficient and cannot entrusted with the security of the citizens. The conflict in the Tana delta has been brutal, with villages burnt and people killed, sparking a debate as to whether the military should be sent in as the police have failed to contain the conflict and prevent attacks on innocent citizens.

Another area of concern has been the increasing cases of unlawful arrests, detention of refugees and asylum seekers and instances of refoulement of asylum seekers of Somali origin, despite clear provisions in the Refugees Act, 2006 and constitutional provisions which provide for the freedom and security of the person (Article 29). Section 11 (3) of the Refugees Act 2006 provides that no person claiming to be a refugee be declared a prohibited immigrant, detained or penalized in any way by reason of illegal entry; Section 13 further provides for the stay of proceedings for persons who have made *bona fide* applications for asylum or who have become refugees. Despite all these progressive provisions, police officers, continue to arrest, detain and charge refugees and asylum seekers for unlawful entry and presence under Sections 33 and 34 of the Citizenship and Immigration Act 2011 and Magistrates continue to convict asylum seekers for these charges.¹¹

Conclusion

Police reforms have been unjustifiably delayed. This is an area where the State is really lagging behind, yet it is an extremely important area. It is more worrying as the country prepares for a general election in a few months' time, yet security of persons is yet to be guaranteed.

The Stakeholders gave the State a red score in this regard, noting the lack of movement in implementing not only the UPR recommendations on police reforms but also constitutional provisions and recommendations from other local and international processes.

10 In August 2012, conflict broke out between various tribal groups in Kenya's North Coast, particularly the Pokomos, Giriomas, the Ormas and Somalis as result of pasture for pastoralist communities at a place called Kanagoni which is in the border of Tana Delta and Magarini Districts.

11 In the year 2011, RCK represented 457 asylum-related cases in court, facilitating the release of 244 individuals through dismissal of charges or reversal of court orders which may include orders for deportation, RCK Annual Report 2011. Available at <http://www.rckkenya.org/index.php/resources/publications.html> accessed on 9 August 2012

2 TRANSITIONAL JUSTICE

Recommendations on transitional justice included:

- Restoring confidence in the truth, justice and reconciliation process, particularly through addressing the credibility issues surrounding the appointment of the Chairperson who was alleged to have been involved in some of the historical injustices¹² that the TJRC was to investigate.
- Putting in place a comprehensive and transparent programme for resettlement and compensation of all Internally Displaced Persons ('IDPs') in the country: including IDP's from earlier conflicts such as those that followed the 1992 and 1997 general elections.
- Cooperating with the International Criminal Court, in accordance with responsibilities as a State Party to Rome Statute, regarding access for court officials to investigate the implementation of witness protection programmes and implementation of warrants that might be issued by the court

Similar recommendations given by the UN *Special Rapporteur* on human rights of IDPs included:

- Establishing a constitutionally entrenched Special Tribunal to prosecute the middle and lower-level perpetrators as recommended by the Waki Commission.
- Developing a comprehensive national strategy on internal displacement.
- Adopting legislative, policy and institutional frameworks on internal displacement
- Collecting data and addressing urgent humanitarian needs of current IDPs in camp-like and other settings and provide durable solutions.
- Preventing and mitigating internal displacement.

The Human Rights Committee, in its concluding observations to the State in 2005¹³, made the recommendation for the establishment of a well funded, independent and effective Witness Protection Agency.

2.1 Progress on Implementation

In April 2012, the Chairperson of the TJRC¹⁴, Ambassador Bethwel Kiplagat returned to the Commission despite earlier objections from stakeholders who were opposed to his involvement in the TJRC as this meant that he would sit in judgment in his own cause. In fact he appeared before the TJRC on March 22, 2012 as a witness to the Wagalla massacre. His return to the Commission in April, 2012, a time when the Commission was preparing its report, raised serious concerns about the credibility of the report.

¹² He was alleged to have been part of the Government machinery involved in the Wagalla massacre – 10 February 1984, illegal acquisition of land (Ndung'u Report). Available at kenyansabroad.org/download.php?f...NdunguLandReport.pdf accessed on 9 August 2012

¹³ Above n8

¹⁴ TJRC was set up in 2008. It has a broad mandate, in addition to investigating and reporting on killings, torture, and other acts of violence, the TJRC is required to investigate and report on expropriation of property, violations of economic rights, economic crimes, grand corruption, the exploitation of natural or public resources, and the irregular and illegal acquisition of public land. [TJRC Act, Sec. 6]

The TJRC was scheduled to release its final report on 3 May 2012. However, the Commission requested an extension of time as it was yet to finalize its report. It got a 3-month extension in May and was to submit its report in August 2012 but sprang another surprise on Kenyan's by seeking a further 6 month extension in August.¹⁵ Since its establishment in 2009, the Commission, which was initially constituted for one year, has never produced any interim report. Colossal sums of money have been spent in the last three years as Kenyans await justice; the TJRC, for its failure to bridge this gap, is likely to be seen as part of the historical justices.

On the IDP situation in the country, although a draft Bill on IDPs has been tabled in Parliament and a draft IDP policy developed and submitted to Cabinet, the absence of a comprehensive legislative and policy framework continues to be a challenge to finding durable solution to the problem of internal displacement in the country. There was poor profiling of IDPs leading to lack of credible and disaggregated data on the IDP population. The Government initiatives to date have continued to focus on resettlement as opposed to the alternative durable solutions that are most appropriate to the IDPs. This limited focus has also resulted in a disregard of other types of human rights violations that victims of the PEV suffered including killings, injuries, psycho-social trauma and sexual and gender-based violence.¹⁶

Despite all the resettlement efforts so far, 1,700 PEV IDPs households are yet to be resettled.¹⁷ The resettlement and compensation exercise has also focused on the 2007/08 PEV IDPs and ignored thousands of other categories of IDPs (from various ethnic clashes, natural disasters and development induced displacement). The *ex-gratia* payment of Kes. 10,000/= (payable to all IDPs) and Kes.25,000 (payable to those whose houses were burnt) were hardly enough to sustain the families for one month, yet they were expected to reconstruct their lives with this amount. The lack of involvement of IDPs, host communities and other relevant actors in the interventions that affect them have led to gaps in adequately addressing their needs.

On co-operation with the ICC, the State has engaged in various actions that cast doubts on its commitment to co-operate with the Court. The Government has engaged in an array of activities in a bid to stall or delay the ICC process including a shuttle diplomacy to garner support to petition the UN Security Council to defer the Kenyan cases, admissibility and jurisdictional challenges filed in the ICC and efforts to confer criminal jurisdiction to the East African Court of Justice and the African Court on Human and People's Rights in support of the cases being referred to these institutions for determination. In January 2012, the ICC confirmed charges against four Kenyan individuals.¹⁸ However, at the national level a special tribunal for the prosecution of middle and lower level perpetrators has not been established. The DPP constituted a multi-agency task force to examine some 6,081 files emanating from the PEV and advice on the way forward. The taskforce released its initial report in August 2012, which indicated that many

15 KBC News –Wamalwa seeks extension of TJRC mandate. Available at <http://www.kbc.co.ke/news.asp?nid=77594> accessed on 6 August 2012. Parliament did on 07/08/2012 approve the extension of the term of the Truth, Justice and Reconciliation Commission (TJRC) for a period of three months. Available at http://www.standardmedia.co.ke/?articleID=2000063603&story_title=Parliament-extends-TJRC-term accessed on 08 August 2012

16 KHRC and ICJ-Kenya Report (2012) Elusive Justice: A Status Report on Victims of 2007 – 2008 Post Election Violence in Kenya

17 Hon. Esther Murugi, Parliament Hansard (2 August 2012)

18 William Samoei Ruto, Uhuru Muigai Kenyatta, Joshua Arap Sang and Francis Muthaura

of the perpetrators of the PEV would not be prosecuted after all since most of the suspects were yet to be identified, there wasn't sufficient evidence in some cases and investigations had been carried out in a shoddy manner by the police. As at August 2012, the task force had reviewed 4,408 of the 6,0821 files and indicated that so far, only 24 suspects had been convicted of PEV-related charges. Of the murder cases, 152 files have been received but only two people have so far been convicted. Of the 150 sexual offences reported, 40 suspects have been identified and 21 taken to court. On general offences, there were 3,446 files and despite 889 suspects being identified, only 13 people were taken to court and 11 convicted.¹⁹

The number of perpetrators convicted so far ²⁰ is marginal in comparison to the scale of violence and atrocities. Moreover, the Government has never put in place a reparation framework for the victims. Instead efforts have centred towards transferring the cases from the ICC to the East African Court of Justice.²¹ This has been seen as a move to shield the suspects from the ICC with no efforts being pursued for justice at the local level.

Conclusion

The State scored a red in transitional justice. It seems the victims of PEV will not get any justice after all. The TJRC has become another white elephant and some IDPs still languish in camps.

The government should also prioritize the establishment of a credible local judicial mechanism to try the middle and lower level perpetrators. In the very minimum, the state should fast-track the processing of the pending cases from the PEV to close the gap on impunity before the next general elections.

The Government should also design a comprehensive program to provide compensation and social security support to the victims of PEV. The Government should also implement the recommendations made by the Special *Rapporteur* on Human Rights of IDPs, particularly relating to the development of a comprehensive national strategy on internal displacement that encompasses all categories of IDPs. Finalization and adoption of policies on Ethnic and Race Relations and National Cohesion and Integration should also be fast tracked.

¹⁹ See <http://www.capitalfm.co.ke/news/2012/08/dpp-assures-poll-victims-of-justice-despite-probe-snap/> (Accessed on 27 August 2012)

²⁰ Convictions include the cases of Republic vs Robert Kipng'etich Kemboi and Kirkland Kipng'eno Lang'at [Kericho High Court HCCR 24/08] - convicted of murder and sentenced to death, commuted to life imprisonment; Republic vs John Kimita Mwaniki [Kericho High Court HCCR 24/08] - convicted of murder and sentenced to 30 years; Republic vs Charles Kipkumi Chepkwony [Kericho Magistrates Court CR 101/08] - convicted of theft of stock and causing grievous body harm; Republic vs James Mbugua Ndung'u and Raymond Munene Kamau [Naivasha Magistrate Court CR 764/44/08] - convicted of robbery with violence; Republic vs Willy Kipng'eno Rotich and seven others [Sotik Magistrates Court CR 8/08] - convicted of robbery with violence; Republic vs Peter Ochieng [Nakuru Magistrates Court] CR 4001/08 - convicted of grievous harm and sentenced to 10 years; Republic vs Kipkemboi Ruto and two others [Nakuru High Court] – sentenced to life.

²¹ 26 April 2012 the EALA passed a motion urging the Court to transfer the trials from the ICC to the EACJ. Available at http://www.eala.org/oldsite041111/key-documents/doc_details/266-resolution-2007-kenya-general-elections-aftermath-case.html accessed on 6 August 2012

3 PROTECTION OF HUMAN RIGHTS DEFENDERS AND WITNESSES

The UPR recommendations on HRDs urged the State to:

- Undertake all measures, including seeking technical assistance and capacity-building to address the concerns relating to the need to strengthen institutions responsible for the enforcements of human rights
- Extend an invitation to the special *rapporteur* for HRDs
- Take every useful measure to investigate human rights violations committed by the police, in particular extra-judicial killings, in order to bring to justice the perpetrators of such acts and ensure the effective protection of HRDs and Witnesses
- Establish an independent witness protection agency that is free of political influence
- Undertake credible and effective investigations as a matter of priority on *Mungiki* killings, the mount Elgon operations and the murders of two civil society activists in addition to the post election violence
- Review its national legislation on freedom of expression so that it fully complies with provisions of the International Covenant on Civil and Political Rights, and ensure effective protection of HRDs against harassment and persecution
- Promptly take effective measures to safeguard the work of human rights defenders, including by ensuring that witness protection and the protection of human rights defenders who assist witnesses are a priority for the Government
- Investigate harassment and attacks against journalists and human rights defenders in order to bring those liable to justice

3.1 Progress on Implementation

The Witness Protection Agency is now independent of the Attorney General's office. However, it is difficult to ascertain its effectiveness or impact in protecting witnesses. In the 2012/2013 budget, the Agency was allocated Kes. 235,000,000.00, the same amount as in the preceding year. The allocation went towards the payment for Administrative Services with no clear allocation for witness protection.

The cash allocated went to the following items:

- Other operating expenses - Kes. 78, 773 610
- Personal allowances - Kes. 28, 042 000
- Basic salaries (permanent employees) - Kes.27 186 390

Concerns about the safety of witnesses related to the ICC cases continue to be raised by the ICC Prosecutor.

Human rights defenders who were instrumental in providing information related to the ICC investigation have also remained at risk with some being forced to relocate. In addition, the human rights organizations that provided information in the framework of the ICC investigations saw their offices broken into in

search of information and in some instances computers and hard drives were stolen.

Still outstanding are investigations of the execution of Oscar King'ara, a lawyer and Chief Executive Officer of the Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK), and John Paul Oulu, OFFLACK Communications and Advocacy Officer. The State in its address to the Human Rights Council in July 2012 indicated that this file is active and investigations are on-going, but all indications are that nothing is actually happening.

Following various reported threats to HRDs in the course of their work, the state has not clearly demonstrated its efforts to recognize the work of HRDs on promoting basic rights and fundamental freedoms as well as offering protection to HRDs at risk. Protection strategies by the state need to indicate a special approach to the most vulnerable HRDs like women and journalists. The State further needs to extend an invitation to the Special Rapporteur on HRDs preferable before the next general elections

Conclusion

The State scored a red in this regard, principally because there is no demonstration by the government to recognize the work of HRDs or to protect them. There have been no investigations on instances where HRDs have been killed, threatened or harassed. The stakeholders are still advocating for the government to carry out thorough, independent and impartial investigations into the cases of extrajudicial killings and acts of intimidation and harassment of journalists and human rights defenders. The results of any such investigations must be made public, in order to bring all those responsible before a court of law. The State should also extend an invitation to the Special Rapporteur on HRDs before the next general elections.

4 FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

The following recommendations were made to the State during the UPR:

- Enact as a matter of urgency the Freedom of Information Bill
- Review its national legislation on freedom of expression so that it fully complies with the relevant provisions of the ICCPR, & ensure the effective protection of human rights defenders against harassment or prosecution
- Extend an open & standing invitation to all UN special procedures

Similarly the following recommendations have been made²² to the State on freedom of expression and access to information:

- Adopt a firm stand against the use of ethnic lines for political purposes; strictly enforce the legislation on hate speech & incitement to hatred and investigate all allegations brought to its attention
- Ensure that all those charged are properly prosecuted regardless of their station in life & that the sanctions imposed take into account the gravity of these acts
- Strictly enforce the relevant laws on the liability of the media when reporting or publishing racist statements

Under the African Peer Review Mechanism (APRM), the State was urged to pro-actively ensure public officers share information and are accessible to ordinary citizens.

4.1 Progress on Implementation

The Freedom of Information Bill is yet to be enacted. Several laws such as the Official Secrets Act, the Public Order Act, the Defamation Act and the Preservation of Public Security Act, that in one respect or another restrict or threaten freedom of expression as still retained in the statute books.

Even though the press enjoys relative freedom in Kenya, tensions between the government and the media remain and take the form of threats, insults and legal challenges resulting in the imposition of hefty fines. Journalists investigating corruption have cited instances of threats or actual physical harm and attempts at bribery; all contributing to a culture of self-censorship.

Further, journalists reporting about and exposing human rights violations remain subject to acts of intimidation. For example, Mohammed Ali, a journalist formerly working with the Standard Group continues to receive threats to his life. In March 2012, he was charged with the alleged possession of a stolen mobile phone. The charges, which have since been withdrawn, were believed to be attempts by the State to deter him from engaging in his investigative work.

²² Concluding Observations of Committee on the Elimination of Racial Discrimination during its 79th session (8th August-2nd September 2011). Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/455/03/PDF/G1145503.pdf?OpenElement> accessed on 6 August 2012

In December 2011, a Bungoma based Standard Group journalist Robert Wanyonyi, reported that his life was in danger because of his investigations into the Coffee smuggling scam in Bungoma and complained that the police did not investigate the matter even after he made the report. Before that, Frontline Defenders, an international organisation working on press freedom reported that a human rights defender, Wilberforce Wanyama Lumbuku, had been subjected to a campaign of harassment, including detention, break-in and public stigmatization.

The Penal Code also offers special protection to the President, Cabinet Ministers and Parliament. However, international human rights mechanisms have consistently held that public officials should tolerate more, not less, criticism than ordinary citizens. Vigorous debate about the functioning of public officials and the government is an important aspect of democracy, particularly in the electioneering year. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. Alarming, courts continue to award public officials exorbitant amounts over the prescribed maximum fines for civil defamation. The possibility of criminal prosecution for defamation also remains problematic as a conviction under Kenya's Defamation Act could result in a prison term of up to two years and/or a fine. This sanction undoubtedly has the potential to inhibit free speech and intimidate journalists or human rights defenders, thereby unduly restricting freedom of expression.

Conclusion

Due to prolonged delays with the passage of the Freedom of Information Law and the frequency of threats and intimidation of journalists, the Stakeholders gave the State a red score in this regard. This score will remain so until the FOI law is passed and efforts put in place to protect journalists reporting on sensitive issues.

5. THE DEATH PENALTY

The UPR recommendations in this regard included:

- Establishing a *de jure* moratorium on capital punishment, with a view to abolishing the death penalty
- Strictly ensure that the death penalty is not imposed on children, and declare an official moratorium on executions with a view to abolishing the death penalty.
- Abolish the death penalty and ratify the 2nd Optional Protocol to the International Covenant on Civil and Political Rights.

Similar recommendations previously made to the State included:

- Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction²³
- Kenya should amend its death penalty laws so that it only applies to the crime of intentional deprivation of life, and is not mandatory following conviction²⁴
- The State party should take the necessary steps to establish an official and publicly known moratorium of the death penalty with a view of eventually abolishing the practice²⁵

5.1 Progress on Implementation

There has been no movement towards abolishing the death penalty. The State has not embarked on awareness creation initiatives to educate the public on the need for abolition.

From the Judiciary, there have been conflicting view points on the status of capital punishment revealing the need for sensitization even among judicial officers. The Court of Appeal for instance held in 2010²⁶ that the mandatory death sentence was unconstitutional, but the High Court later seemed to be ‘reversing’ this by holding that the death penalty was indeed a proper sentence and the President’s commutation of 4000 death sentences to life imprisonment was an abrogation of his constitutional duties.²⁷

During the year under review, KNCHR has been conducting a survey among death row inmates on the impact of capital punishments particularly as it relates to cruel, inhuman and degrading punishment. The survey revealed that most of the convicts on death row were convicted for the offence of robbery with violence. The definition of robbery with violence in the Penal Code is so wide and the result is that some people end up being convicted to death for non-serious offences, as long as it can fit within the very wide definition of robbery with violence.

23 Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Christ of Heyns) Follow up Country Recommendations (15th June 2012).

24 Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Christ of Heyns) Follow up Country Recommendations (26 April 2011) UN Doc. A/HRC/17/28/Add.4 Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-28-Add4.pdf> accessed on 6 August 2012

25 Committee Against Torture Forty-first session- 19th January 2009. Available at <http://www.unhcr.org/refworld/docid/4986bc0e0.html> accessed on 8 August 2012

26 Godfrey Ngotho Mutiso and Republic (2010 eKLR). Available at http://kenyalaw.org/Downloads_FreeCases/76411.pdf accessed on 6 August 2012

27 Republic vs Dickson Mwangi Munene and another. Available at http://kenyalaw.org/CaseSearch/view_preview1.php?li nk=29455742084129553480301 accessed on 6 August 2012

The survey also revealed that the death sentence has serious psychological impact on the inmates and their families. The stigmatization of these convicts and their conditions of detention, coupled with the fact that they do not know if the sentence will be carried out leads to a very dire situation. At Kakamega women's prison for example, the inmates uniforms are labeled 'condemned', leading to further stigmatization. The psychological torture is exacerbated by the regular servicing of the execution machinery. Even were the death sentences to be carried out eventually, the method of hanging provided for in the law is outdated and out-rightly crude.

Before the Human Rights Committee in July 2012, the State indicated that it was confident the *Mutiso* and *Macharia* judgments would prevail, indicating a political will to eventually abolish the death sentence. However, this must be followed through with concrete actions in changing the public perception on the death penalty.

Conclusion

The State has shown political will to abolish capital punishment hence it scored a yellow in this regard for the effort. However, this political will must be followed by taking leadership to educate the public on the need for abolition of the death penalty. Further, the conditions of detention for death row convicts must be immediately addressed. Further, the State should immediately convert the moratorium on the death penalty to a *de jure* moratorium as it works towards abolition.

6. TORTURE AND ILL TREATMENT

The UPR recommendations included:

- Providing human rights training to judges, police officers, prison guards and law enforcement officers.
- Take all steps available to eradicate the use of torture and ill treatment by public officials, and prosecute and punish those responsible
- Intensify its efforts to investigate and punish those responsible for punishable violence especially perpetrated by security forces and armed forces.
- Take effective measures against police violence, in particular by ensuring comprehensive investigations and prosecution of alleged offenders within the police and security forces
- Undertake credible and effective investigations as a matter of priority regarding the *Mungiki* killings, the Mount Elgon operation and the murders of two civil society activists in addition to the post- election violence.
- Prevent extra judicial killings and ensure compensation and justice for the families of victims, taking into account the recommendations of the United Nations Special *Rapporteur* on extra judicial killings.

Similar recommendations from other UN²⁸ and regional mechanisms include:

- Independent investigations on allegations of torture by the military in during the *Operation Okoa Maisha* in Mt Elgon as well as investigations into the deaths of numerous youth on account of the crackdown on organized militia groups such as the *Mungiki*
- Ensure incorporation of the Convention into its legal framework including a definition of torture in its penal legislation in conformity of Article 1 of the convention on torture.
- Address police actions, including unlawful and arbitrary arrests and widespread police corruption through clear messages of zero tolerance to corruption.
- Conduct systemic review of interrogation rules, instructions, methods and practices to prevent cases of torture... provide statistical data disaggregated by crime on prosecution as well as criminal and disciplinary actions against law enforcement officials found guilty of torture and ill treatment.
- Take effective measures to bring conditions of detention into line with UN standard minimum rules for the treatment of prisoners, allocate the material, human and budgetary resources necessary to: reduce overcrowding in prisons, ensure availability of adequate health services in prisons, reduce the high level of violence inside prisons, and strengthen judicial supervision of conditions of detention.
- Adopt necessary measures to bring expulsion and *refoulement* procedures and practices fully in

²⁸ The UN Committee Against Torture in its Concluding Observations (Nov 2008) on Kenya's report on CAT. Available on <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/11/PDF/G0940311.pdf?OpenElement> accessed on 6 August 2012

line with Article 3 of the Convention expulsion and *refoulement* of individuals should be decided after careful assessment of the risk of being tortured in each case and should be subject to appeal.

- Take immediate action to ensure prompt, impartial and effective investigation of all allegations of excessive use of force and torture by the police, Including sexual violence and gang rape, with the aim of prosecuting and punishing perpetrators ensure that the victims of post election violence obtain redress and adequate compensation.
- Ensure that any measure taken to combat terrorism is in accordance with Security Council resolutions 1373(2001) and 1566(2004), which require that anti terrorist measures be carried out with full respect for inter alia, international human rights law.
- Take immediate action to ensure prompt, impartial and effective investigations into the allegations of use of force and torture by the military during the Operation *Okoa Maisha* in March 2008, ensure that perpetrators are prosecuted and punished, that victims who lost their lives are properly identified and that their families, as well as the other victims are adequately compensated.
- Adopt effective measures to prevent the use of excessive force during evictions and provide specific training on such actions for police officers, and ensure that complaints concerning forced evictions are thoroughly investigated and that those found responsible are brought to trial
- Take vigorous steps to eliminate impunity for perpetrators of acts of torture and ill-treatment by ensuring that all allegations are investigated promptly, effectively and impartially, that perpetrators are prosecuted and convicted in accordance with gravity of the Acts, and that victims are adequately compensated.
- Take necessary measures to ensure that all individuals who may have been subject to torture and ill-treatment have the possibility to complain and their case promptly and impartially examined ensure that all necessary steps to file a complaint are facilitated , including access to medical assessment as required by 'P3 form'
- Take effective steps to ensure that all persons reporting on acts of torture and ill-treatment are protected from intimidation and from any form of reprisal as a result of their activities seek closer cooperation with civil society in preventing torture, in particular in the on-going process of investigating and holding persons accountable for the post-election violence.

6.1 Progress on Implementation

In the period under review the National Police Service Act and the National Police Service Commission Act were passed into law. Among the progressive provisions was changing the police force into a service and merging of the Administrative police with the Kenya Police. The National Police Service Act criminalizes torture and provides sanctions for the same. However, with regard to prohibition of torture,

there is still no legislation that specifically defines torture and exhaustively deals with the offense. A draft Prevention of Torture Bill developed by civil society organizations is yet to be introduced in Parliament.²⁹ The concern among stakeholders has been that this Bill is not considered as a priority bill. There is also a delay in making the National Police Service Act operational. The lack of a comprehensive legislative framework still presents a major obstacle in combating torture.

Instances of extra judicial executions by State security agents are still reported. In the period under review several cases were reported in the media. Allegations of unlawful killings are rarely investigated by the authorities, and seldom are the perpetrators tried and convicted of the crimes committed. Of concern is that while 405 gun- shot deaths were recorded in the PEV³⁰ there has not been any tangible progress in the investigations and prosecution of the widespread extra-judicial killings by the police. A 2011 Report by IMLU noted that 63% of Kenyans were unhappy with police performance owing to claims of corruption, brutality and a culture of extrajudicial killings.³¹

The killings that occurred in Mt. Elgon during the joint police – military operation, termed “Operation *Okoa Maisha*” have not been investigated and neither have prosecutions been carried out despite evidence collected by different civil society organizations.

In a report titled “Double Tragedy”, IMLU reported that there was systematic torture, cruel, inhuman degrading treatment or punishment perpetrated by security officers and the criminal militia (SLDF).³² There were also allegations of enforced disappearances of persons in custody of both the police and the military and the Kenyan state had failed in its obligations under the UN Convention against Torture. A big challenge has been the absence of an independent investigative agency to conduct on investigations of deaths occurring in custody. The police are charged with the role of investigating and forwarding the files to the Magistrates for institution of an inquest leaving room for interference with investigations. The appointment of Inspector General of police is also still outstanding, despite the fact that the time prescribed by the constitution for such appointment has since lapsed.

There has been reported increase of harassment and arbitrary arrest of Kenyan Somalis and refugees by the security agents following the military incursion by the Kenya Defense Forces (KDF) into Somalia under the *Operation Linda Nchi* (Operation Protect the Nation). Since this incursion began in October 2011, instances of insecurity have increased both in the refugee camps and in various other parts of the country – this has coincided with increasing allegations of excessive use of force and human rights abuses by security forces in the North Eastern province.³³ The Government of Kenya has routinely justified police and military raids on Somalis as preserving the interests of national security.³⁴ The Human Rights

29 The Bill was developed by civil society actors including IMLU, ICJ-Kenya, MUHURI in collaboration with KNCHR, KLR and MOJNCCA

30 CIPEV report on Post-Election Violence. Available at <http://www.communication.go.ke/media.asp?id=739> accessed on 8 August 2012

31 See IMLU’s Report “Up scaling Torture Prevention and Response in Kenya, National Torture Prevalence Survey Report 2011. Available at http://www.imlu.org/?page_id=278 accessed on 8 August 2012

32 See Double Tragedy Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon “Operation *Okoa Maisha*”, August 2008. Available at http://www.imlu.org/?page_id=278 accessed on 8 August 2012

33 Asylum Under Threat: Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor (2012).

Available at http://www.humansecuritygateway.com/documents/DRC_RCK_AsylumUnderThreat.pdf accessed on 8 August 2012

34 Human Rights Watch (2012), Welcome to Kenya: Police Abuse of Somali Refugees. Available at <http://www.hrw.org/news/2010/06/09/kenya-police-abuse-somali-refugees> accessed on 9 August 2012

Watch has reported incidents of rape, beatings, looting, and arbitrary arrests of civilians following the attacks by suspected Al Shabaab sympathizers, largely Kenyan Somalis as well as Somali refugees, both in Garissa and in the Dadaab refugee camps.³⁵

A fact finding mission conducted by the Refugee Consortium of Kenya (RCK) in May 2012, following the explosion of an IED in Dagahaley refugee camp in Dadaab, confirmed these allegations where they established that the police conducted a swop where they broke into homesteads, assaulted both adults and minors in the presence of their family members and arrested refugees arbitrary.³⁶ The Refugee Consortium of Kenya in its 2012 report titled “Asylum under Threat” noted that there has been an increase in police harassment and arbitrary arrests and detention of refugees and asylum seekers.³⁷

A report by KNCHR titled “Silenced Minds: The Systemic Neglect of the Mental Health System in Kenya,” revealed that there is entrenched stigma and discrimination against mental illness and persons with mental disorders. The report further reveals that this current state is as a result of poor Government policies and practices which have to a great extent led to the marginalization of mental health and in effect discriminating against persons suffering from mental disorders. Further, the low level of awareness on mental health has resulted in persons with mental health disorders being neglected and ostracised by their families, friends and the community. To a great extent this neglect and ostracisation of persons with mental illness can be viewed as torture and ill treatment.³⁸

On a positive note, KNCHR’s inspection visits to various prisons revealed that there is a decline of torture in prisons.

Conclusion

There is minimal progress in this regard; hence the stakeholders gave the State a score of red. This is because the efforts at combating torture are yet to reach the 50% mark. There is immediate need for legislative provisions on the definition of torture, cruel, inhuman and degrading treatment. Some of the bills which require fast-tracking include: the Prevention of Torture Bill and the Coroners Bill to provide for independent investigation of suspicious or unexplained deaths including deaths that occur in police custody. The State should also fast track the process of the appointment of the Inspector General of Police as part of the process of operationalising the National Police Service Act and the National Police Service Commission Act.

There is also need for development and implementation of a policy on zero tolerance on torture. Further, the Judiciary should strictly enforce the law providing that information obtained by torture or other ill-

35 Human Rights Watch (2012). *Criminal reprisals - Kenyan police and military abuses against ethnic Somalis*. Available at <http://www.hrw.org/reports/2012/05/04/criminal-reprisals> accessed on 9 August 2012

36 RCK Press Statement (23 May 2012): “Restraint Urged Against Abusive Police Operations in Dadaab”

37 Above at n33

38 According to the UN Special Rapporteur on Torture to the United Nations General Assembly, practices of neglect, severe forms of restraint and seclusion as well as physical, mental and sexual violence on persons with disabilities should be recognized as torture or other cruel, inhuman degrading treatment or punishment. (Torture not Treatment, 2010) Available at <http://www.mdri.org/PDFs/USReportandUrgentAppeal.pdf>

treatment is not under any circumstances admissible as evidence in any proceedings.

The Government in collaboration with other relevant ministries and non-state actors should establish public education and awareness raising programs at the community level that promote good mental health and mitigate ostracisation of persons with mental illness

Training on human rights, prevention of torture and non-*refoulement* of refugees and asylum seekers should be mainstreamed in the training curriculum of police and judicial officers. The DPP's office should also exercise his powers to initiate investigations and prosecutions of all perpetrators of torture, cruel inhuman degrading treatment or punishment in Mt. Elgon, something that has not been done to date.

7. THE RIGHTS OF THE CHILD

During the UPR, the following recommendations were made to the State on the rights of the child. These included:

- Set up mechanisms to implement the national child act, which incorporates the Convention on the Rights of the Child and which is considered a positive step that grants applicable rights to Kenyan children
- Continue to implement the core elements of the Children's Act, which is a great step forwards in the achievement of the Millennium Development Goals
- Include in the national action plan for the promotion and protection of human rights continued attention to and focus on children and an emphasis on ensuring their right to health and education
- Adopt a national plan of action on children and children's rights
- Strengthen protection for women and children against violence and exploitation
- Adopt and duly implement measures to eradicate female genital mutilation, including public awareness-raising campaigns against this phenomenon
- Ensure strict criminalization of female genital mutilation and carrying out awareness-raising to eradicate its acceptability among the public
- Adopt legislation and a coherent national policy criminalizing female genital mutilation
- Take appropriate and efficient measures with the view to ending the practice of female genital mutilation
- Urgently adopt legislation criminalizing female genital mutilation, and train members of the police, prosecutors and judges on the strict application of laws and regulations to be adopted in this field
- Eliminate the practice of female genital mutilation
- Adopt a comprehensive national policy aimed at the fight against child prostitution and the trafficking of children
- Take all appropriate measures to ensure for street children, who are vulnerable to various forms of violence, appropriate care and protection
- Raise the age of criminal responsibility in order to bring it into line with international standards
- Adopt and implement measures necessary to address the needs and challenges of juveniles in prison custody, including raising the minimum age of criminal responsibility, in line with international standards
- Establish a comprehensive national policy and guidelines governing adoption in compliance with CRC
- Further promote the law on the minimum age of marriage at 18 years
- Undertake a study on child labor at the national level with the support of the International Labor Organization and other partners to look at the issue of child labor, and enact as quickly as possible legislation focused on the prevention of child labor and the removal of its victims from the workplace, as well as their rehabilitation, social reintegration and education
- Take effective steps to address child labor

- Place emphasis on linking the objective of poverty eradication to those of eliminating child labor and increasing school enrolment
- Formulate an educational policy aimed at combating illiteracy, with particular emphasis on the education of the girl child
- Develop and implement a specific education policy which would cover all children with special needs
- Seek the support of the international community and cooperate with it to formulate policies aimed at further broadening access to free and compulsory education, particularly for children from poor households

Similar recommendations made to the State on children's rights under other mechanisms³⁹ included:

Legislation

- The harmonization of national legislation, inter alia through completing the legislative review regarding orphans and vulnerable children, and work towards the adoption and implementation, without further delay, of the various proposed laws and policies that benefit and protect children, and engage all efforts and resources necessary for the effective implementation of the Children's Act, as a matter of priority.
- The State should ensure, through adequate legal provisions and regulations, that all children victims and or witnesses of crimes, e.g. children victims of abuse, domestic violence, sexual and economic exploitation, abduction and trafficking and witnesses of such crimes, are provided with the protection required by the Convention, taking fully into account the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex, of 22 July 2005)

Coordination and national plan of action

- The State should adopt a national plan of action which covers all the rights in the Convention and takes into account the outcome document of the General Assembly Special Session on Children "A world fit for children" adopted by the General Assembly of the United Nations at its special session on children, held in May 2002 (resolution S-27/2, annex), and continue and strengthen its efforts to establish mechanisms for coordination at the local level throughout the country and assign adequate resources to support effective inter-institutional coordination at both national and local levels;

Best interests of the child

- The State should ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, inter alia by sensitizing

³⁹ Convention on the Rights of the Child, Committee on the Rights of the Child 44th Session CRC/C/KEN/CO/2; 19 June 2007. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/425/08/PDF/G0742508.pdf?OpenElement> accessed on 9 August 2012

and training all involved officials and other professionals;

Adoption

- The State should :

- (a) Ensure the compliance of the legislation regarding adoption with Article 21 of the Convention;
- (b) Establish a comprehensive national policy and guidelines governing adoption in order to ensure that domestic and inter-country adoption are performed in full compliance with the best interests of the child and the appropriate legal guarantees in accordance with the Convention;
- (c) Strengthen its monitoring of inter-country adoptions, in particular by ratifying and implementing the 1993 Hague Convention No. 33 on Protection of Children and Cooperation in Respect of Inter-country Adoption;
- (d) Seek technical assistance from the Hague Conference on Private International Law for the above-mentioned purpose;

Harmful traditional practices

- The State party should :

- (a) Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;
- (b) Conduct awareness-raising campaigns to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls;
- (c) Introduce sensitization programmes for practitioners and the general public to encourage change in traditional attitudes, and engage the extended family and the traditional and religious leaders in these actions;

Economic exploitation

- The State party should :

- (a) Develop and enact legislation, as well as policies, to protect children from the worst forms of child labor, including measures to address the root causes of this problem;
- (b) Strengthen the capacity of the institutions responsible for the control and protection of child labor;
- (c) Seek the support and technical assistance of the International Labor Organization (ILO), UNICEF and national and international non-governmental organizations (NGOs), in order to develop a comprehensive programme to prevent and combat child labor, in full compliance with ILO Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor and ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment, which the State party has ratified;

Street children

- The State party should:

- (a) Identify and address the root causes of children living in the streets;
- (b) Develop a comprehensive strategy to address the large number of street children, with the aims of

reducing and preventing this situation;

(c) Ensure that street children are provided with adequate nutrition and shelter, as well as health care, educational opportunities, protection and recourse to the justice system, in order to support their full development;

(d) Raise awareness of the issue of street children in order to change stigma and negative public attitudes, particularly among law-enforcement officers;

(e) Ensure that street children are provided with recovery and reintegration services, including psychosocial assistance for physical, sexual and substance abuse, and where possible and when in the best interests of the child, services for reconciliation with a view to reintegrating them into their families;

Sexual exploitation and trafficking

- The State party should:

(a) Strengthen its legislative measures and develop an effective and comprehensive policy that addresses the sexual exploitation of children, including the factors that place children at risk of such exploitation, and that addresses areas where such exploitation has been identified as most prevalent;

(b) Prevent the criminalization of child victims of sexual exploitation;

(c) Implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims, in accordance with the Declaration and Agenda for Action and the Global Commitment adopted at the 1996 and 2001 World Congress against Commercial Sexual Exploitation of Children;

(d) Ratify the Optional Protocol on the sale of children, child prostitution and child pornography;

(e) Provide the Committee with further information on efforts to address child pornography;

(f) Enact the “counter-trafficking in persons” bill, taking into account international legal obligations;

(g) Dedicate further resources to prevention and awareness-raising, paying particular attention to the tourism sector;

(h) Train law-enforcement officials, social workers and prosecutors on how to receive, monitor, investigate and prosecute cases, in a child-sensitive manner that respects the privacy of the victim;

(i) Ensure enforcement of the law to avoid impunity;

(j) Seek further technical assistance from among others, UNICEF and ILO-IPEC (International Programme for the Elimination of Child Labour);

Administration of juvenile justice

- The Committee recommends that the State party bring the system of juvenile justice fully into line with the Convention, in particular Articles 37, 40 and 39, and with other United Nations standards in the field of juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”); the United Nations Guidelines for

the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”); the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty; (the “Havana Rules”), and the Guidelines for Action on Children in the Criminal Justice System (the “Vienna Guidelines”); and the recommendations of the Committee’s General Comment No. 10 (CRC/C/GC/10) on children’s rights in juvenile justice. In this regard, the Committee recommends that the State party:

- (a) Raise the age of criminal responsibility at least to the age of 12 years, and consider increasing it;
- (b) Ensure that all minors, including those who have committed serious offences are treated under the rules of juvenile justice and not in adult criminal courts;
- (c) Establish children’s courts in different places throughout the country, drawing on the experience in Nairobi;
- (d) Guarantee that no children are sentenced to the death penalty;
- (e) Collect data on the number of children in conflict with the law and ensure that this information is taken into account in policy design and reform;
- (f) Take all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort and that, if detained, children remain separated from adults;
- (g) Ensure that children in need of care are separated from children in conflict with the law;
- (h) Implement alternative measures to deprivation of liberty, such as diversion, probation, counseling and community services;
- (i) Ensure that persons under 18 years of age in conflict with the law have access to free legal aid as well as to independent and effective complaints mechanisms;
- (j) Make sure that street children are not systematically treated as children in conflict with the law;
- (k) Ensure that both sentenced and released persons under the age of 18 are provided with educational opportunities, including vocational and life-skills training, and recovery and social reintegration services, in order to support their full development;
- (l) Continue to seek technical assistance and cooperation from, inter alia, the United Nations Inter-Agency Panel on Juvenile Justice which is composed of representatives of OHCHR, the United Nations Office on Drugs and Crime (UNODC), UNICEF and NGOs.

Right to Nationality

The African Committee of Experts⁴⁰ in 2011 found Kenya in violation of Articles 6(2), (3) and (4); Article 3; Article 14(2), (b), (c) and (g); and Article 11(3) of the African Children’s Charter by the Government of Kenya, and recommended that:

- The Government should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.
- The Government should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognized are systematically afforded the benefit of these new

⁴⁰ 002/09 : IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya, [March 22, 2011], available at <http://caselaw.ihrda.org/doc/002.09/view/>

- measures as a matter of priority.
- The Government should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.
 - The Government should adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.

7.1 Progress on Implementation

There is a draft Child Justice Bill which recommends the raising of the age of criminal responsibility from eight years to twelve years. This Bill is currently being reviewed. During the last review meeting to discuss this Bill, the Ministry of Gender, Children and Social Development made a strong proposal that this draft Bill be merged to merge it with The Children Act, 2001 (Amendment Bill) with a view to harmonizing the legislation on the rights of the child and to offer a better framework for the promotion and protection of the rights of the child. Addressing the needs of children in conflict with the law still represents a challenge especially since there are inadequate separate holding facilities in various places across the country and those in existence are overstretched.⁴¹

Even though there is existence of free and compulsory primary education with financial support from the State, there has been poor planning in disbursement of funds. When schools re-opened in May 2011, for their second term, the Minister of Finance did not release funds until the teachers threatened to go on strike. He was of the opinion that he would release the funds a few weeks later into the school term. There was poor planning and lack of coordination between Government Ministries as it is the Ministry of Education that sets the dates for school terms.

In September 2012, teachers in public Primary and Secondary Schools went on strike. This strike commenced on 3rd September 2012, the date when all schools were scheduled to re-open for the third and last term in the year. The strike is over a memorandum of understanding that the teacher's reached with the then Ministry of Education representatives in 1997, involving salary increment and other allowances to harmonize their salaries with those offered to civil servants. However, fifteen years down the line, the State is yet to harmonize teachers' salaries or make good the contents of the said MoU. The has gone on for over three weeks and has completely paralyzed learning in public schools.

The Doctors at Kenyatta National Hospital (KNH) and government hospitals also went on strike in September 2012. KNH is a regional teaching and referral hospital and this strike is crippling the services being offered at the Hospital. This in effect does affect services such as the provision of pediatric health care. The State has done little to meet with the striking Doctors in order to reach an amicable solution.

41 In Nairobi only Kabete Remand Home is in existence serving Makadara Law Courts, Kibera Law Courts, Kiambu Law Courts, and Limuru Law Courts. Limuru and Kiambu are in Central province but they use the Kabete Remand Home due to proximity

Minimal progress has been made by the Government on setting up mechanisms for family tracing and reunification of children in displacement situation as provided for in the Children Act, 2001 and the Refugee Act, 2006. Section 23 of the Refugee Act, 2006 elaborates the rights of refugee women and children and the government's responsibilities to them in general. These include the provision of appropriate protection and assistance to refugee children or children in need of refugee status; facilitation for family tracing and reunification; and protection to children whose family members cannot be found in the same way as children who are temporarily or permanently deprived of family. Prolonged encampment effectively infringes on the realization of the rights of a child contrary to Section 3 of the Children Act, 2001 and specifically to Section 10 (Protection of Child Labour and Armed Conflict); Section 13 (Protection from Abuse); Section 14 (Protection from Harmful cultural rites e.g. FGM and early marriages) and Section 15 (Protection from Sexual Exploitation). The Commissioner for Refugee Affairs is required under Section 23(3) of the Refugees Act, as far as possible, to assist in the tracing and reunification of refugee children with their parents or other family members. Under Section 6(3) of the Children Act, 2001, the Government is required to provide assistance for reunification of the child with their family. These activities however, have solely been undertaken by agencies whose tracing services have been described as lengthy and achieving minimal success.

Despite its prevalence in Kenya, child labor continues to receive inadequate attention from the State. Data on the extent of child labor is only available from other organizations and not the government. A report released in June 2012 revealed that more than 1.1 million children are engaged in various forms of labor.⁴² A child labour policy was proposed in June 2012 at a conference organized by the Ministry of Labour with support of other NGOs (including CISP) and other organizations with the theme "Human Rights and Social Justice, lets end child labour".⁴³ Unless this policy is drafted and implemented child labor will continue to be prevalent.

The Counter-Trafficking in Persons Act, 2010 was enacted in 2010 but is yet to be operationalised. The State has gazetted it twice without giving it a commencement date. One of the stakeholders partner organizations has now sued the State over the delay in implementing this piece of legislation.

Conclusion

The State scored a yellow in this regard due to the ongoing efforts. However, a lot more remains to be done. The MoGCSD should revive the process of amending the Children Act of 2001 and ensure the minimum age of criminal responsibility is increased from eight years to twelve years.

The Counter Trafficking in Persons Act Counter Trafficking in Persons Act is yet to be operationalised two years after it was enacted into law. This Act should be given a commencement date and the State should put in place structures to operationalize and enforce it.

⁴² Report released by CESVI.

⁴³ WORLD DAY AGAINST CHILD LABOUR: 12th June 2012. Available at <http://www.cisp-kenya.org/?p=3041&lang=en> accessed 9 August 2012

The government should also undertake a survey on child labor since the last national survey on child labor was undertaken in 1998/99. The state should support actors working on family tracing and reunification of children in displaced situations through closer engagement or partnerships with them and through the promotion of awareness creation on these services.

The Government should also implement the decision on the right to nationality for Nubian children in Kenya and take all necessary steps to prevent and reduce statelessness in Kenya.

8. WOMEN'S RIGHTS

Several recommendations were made to the State during the UPR with regard to the protection and promotion of women's rights. These included;

- Take measures aimed at ensuring the economic rights of women, addressing the issue of their employment and increasing their participation in the political life of the country
- Ensure strict criminalization of female genital mutilation and carrying out awareness-raising to eradicate its acceptability among the public
- Adopt legislation and a coherent national policy criminalizing female genital mutilation
- Urgently adopt legislation criminalizing female genital mutilation, and train members of the police, prosecutors and judges on the strict application of laws and regulations to be adopted in this field
- Take appropriate and efficient measures with the view to ending the practice of female genital mutilation
- Review its national laws so that they fully uphold the principle of nondiscrimination, in particular on grounds of gender, personal status and citizenship
- Further promote the law on the minimum age of marriage at eighteen years
- Redouble its efforts to save mother and child
- Improve access to reproductive health services for pregnant women
- Undertake more effective measures to address the problems of impunity, violence and trafficking in women and girls, including through the strengthening of law enforcement and the judicial system and intensive media and education programmes aimed at increasing public awareness on the rights of women
- Strengthen protection for women and children against violence and exploitation
- Establish a policy for gender promotion to ensure the improved representation of women in decision-making bodies
- Sign and ratify the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social, Economic and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Sustain its efforts with regard to the resettlement of internally displaced persons, and ensure their access to basic human rights and social services
- Formulate an educational policy aimed at combating illiteracy, with particular emphasis on the education of the girl child

Similar recommendations forwarded from international and regional mechanisms included:

The CEDAW Committee (on consideration of the seventh periodic report of Kenya (CEDAW/C/KEN/7) on 19 January 2011) urged the state party to:

- a) Continue to intensify the implementation of gender-sensitive poverty reduction and development programmes in rural and urban areas and to ensure the participation of women in the development of such programmes; and women in the development of such

programmes;

- b) Continue to develop targeted policies and support services for women aimed at alleviating and reducing poverty among women, particularly rural women the seventh periodic report of Kenya (CEDAW/C/KEN/7) at its 963rd and 964th meetings, on 19 January 2011
- c) Ensure the effective implementation of the 2001 Children's Act which outlaws FGM for girls under eighteen years, as well as prosecution and punishment of perpetrators of this practice;
- b) Take all necessary measures to expedite the enactment of the Prohibition of Female Genital Mutilation Bill (2010) which will, inter alia, outlaw the practice for all women;
- c) Continue and increase its awareness-raising and education efforts targeting families, practitioners and medical personnel, with the support of civil society organizations and religious authorities, in order to completely eliminate female genital mutilation and its underlying cultural justifications; and
- d) Establish support services to meet the health and psycho-social needs of women and girls who are victims of this practice.
- e) Enact, within two years, the Family Protection Bill 2007, the unified Marriage Bill 2007, the Matrimonial Property Bill 2007 and the Equal Opportunity Bill;
- f) Give priority attention to the elaboration of new laws as well as the review and repeal of discriminatory provisions in order to achieve de jure equality for women and compliance with the State party's obligations under CEDAW and to this end reduce the prescribed time line in Schedule 5;
- g) Establish an effective monitoring mechanism to ensure that the Constitutional Implementation Oversight Committee, established by the parliament, is effectively carrying out its mandate;
- h) Harmonize religious and customary law with Article 16 of the Convention and consider bringing *Kadhi* courts under the specific equality provision enshrined in the new Constitution
- i) Bring all marriage laws under the prohibition of polygamy.
- j) Ensure that the Matrimonial Property Bill overrules the *Echaria* case so that non-monetary contribution to matrimonial property is accorded equal value and women are awarded equal share in matrimonial property regardless of the nature of their contribution.
- k) Broaden the definition of matrimonial property to include both tangible and non-tangible assets.
- l) Expedite the process of re-examination of the Succession Act so as to eliminate its discriminatory provisions

The Committee also urged the State party to:

- a) Take all necessary measures to improve women's access to reproductive health care and related services, including the speedy enactment of the Reproductive Rights Bill, within the framework of the Committee's general recommendation No. 24 on article 12;
- b) Strengthen its efforts to reduce the incidence of maternal mortality and to raise awareness of and increase women's access to health-care facilities and medical assistance by trained personnel, especially in rural areas;
- c) Provide women with access to quality services for the management of complications arising from unsafe abortions and to consider reviewing the law relating to abortion with a view to removing

- punitive provisions imposed on women who undergo abortion, in line with the Committee's general recommendation 24 on women and health, and the Beijing Declaration and Platform for Action;
- d) Strengthen and expand efforts to increase knowledge of and access to affordable contraceptive methods throughout the country and ensure that women in rural areas do not face barriers in accessing family planning information and services; and
 - e) Widely promote education on sexual and reproductive health and rights targeted at adolescent girls and boys, with special attention to the prevention of early pregnancy and the control of STIs, including HIV/AIDS.

The Committee called upon the State party to fully implement article 6 of the Convention, including through:

- a) Effective implementation of the new legislation on trafficking, ensuring that perpetrators are punished and victims adequately protected and assisted;
- b) Increasing of its efforts at international, regional and bilateral cooperation with countries of origin, transit and destination through information exchange in order to prevent trafficking, and to harmonize legal procedures aimed at the prosecution of traffickers;
- c) Conducting comparative studies on trafficking and prostitution to identify and address their root causes in order to eliminate the vulnerability of girls and women to sexual exploitation and traffickers as well as facilitate recovery and social integration of victims;
- d) Pursuing a comprehensive approach in addressing the question of prostitution, including exit programmes for women who wish to leave prostitution and legislation to sanction the demand side; and
- e) Adopting a comprehensive action plan to address trafficking and sexual exploitation of women and girls and ensure the allocation of sufficient human and financial resources for its effective implementation, including collection of disaggregated data and to include such data in its next periodic report.

The Committee urged the State party to give attention, as a priority, to combating violence against women and girls and adopting comprehensive measures to address such violence, in accordance with its general recommendation No. 19. The Committee called upon the State party to expeditiously:

- a) Repeal section 38 of the Sexual Offences Act under which women face the risk of being victimized for initiating prosecutions against their abusers;
- b) Adopt the regulations for implementation of the Sexual Offences Act;
- c) Enact the Family Protection Bill;
- d) Criminalize marital rape; and
- e) Develop a coherent and multi-sectoral action plan to combat all forms of violence against women.
- f) Speedily put in place the institutional and legal framework required to implement the 2006 Presidential Decree and the constitutional principle of a 30% recruitment and promotion of women in all public offices;
- g) Revise the Political Parties Bill so as to reintroduce a provision to ensure a quota for female candidates

- and speedily enact it;
- h) Implement awareness-raising activities for the society as a whole about the importance of women's participation in decision-making and develop targeted training and mentoring programmes on leadership and negotiation skills for present and potential women candidates and women holding public office;
 - i) Carefully monitor the effectiveness of measures taken and results achieved to ensure women's greater participation in political and public life and inform the Committee thereof in its next report.

The CEDAW Committee (concluding observations made to Kenya upon consideration of its combined fifth and sixth periodic report of (CEDAW/C/KEN/6) on 27 July 2007) urged the state to:

- a) Take all appropriate measures to ensure that the Convention is sufficiently known and applied by all branches of Government and the judiciary as a framework for all laws, court decisions and policies on gender equality and the advancement of women;
- b) Recommends that the Convention and relevant domestic legislation be made an integral part of the legal education and training of judges and magistrates, lawyers and prosecutors, particularly those working in the local council courts, so that a legal culture supportive of women's equality with men and non-discrimination on the basis of sex is firmly established in the country;
- c) Requests the State party to take all appropriate measures to remove impediments women may face in gaining access to justice and to this end: speedily adopt the national legal aid and awareness policy with the view to institutionalize legal aid throughout the country; implement legal literacy programmes and disseminate knowledge of ways to utilize available legal remedies against discrimination; and, monitor the results of such efforts

The Committee reiterates its request to urgently address the situation of refugee and internally displaced women in Kenya, in particular in respect to the means used to protect these women from all forms of violence and the mechanisms available for redress and rehabilitation. It further urges the State party to take steps to investigate, prosecute and punish all perpetrators of violence against refugees and internally displaced women. It also encourages the State party to continue to collaborate with the international community, especially the Office of the United Nations High Commissioner for Refugees (UNHCR), in these efforts. The Committee urges the State party to ensure effective policing in the slums and informal settlements and to address the issue of gender-based and other forms of violence, inter alia by urgently providing sanitation facilities in the immediate vicinity of each household.

The Committee urges the State party to enhance its compliance with Article 10 of the Convention and to raise awareness of the importance of education as a human right and the basis for the empowerment of women. To this end, it urges the State party to:

- (a) Ensure equal access of girls and women to all levels and fields of education, take steps to overcome traditional attitudes that in some areas may constitute obstacles to girls' and women's education, address girls' dropout rates and strengthen its policy on the readmission to school of pregnant girls

- and young mothers;
- (b) Strengthen awareness-raising and training of school officials and students, sensitization of children through the media and the establishment of reporting and accountability mechanisms to ensure that perpetrators of all sexual offences against schoolgirls are prosecuted; and,
 - (c) Enforce a zero tolerance policy with respect to sexual abuse and harassment in schools and ensure that perpetrators are punished appropriately

8.1 Progress on Implementation

The Prohibition of Female Genital Mutilation Act was passed in 2011 and a national policy and action plan on FGM were developed. However, the law is still weak in protecting people against FGM as it is still yet to be aggressively applied. Unless perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM.

The Matrimonial Property Bill, The Protection against Domestic Violence Bill and The Marriage Bill are still yet to be enacted into law. Currently, the bills are undergoing internal review by CIC and stakeholder consultation.⁴⁴ It is emerging that one of the contentious issues is the value to be placed on the non-monetary contribution to matrimonial property. This issue has presented a challenge to the courts over the years⁴⁵ hence it is imperative that the provisions relating to equality of women are retained in the Bills.

The Constitution provides that women and men have equal treatment including, the right to equal opportunities in economic, cultural and social spheres (Art. 27(3)). The Constitution further requires the promotion of representation of women in Parliament (Art. 100) and in decision making processes and further provides that no more than two thirds of the members of elective or appointive bodies shall be of the same gender Art. 27(8). In the period under review, implementation of these provisions has continued to face challenges most recently with the appointment of County Commissioners on 11 May 2012. A civil society organization moved to court to challenge the Presidential appointment of the County Commissioners seeking a declaration that the appointment of these Commissioners was unconstitutional as only ten of the forty seven Commissioners were women. The Court subsequently reversed these appointments terming them unconstitutional. Still pending in court is the case on the appointment of the Supreme Court Judges where a challenge was lodged accusing the JSC of nominating only one woman out of the five members of the Supreme Court.⁴⁶

Access to reproductive health services for women has also remained a challenge in the period under review. A report released by KNCHR in May 2012 revealed that access to reproductive health services is still a challenge to many women. The Reproductive Health Bill has not yet been passed. On 14 February 2012 the Government re-launched its family planning campaign at both national and county levels under

⁴⁴ The three Bills are available at <http://www.cickenya.org/legislation?page=1> accessed on 9 August 2012

⁴⁵ Please see the decisions on: *Kivuitu vs Kivuitu* [1991] 2 KAR 241; *Peter Mburu Echaria vs Priscilla Njeri Echaria* [2001] eKLR. Available at http://docs.thecourt.ca/top_court_talk/echaria.pdf accessed on 9 August 2012

⁴⁶ Case lodged by Federation of Kenya Women Lawyers (FIDA), Center for Rights Education and Awareness (CREAW), the League of Kenya Women Voters, Women in Law and Development in Africa (WILDAF), Caucus for Women Leadership and Coalition against women

the Ministry of State for National Planning and Vision 2030. This will entail the enhanced use of media and is meant to sensitize Kenyans on the benefits of family planning.⁴⁷

Access to medical care, psychosocial support and justice for women victims of the 2007/8 PEV has also remained as a challenge. A recent report by the KHRC, reveals that the Government has failed in its obligation to survivors of sexual violence in ensuring that perpetrators of sexual based violence are punished and that adequate support is afforded to survivors of sexual violence in the form of medical and psychosocial care.⁴⁸ The interim report of the task force on the PEV cases also revealed that a majority of the PEV victims may never get justice due to the lack of proper evidence in their cases and the poor investigation done by the police. The report notes that of the 150 sexual offences files received, 40 suspects have been identified, three are pending arrest, 21 have been taken to court, five withdrawn and one person acquitted.⁴⁹ As a result of this many survivors continue to bear the brunt of the violations years after the violence and justice for them is indeed elusive. The report also shows that the government has not taken any action regarding the restoration of, or compensation for lost property resulting from post-election violence.⁵⁰ The minimal funds (ex gratia payments) that were being distributed to the victims through Operation Rudi Nyumbani were too meager to be considered as a comprehensive compensation. This contravenes the Great Lakes Protocol⁵¹ on the Property Rights of Returning Persons and Article 40 of the Constitution.

Conclusion

There are positive steps such as enactment of the Prohibition of FGM Act but its implementation, particularly through prosecuting the perpetrators and continued awareness creation, is yet to be achieved. Actualizing the realization of the right to the highest attainable standard of physical and mental health and availing women with the necessary reproductive health information and family planning methods is yet to be achieved. The family bills are still pending and there are challenges in safeguarding the Constitutional provisions on equality of women and men in all spheres of life. The state scored a weak yellow in implementation of recommendations regarding women's rights.

47 Speech delivered by Minister of Planning Wycliffe Oparanya on 12 February 2012 during the re-launch of the National Family Planning Campaign at the KICC

48 KHRC Report (2012) Elusive Justice: A Status Report on Victims of 2007-2008 Post Election Violence in Kenya

49 See media article at <http://m.standardmedia.co.ke/story.php?id=2000064300&pageNo=2>

50 Above n48

51 The Great Lakes Protocol on the Property Rights of Returning Persons specifies that Kenya has an obligation to assist IDPs and or resettled IDPs to recover, to the extent possible, their property and possessions which they left behind or were disposed of upon their displacement.

9. RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES

The recommendations made to the State included;

- Design and prioritize affirmative measures and development programmes aimed at addressing the concerns of indigenous communities, particularly the 2006 report by the Special Rapporteur on the rights of Indigenous Peoples
- Consider acceding to ILO 169 and signing of the United Nations Declaration on the Rights of Indigenous Peoples as enhancements to the Constitutional provisions on the rights of minorities and marginalized communities
- Consider reviewing its stand regarding the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratification of ILO 169

Similar recommendations from UN and treaty mechanisms included:

- State to expeditiously implement the Kenya 2007 recommendations of the SR report on the rights of Indigenous Communities
- State to implement of the ACHPRs decision regarding the *Endorois* community.
- The State should respect the rights of minority and indigenous groups and involve them in its planning and development projects.

9.1 Progress on implementation

The decision by the African Commission on Human and Peoples' Rights (ACHPR) in *CEMIRIDE and Minority Rights Group International (on behalf of the Endorois Welfare Council) versus The Government of Kenya* is yet to be implemented by the State.⁵² The State keeps sending mixed signals. First, its response was that this decision will be implemented within the larger framework of the National Land Policy. Such an attempt however, would do more than frustrate the implementation of this decision particularly noting that two years have lapsed since the decision was made. Before the Human Rights Committee in July 2012, the State indicated that the AGs office and the Ministry of Justice National Cohesion and Constitutional Affairs (MoJNCCA) were working on an implementation framework. The stakeholders are yet to be consulted on such a framework.

Further, despite the numerous Constitutional provisions on minorities and other vulnerable groups, the prevailing experience of minorities in Kenya is increased vulnerability. For example due to the ongoing land degradation, a number of minority groups in Kenya continue to be threatened. This means that legislative and administrative implementation remains a challenge. There is concern that constitutional recognition may not translate into positive developments for minority groups in reality.

⁵² Communication No. 276/2003. Available at <http://caselaw.ihrda.org/doc/276.03/view/> accessed on 8 August 2012 The African Commission recommended that the Respondent State: (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land. (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. (c) Pay adequate compensation to the community for all the loss suffered. (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve. (e) Grant registration to the Endorois Welfare Committee. (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations. (g) Report on the implementation of these recommendations within three months from the date of notification.

Land-related concerns from marginalized communities remain unaddressed. The members of the *Ogiek* community evicted from the catchment and biodiversity hotspots within the Mau Forest Complex continue to await resettlement in line with the recommendations of a government-sanctioned taskforce. Marginalized communities including the *Awer*, *Sanye*, *Orma*, *Wardei*, *Samburu*, *Turkana* and *El Molo* have voiced concerns regarding the impact of the Lamu Port-South Sudan- Ethiopia Transport Corridor (LAPSSET) project on their land rights, cultures and livelihoods. This is further compounded by the lack of sufficient dialogue and consultation between the State and these communities. The failure to adequately address land historical injustices in the Coastal region has led to challenges in State legitimacy as epitomized by the rise of the MRC.

The exploration and exploitation of natural resources identified within the lands of marginalized communities continues in the absence of requisite safeguard mechanisms as the legislation on community land is yet to be enacted. So far indigenous people and marginalized people do not benefit from this exploration particularly in the tourism sector.

No progress has been made towards ratification of ILO 169.

Conclusion

The government scored a red in implementation of the rights of indigenous persons. Lack of enforcement of judicial decisions of international or regional human rights bodies is worrying. In particular, the lack of enforcement of the *Endorois* decision three years after it was made is alarming. Legislation on community land is yet to be enacted with the result that there is still no legal framework for the use, transfer and management of community land in line with the Constitution. To protect the rights of indigenous persons in the meantime, the State should place a moratorium on creation of any new protected areas, new natural resource extraction and development licensing, extension of existing land and natural resource leases, or large scale development in lands falling within Article 63 of the Constitution for a minimum of two years to allow filing and adjudication of community claims.

10. SEXUAL ORIENTATION AND GENDER IDENTITY

UPR Recommendations to the State included:

- Take measures to provide for the protection and equal treatment of transgender persons
- Take concrete steps to provide for the protection and equal treatment of lesbian, gay, bisexual persons; Decriminalize same-sex activity between consenting adults;
- Repeal all legislative provisions which criminalize sexual activity between consenting adults;
- Decriminalize homosexuality by abrogating the legal provisions currently punishing sexual relations between consenting individuals of the same sex;
- Subscribe to the December 2008 General Assembly Declaration on sexual orientation and human rights;

Similar recommendations from international and regional mechanisms included:

UN Human Rights Council Resolution:

- On June 17, 2011, a Resolution submitted by South Africa requesting a study on discrimination and sexual orientation (A/HRC/17/L.9/Rev.1) passed, 23 to 19 with 3 abstentions. The resolution called on the UN High Commissioner on Human Rights to draw up the first UN report⁵³ on challenges faced by LGBTI people worldwide. Kenya was one of the countries that opposed this resolution.
- The Resolution calls on the office of United Nations High Commissioner for Human Rights Navi Pillay to draw up the first U.N. report on challenges faced by LGBT people worldwide.

UN Committee on Economic, Social and Cultural Rights:

In May 2009, the UN Committee on Economic, Social and Cultural Rights adopted a General Comment on Non-Discrimination, which provided a clear affirmation that discrimination on the grounds of sexual orientation was prohibited under the International Covenant.

Office of the High Commissioner for Human Rights:

The 2008 Annual Report of the Office of the High Commissioner for Human Rights (released May 2009) also prominently featured sexual orientation and gender identity issues.

UN High Commissioner for Refugees:

- Publication on working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement, 2011. It is recommended that it is important for UNHCR to ensure that the rights of LGBTI persons of concern to the Office are met without discrimination.
- The multiple vulnerabilities that LGBTI refugees may face in all stages of the displacement cycle is an increasing protection concern, due to the discrimination and abuse they experience, many LGBTI people, including adolescents, flee their home countries and seek protection abroad.

⁵³ Report of the UN High Commissioner on Human Rights “Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and their Gender Identity” 17 November 2011, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_en.pdf. Accessed on 6 August 2012

UN Human Rights Committee at its 105th Session 9th – 27th July 2012

- The State should decriminalize sexual relations between consenting adults of the same sex and take necessary steps to put an end to the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity.

10.1 Progress on Implementation

The Constitution in its provision on equality and non discrimination (Art. 27(4) provides that there shall be no discrimination on the grounds *inter alia* of sex, health status, age, disability, conscience, dress or birth .

Under Kenya's National AIDS Strategic Plan 2009/10 – 2012/13, men who have sex with men were considered as part of the most at risk population and in this regard noted that there were obstacles in undertaking programs geared towards MSMs. The recommendation was that there is need to come up with policies that would facilitate scaling up access to services by the different groups under the terms MARPs (Most at Risk Populations including MSMs--Men who have Sex with Men). The Transgender Education & Advocacy continues to advocate for inclusion of transgender people in the next KNASP.

Civil society organizations working on sexual orientation formulated a strategy towards achieving a decriminalization in Kenya. This is currently being implemented by the different organizations.

The KNCHR report on the Inquiry on Sexual and Reproductive Health Rights in Kenya (2012) revealed that Lesbians, Gays and Bisexual people still suffer human rights violations including discrimination and stigma, exclusion from decision making processes, limited access to sexual reproductive health services, lack of protection from STIs and HIV and AIDS as well as lack of recognition from the society of their existence. Additionally, transgender people were still being denied access to sex change surgery.. The report called for the decriminalization of same sex relations. The report also recommended that there was need for the government to eradicate stigma and discrimination against transgender people as well as the need for policies to ease access to sex reassignment therapy.

The Transgender Education & Advocacy (TEA) has been involved in legal reforms and noted that various government ministries are developing laws which will violate the rights of transsexual people. Of particular concern are the Kenya National Examination Council Bill 2012, the Births and Deaths Registration Bill 2011, Identification and Registration of Persons Bill 2011. Additionally, various ministries continue to ignore contributions from transgender people which was well demonstrated in the development of the Health Law Draft. The State continues to deny transgender people sex change surgery as well as rejecting their application to effect changes of names in their identity cards resulting to having transgender people seeking justice in courts.

Before the Human Rights Committee in July 2012, the State seemed to take back the gains in this regard and stated that they would not do anything to recognize the rights of sexual minorities and that there would be no actions aimed at decriminalizing same sex conduct in the Country.

Conclusion

The State scored a red in this regard for its unwillingness to recognize and protect the rights of sexual minorities. Stakeholders will continue engaging with the government and raise awareness on protection of rights of Sexual Minorities, particularly on access to services and on the need to decriminalize consensual same sex activity. In this regard, the National Health Strategic Plan should include provisions on the health rights of persons of different sexual orientation and gender identity.

The Stakeholders also expect that the National Gender and Equality Commission in its mandate to promote gender equality and equity will include sexual orientation and gender identity as protected grounds and facilitate its mainstreaming.

Further, the Kenya National Commission on Human Rights in its mandate to promote the protection and observance of human rights should provide redress mechanisms to persons of different sexual orientation whose human rights have been violated.

The stakeholders will keep advocating for development of a policy on intersex conditions.

11. RIGHTS OF PERSONS WITH DISABILITIES

The recommendations made to the State with regard to persons with disabilities included securing employment for persons with disabilities, ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP -CRPD) and extending an invitation to the Special *Rapporteur* on the Convention on the Rights of Persons with Disabilities (CRPD).

11.1 Progress on Implementation

The MoGCSD Development in collaboration with National Council for Persons with Disabilities is currently in the process of collecting data on employment of persons with disabilities within the civil service. This is in a bid to ensure whether among others Ministries are complying with Section 13 of the Persons with Disabilities Act, which calls for the reservation of 5% of all casual/emergency and contractual positions in employment in the public and private sector to persons with disabilities. A monitoring survey carried out in various counties by KNCHR revealed that the 5% requirement is still far from being attained and many PWDs are unemployed. One of the contributing factors to this is because advertisements for employment opportunities are conducted in formats that are not accessible to all persons with disabilities.⁵⁴

The cash transfer program under the MoGCSD was enhanced from Kes. 1,500 to Kes. 2,000 and now targets seventy instead of ten households per constituency. Despite this review, the amount is still woefully inadequate to meet the needs of these persons and their care givers. Further, majority of PWDs are left out of this scheme. The situation is dire for women who have children with severe disabilities. These women are unable to engage in any economic activity as they are the primary care-givers of these children. In conclusion PWDs are yet to attain their ECOSOC rights.

Persons with Disabilities also face numerous challenges in accessing essential services such as buildings, communication and transport facilities. This is despite Art. 54(1)(c) of the Constitution which provides that a person with any disability is entitled to reasonable access to all places, public transport and information. Section 22, 23, 24, 35(1)(2), 39 and 40 of the PWD Act were operationalized in 2010, meaning that adjustment orders can now be issued to building owners and transport operators. However, despite this operationalization nothing much has been done and PWDs continue to face accessibility barriers and inaccessible transport systems

Conclusion

There are conscious efforts to implement recommendations around the rights of PWDs but the State still has a long way to go. Part of the efforts should be to ensure the representation of PWDs particularly in the Senate, Legislature and County Assemblies, as it is only through political and economic participation

⁵⁴ KNCHR “*Left to Fate: A status report on the Rights of Persons with disability in Uasin Gishu and Elgeyo Marakwet Counties*”. Available at <http://www.knchr.org/ReportsPublications/General.aspx> accessed on 8 August 2012

that PWDs can secure their rights

The State should also allocate more funds to the cash transfer program so that the amount disbursed is adequate to cater for the needs of the beneficiaries. The cash transfer program should be expanded to include all PWDs and not just the seventy targeted households per county. The National Disability Policy should also be finalized.

12. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

12.1 Progressive Realization of the Right to Food

During the UPR, the State was asked to ensure the equitable distribution of food to the entire population, especially during times of drought.

Similar recommendations included:

Committee on Economic, Social and Cultural Rights 41st Session (Geneva, 3 - 21 November 2008)

- The Committee is concerned about the risk of possible adverse impacts that the Economic Partnership Agreement (EPA), which is currently being negotiated with the European Union, the Investment Agreement under the Common Market for Eastern and Southern Africa (COMESA) as well as of bilateral trade and investment agreements, may have on the State party's obligations under the Covenant and, in particular, on the livelihoods of small-scale farmers who depend on maize, wheat, rice and dairy, the employment of workers in the Kenyan food processing, textiles, paper and printing industries and on labor rights and the right to food. (Article 2, paragraph 1)
- The Committee recommends that the State party undertake the measures necessary to assess the potential adverse impact of any commitments under the Economic Partnership Agreement with the European Union and the Investment Agreement for the COMESA Common Investment Area, which are currently being negotiated, as well as under bilateral trade and investment agreements, on the economic, social and cultural rights of Kenyans, and to ensure that Covenant rights are not adversely affected.
- The Committee is concerned about the high incidence of acute malnutrition in the North Eastern Province and of chronic malnutrition in all provinces of the State party, particularly affecting children. (Article 11)
- The Committee recommends that the State party effectively implement and allocate sufficient resources to relevant programmes and funds, such as the Child Survival and Development Strategy and the Constituencies Development Fund, to ensure physical and economic access for everyone, including children in rural and deprived urban areas, to the minimum essential food, which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger, in line with the Committee's General Comment No. 12 on the right to adequate food (1999)⁵⁵ as well as its Statement on the world food crisis.⁵⁶

12.1.1 Progress on Implementation

The draft National Policy on Human Rights recognizes the right to be free from hunger and to have adequate food of acceptable quality. Despite this attainment, food security continues to pose a challenge

⁵⁵ Available at <http://www.unhcr.org/refworld/docid/4538838c11.html>. accessed on 9 August 2012

⁵⁶ Available at <http://www.unhcr.org/refworld/pdfid/4a002b812.pdf> accessed on 9 August 2012

in many parts of the country. Factors driving the crisis level of food insecurity particularly in the northern Kenya include recurrent drought, conflicts⁵⁷ insecurity and crop failure. Insecurity along the Kenya-Somalia border is disrupting market supply routes leading to below normal supply of food and other important items and inflation has also continued to push the price of food and essential commodities beyond the reach of many Kenyans.

In the period under review, the Kenya Food Security Steering Group (KFSSG) confirmed that about 2.2 million people are classified in either crisis or stress phases of food insecurity down from the 3.75 million people in 2011. Still, this number is too high. The strategic national grain reserves were almost depleted in the year under review exposing the country to further risk. Of most concern is that the interventions are largely through food aid from relief agencies which intervene through general distribution, food assets, cash for assets and unconditional cash transfer modalities.

The Government initiated several irrigation projects to transform farming and enhance food security in the country.

In September 2011, the Price Control (Essential Goods) Act was passed to provide for the regulation of prices of essential commodities in order to secure their availability at reasonable prices. The Act has not been implemented yet and therefore its intended benefits are yet to be realized. There is also a proposed Consumer Protection Bill 2011 which seeks to prohibit unfair trade practices and promote a fair, accessible and sustainable marketplace for consumer products. It is yet to be enacted into law.

The country has been dependent on relief and aid and long term solutions are required to tackle the issue of food insecurity.

Conclusion

There has not been enough effort in attaining food security; hence the State scores a red in this regard. There needs to be a coordinated and holistic approach to ensuring food security in Kenya which includes among others undertaking legislative, policy and administrative measures to make operational the right to be free from hunger and to have adequate food of acceptable quality. There is also need to monitor cross border issues that may exacerbate or mitigate rapid deterioration in food security situation, including changes in trade policies, cross border maize inflows, the security situation in South Sudan and food security conditions in Somalia.

Further, the development and adoption of the National Disaster Management policy should be fast tracked and regular studies conducted to determine the food supplies levels. The state should also include the active and meaningful participation of communities from ASAL's in the development and implementation of the food security policies.

⁵⁷ Conflicts have displaced about 4,200 households from northeast Moyale, into southern Ethiopia and northwest Wajir. The displaced households have increased pressure on water and grazing resources in areas where they have fled to, leading to high tension.

The State should increase the current food reserves and also provide farm inputs including fertilizers to farmers in order to increase production. There should be improvement of infrastructure to ensure that farmers are able to market their products and also ensure easy access for relief food suppliers when delivering supplies.

12.2 Right to Water and Sanitation

The recommendation on water was similar to that on food, with the State being asked to ensure the equitable distribution of water to the entire population, especially during times of drought.

Similar recommendations from other UN mechanisms include:

Committee on Economic, Social and Cultural Rights 41st Session (Geneva, 3 - 21 November 2008).

- The Committee notes with concern that persons living in informal settlements, as well as in arid and semi-arid rural areas, are frequently deprived of affordable access to adequate water and sanitation. The Committee recommends that the State party take immediate measures to ensure affordable access to adequate water and sanitation in informal settlements and arid or semi-arid rural areas, in line with the Committee's general comment No. 15 (2002) on the right to water; by, *inter alia*, reducing waiting times for collecting water, adequately controlling prices charged by private water services and water kiosks.

12.2.1 Progress on Implementation

A draft Water Bill and a Water Policy is currently being developed to align the 2002 Water Act to the Constitutional provisions recognizing the right to Water (Art. 43). A new "water master plan" is also being developed which seeks to mitigate the effects of climate change that affect water levels in the country especially during dry spells.

The National Water Quality Management Strategy (2012-2016) has been developed to streamline and harmonize water quality management. The Ministry of Water is also undertaking measures geared towards ensuring provisions for development of water storage units address the perennial water shortage including enhancing irrigation countrywide.

Conclusion

The State scored a yellow in this regard for the efforts towards implementation. The stakeholders still recognize that much more effort should be put in ensuring that water is available and accessible particularly to the rural and urban poor as well as ASAL areas.

12.3 Right to Education

The UPR Recommendations on the right to education included:

- Include in the national action plan for the promotion and protection of human rights continued attention to and focus on children and an emphasis on ensuring their right to health and education;
- Strengthen its educational policy to guarantee the required quality of education, accessible to all members of its population, especially the marginalized and most vulnerable groups;
- Develop education policies that ensure quality education, particularly for the poor, marginalized and vulnerable segments of its population, and request international assistance to that end;
- Formulate an educational policy aimed at combating illiteracy, with particular emphasis on the education of the girl child;
- Develop and implement a specific education policy which would cover all children with special needs;
- Continue to develop programmes and measures aimed at ensuring quality and free education and health services for its population;
- Seek the support of the international community and cooperate with it to formulate policies aimed at further broadening access to free and compulsory education, particularly for children from poor households;

Similar recommendations from international and regional mechanism included:

Committee on the Rights of the Child 28th Session 2001

Education in General

- The Committee urges the State party to take legal and other measures to guarantee the right to education for all children in its territory, in particular free and compulsory primary education;
- The Committee recommends that the State party take effective measures, including the allocation and distribution of adequate financial, human and technical resources, to enhance the quality of education, to decrease the repetition and drop-out rates, and to ensure that all children enjoy the right to education.
- It is further recommended that the State party reinforce its efforts to increase access to education by, inter alia, abolishing cost-sharing in primary education and rationalizing it in secondary and tertiary education.
- The State party should pay particular attention to the quality of education, in the light of article 29.1 and the Committee's General Comment on the aims of education.
- The Committee strongly encourages the State party to take effective measures to protect children, especially girls, against sexual abuse and violence in the school environment and to facilitate care and the rehabilitation of child victims in this regard. It is recommended that the State party seek to strengthen its educational system through closer cooperation with UNICEF and UNESCO.

Children with disabilities

- Establish special education programmes for them and where feasible, include them in the regular school system;
- Increase the resources (financial and human) allocated to special education and enhance the support given to the families of children with disabilities;
- Seek technical cooperation for the training of professional staff, including teachers, working with and for children with disabilities, from, inter alia, WHO.

Refugee Children, IDP's e.t.c

- The Committee recommends that the State party take effective legal and other measures to ensure adequate protection of refugee, asylum-seeking and unaccompanied children, especially girls, and to implement further policies and programmes to guarantee their adequate access to health, education and social services

Street Children & Education

- Take all effective measures to ensure that street children are provided with a suitable programme of assistance, with adequate nutrition, clothing, housing, health care and educational opportunities, including vocational and life-skills training, in order to support their full development

Committee on the Rights of the Child (Concluding observations on Kenya's report, the 44th session, Geneva, 15 January-2 February 2007, 13 March 2008)

Education in General

- The Committee further recommends that the State party, taking into account its General Comment No. 1 (CRC/GC/2001/1) on the Aims of Education:

(a) Ensure that all children complete eight years of compulsory free primary education;

(b) Undertake measures to provide secondary education free of cost;

(c) Increase public expenditure in education, in particular in pre-primary, primary and secondary education;

- Increase enrolment in primary and secondary education, reducing socioeconomic, gender, ethnic and regional disparities in the access and full enjoyment of the right to education;
- Undertake additional efforts to ensure access to informal education to vulnerable groups, including in particular pastoralist and hunter-gatherer children, as well as street children, orphans, children with disabilities, child domestic workers, children living in conflict risk areas and refugee camps by, for example, introducing mobile schools, evening classes and eliminating indirect costs of school education;
- Strengthen vocational trainings, including for children who have left school before completion;
- Provide detailed information on the implementation

Girls and Education

- Combat discrimination by ensuring equal access to education, health-care facilities and poverty-alleviation programmes and pay special attention in this regard to the rights of girls;
- Undertake a comprehensive study to assess the nature and the extent of adolescent health problems and, with the full participation of adolescents, use this as a basis for formulating adolescent-health policies and programmes in the school curriculum, with a particular focus on the prevention of teenage pregnancies, unsafe abortions and sexually transmitted diseases, including HIV/AIDS, taking into account the Committee's General Comment No. 4 (CRC/GC/2003/4) on adolescent health and development;
- Continue to provide support to pregnant teenagers and ensure the continuation of their education.

Children with Disabilities and Education

- The Committee recommends that the State party take fully into account the Committee's General Comment No. 9 (2006) on the rights of children with disabilities (CRC/C/GC/9), and more specifically:
- Further encourage the inclusion of children with disabilities into the regular educational system and their inclusion into society;
- Pay more attention to special training for teachers and making the physical environment, including schools, sports and leisure facilities and all other public areas, accessible for children with disabilities;
- Improve and strengthen early detection and treatment services through the health and education sector;
- Increase the financial allocation given to children with disabilities in schools.
- The allocation of resources should take into consideration the specific needs of each child;

Street Children & Education

- Ensure that street children are provided with adequate nutrition and shelter, as well as health care, educational opportunities, protection and recourse to the justice system, in order to support their full development;

Detained Children & Education

- Ensure that both sentenced and released persons under the age of 18 are provided with educational opportunities, including vocational and life-skills training, and recovery and social reintegration services, in order to support their full development;

Minority and indigenous children & Education

- Put into place affirmative-action measures and the corresponding resources to ensure free universal primary education and basic health care for children belonging to indigenous peoples and minority communities. These measures should include further efforts to establish clinics

and mobile schools, and conduct birth-registration campaigns, as well as specific incentives and training for health workers and teachers. Such measures should be developed in consultation with and with the participation of the communities concerned;

Committee on Economic, Social and Cultural Rights (Concluding Observations on Kenya, 41st Session Geneva, 3 to 21 November 2008)

Children affected by HIV & Education

- The Committee recommends that the State party step up its efforts to monitor regular school attendance by children and orphans with HIV/AIDS or from HIV/AIDS affected households, combat discrimination by school officials and ensure that these children receive continuous material and psychological support for their education
- The Committee recommends that the State party increase the funds allocated to bursaries and textbook subsidies for children from poor families, as well as to school transportation and mid-day meals in remote rural and deprived urban areas;
- facilitates the readmission of girls who dropped out of school due to pregnancy by supporting them in finding adequate arrangements for the care of their babies;
- ensure adequate access for nomadic children to mobile schools, including in the North Eastern Province;
- cater for the special needs of children with disabilities and integrate refugee children and internally displaced children in the regular school system

African Peer Review Mechanism (APRM) Kenya Country Report, May 2006⁵⁸

The State should:

- Increase budgetary allocations to the social sectors, especially health and education
- Implement the Kenya Education Sector Support Programme (KESSP)
- Strengthen tertiary level educational institutions.

Improve the quality of education by:

- Expanding educational facilities
- Employing more teachers
- Providing more textbooks for schools
- Improving remuneration and incentives for teachers,
- Providing study leave with pay.
- Ensuring that bursaries are awarded on the basis of demonstrable needs
- Establishing transparent disbursement mechanisms.
- Targeting the girl child and ASAL areas.
- Improving on alternative education models that target children from nomadic communities

⁵⁸ Available at <http://www.africa platform.org/sites/default/files/resources/Country%20Review%20Report%20Kenya.pdf> accessed on 8 August 2012

Recommendations and Observations to The Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child Concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child

- The Committee recommends that the State Party adopt and implement a policy of integrated development for young children, with all attendant measures such as financial and human resource allocation, as well as scaling up facilities. Such a policy should be consistent with Kenya's education system, as well as child health and welfare policies.
- The Committee recommends that the State Party take all necessary measures and steps to encourage the education of girls. It also recommends a review of the Law on Education with regard to defining the age bracket that should benefit from compulsory free education in a bid to give greater effect to that law and further recommends that free education be extended to the secondary level so as to provide opportunities for all children to continue their studies.
- The Committee recommends, in general, that the Government of Kenya reflect on the problems which constitute obstacles to fully exercising the right to an education in a bid to find a lasting solution which will permit all Kenyan children to avail themselves of this right.

12.3.1 Progress on Implementation

In the period under review, The Task Force on the Re-Alignment of the Education Sector released a report recommending extensive reforms in the education sector. It recommended a restructuring of Kenya's education system and curriculum, with a structure of 2 years of Pre-primary, 6 years of Primary (3 years lower and 3 years upper), 6 years Secondary (3 years junior and 3 years senior), 2 years minimum of Middle level Colleges and 3 years minimum University education.

The Task Force further recommended expanding access to education at all levels, undertake major curriculum reviews; abolish all school levies which discriminate against poor households; review capitation grants to be in line with inflationary trends; and establish a National Council for Nomadic Education in Kenya (NACONEK).⁵⁹ Based on its report the Taskforce was further required to come up with a Sessional Paper, Draft Education Bill and Cabinet Memorandum. A draft Education Bill 2012, a policy framework for education as well as a Sessional Paper have been developed and are to be presented to Cabinet.

There are currently 19,360 Primary schools and 6,178 post Primary institutions that require a total of 333,480 teachers. However, the institutions only have 263,060 teachers, creating a shortage of 70,420 teachers.⁶⁰ Schools in rural areas and semi arid regions suffer a greater shortage than those in urban areas.

There is still a big challenge in access to education for children with special needs despite the efforts at

⁵⁹ Task Force on the realignment of the education sector to the Constitution (February 2012). Available at http://www.vision2030.go.ke/cms/vds/Task_Force_Final_Report_Feb_20123.pdf accessed on 8 August 2012

⁶⁰ Education Sector Medium Term Expenditure Framework 2012/13 – 2014/15 (January 2012). Available at http://www.treasury.go.ke/oldwebsite/index.php?option=com_docman&Itemid=145 accessed on 8 August 2012

restructuring the education sector. Education for children with special needs is not mainstreamed in the regular education system. There are various schools for learners with disabilities in various parts of the country. There also exist some “integrated” schools in the sense that regular schools establish special units for learners with specific types of disabilities. Even then most of these schools are inadequately funded and the amounts they receive from Government cannot even cater for instruction material (e.g. Braille) required for children with disabilities. There is also a shortage of special-needs education teachers to support children with special needs. Further, the economic situation makes it difficult for parents to pay any fees towards these children’s schooling hence the parents have to rely on sponsors and donors to educate, feed and clothe the children. This is an area that needs urgent State intervention to ensure children with special needs access education on the same basis with other children. It’s of great concern that the budgetary allocation for primary schools in 2012/2013 was the same as 2011/2012 budgetary allocation of (Kshs. 210,000 million) demonstrating the State’s lack of appreciation of the challenges facing the special needs education sector.

On a positive note, there was consideration of Special Secondary schools in the 2012/2013 national budget, an allocation of Kshs. 100,000,000 was made. No allocation had been made for the Special Secondary schools in the 2011/2012 national budget.

Lack of sanitary facilities has also seen many girls fail to attend school for several days. This concern is intended to be addressed by the draft Education Bill, 2012 which provides for the integration of sanitary costs into FPE capitation grants to schools for girls who require them.

In order to make provision for equitable quality education to the marginalized, hard-to -reach and vulnerable groups, the State under the Education Policy seeks to among others establish the National Council for Nomadic Education in Kenya; undertake integration of *madarassa/Duksi* into the formal education system in predominantly Muslim regions; give incentives such as conditional cash transfer to encourage enrollment and retention in marginalized and hard-to-reach areas; and establish mobile schools in ASALs as well as rescue centers to cater for the vulnerable girl-child.

The State’s budgetary allocation to education increased by 21.9%. However, recurrent expenditure has increased as opposed to the development expenditure.

Access to education for children in displaced situations is also still a great challenge. For refugee children, prolonged encampment situation compromises their enjoyment of the right to education due to the protection concerns that arise out of the encampment situation. A report released by the Refugee Consortium of Kenya titled ‘Asylum under Threat’ (2012) noted that provision of education within the camps brings with it a number of protection challenges such as: the long distances to schools, insecure routes to schools, congested and age in-appropriate classrooms, and sanitation facilities leave children open to numerous vulnerabilities.⁶¹

61 Above at n29

Conclusion

For the various on-going efforts, the State scored a yellow in implementation of the recommendations on education. There is however, need for urgent intervention in terms of national budgetary allocations and resources in order to address access to education for children with special needs. Regular schools should also be facilitated to mainstream education for children with special needs in their system.

The State should always ensure timely disbursement of funds to schools instead of waiting for strike notices by the teachers' unions. The State should also ensure continued recruitment of teachers to address the challenge of perennial shortage of teachers in schools.

13. RATIFICATION OF INTERNATIONAL INSTRUMENTS

During the UPR, recommendations were made to the State to sign and ratify the Optional Protocols to the following instruments:

- International Convention on Civil and Political Rights, (1st and 2nd Optional Protocols)
- International Convention on Economic, Social and Cultural Rights (OP-ICESCR)
- Convention on Rights of Persons with Disabilities (OP-CRPD)
- Convention on the Elimination of all forms of Discrimination Against Women (OP-CEDAW)
- Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OP-CAT)
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC)

Recommendations were also made for ratification of the following instruments:

- Convention for the Protection of All the Persons from Enforced Disappearance
- Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,
- The Convention on the Prevention and Punishment of the Crime of Genocide
- ILO 169

Similar recommendations from international and regional mechanisms included:

CEDAW Committee at its 592nd and 593rd meetings, on 15 January 2003:

- The committee encourages the government of Kenya to consider ratifying the treaties to which it is not yet a party to, i.e., International Convention on the Protection of Rights of All Migrant Workers and Members of their Families and the International Convention for the Protection of All Persons from Enforced Disappearance.
- OP-CEDAW - The Committee urges the state to accelerate its efforts to ratify the Optional Protocol to the Convention and to accept the amendment to Article 20, paragraph 1, of the Convention.

CEDAW Committee at its 963rd and 964th meetings, on 19 January 2011:

- The committee notes that the oral statement by the delegation that the ratification of the Optional Protocol to the Convention is currently under positive consideration and urges the state party to accelerate its efforts to ratify the Optional Protocol

Committee against Torture (Forty-first Session- 19th January 2009):

- The Committee encourages the State party to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.
- The Committee invites the State party to ratify the core United Nations human rights treaties to which it is not yet a party, namely the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the

Protection of All Persons from Enforced Disappearance.

Committee on the Rights of the Child – Forty-Fourth Session, 19 June 2007

- The Committee welcomes the statement of the State party delegation of the intention to ratify within 12 months the Optional Protocol on the sale of children, child prostitution and child pornography and urges the State party to submit the initial report to the Optional Protocol on the involvement of children in armed conflict.

Committee on the Rights of the Child- Twenty-eighth session- 7 November 2001

The Committee notes that the State party has not ratified the two Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict

- The Committee encourages the State party to ratify the two Optional Protocols to the Convention on the Rights of the Child.

UN Special Rapporteur on Human Rights of IDPs (6 February 2012)

- Ratify the Kampala Convention at the earliest opportunity.

13.1 Progress on Implementation

In the year under review, there were attempts to develop a ratification law to give effect to Articles 2(5), 2(6) and 94(5) of the Constitution. A Ratification of Treaties Bill was introduced in Parliament as a private members bill but lapsed after the second reading. There have been no attempts to re-introduce this Bill. Stakeholders however note that the Private members Bill was not as comprehensive as the Treaties Bill reviewed by CIC bill and other stakeholders. Stakeholders urge that the Private Members Bill be withdrawn and the CIC Bill be introduced in Parliament. This should be done speedily as there shall be no treaty ratified until a ratification law is enacted. The efforts in developing a ratifications law, are commendable but not enough, hence the State scored a red in this regard.

Conclusion

This report follows an initial progress report prepared by KSC-UPR stakeholders in September 2011, assessing the State's performance one year after the recommendations were made. At the second year point, implementation still remains at the below average mark, with less than 50% of the recommendations implemented. This is worrying particularly since the State has less than two years to implement all the recommendations. It is becoming clear that by 2015 when the State is due for another review, many of the recommendations will remain unimplemented, casting serious doubt on the State's commitment to the recommendations it accepted during the UPR.

Efforts to implement the UPR recommendations should be accelerated. It is the Stakeholder's wish that

at least 75% of the recommendations should have been implemented by the third year, leaving only a small implementation margin in the 4th year as the State prepares for its second review under the UPR.

To enhance implementation, various stakeholders have been forced to take the lead on implementing some recommendations to complement the State's efforts. It must however always be remembered that implementation is the responsibility of the State. KSC-UPR will keep monitoring keenly the progress on implementation, in the hope that the score-board at the 3rd Annual Progress report will reflect more green scores than red and yellow.

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