



Kenya National Commission on Human Rights

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SUBMISSION FOR THE UNIVERSAL PERIODIC REVIEW

Prepared by the Kenya National Commission on Human Rights

Introduction

1. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with 'A' status accreditation¹.
2. This submission² is presented for consideration as part of the Universal Periodic Review (UPR) Stakeholder Report. The submission includes recommendations of some key steps which in our view the State should take to further ensure respect for protection and promotion of human rights.
3. KNCHR led Kenya's stakeholders in the state's UPR process in 2010 and has since the adoption of Kenya's Outcome Report by the Human Rights Council in September 2010, monitored implementation of the 149 recommendations accepted by the state.
4. **Normative Context**³
5. Kenya promulgated a new constitution⁴ giving Kenya one of the most transformative and progressive constitutions in a modern democracy with a Bill of Rights which provides explicit protection in the arenas of economic, social and cultural rights; better protection of vulnerable groups and marginalized groups; and constitutional entrenchment of KNCHR.
6. The State has ratified most of the core human rights treaties,⁵ it has however not ratified some⁶; it has not ratified most of the optional protocols despite putting in place a legislative framework for ratification⁷

Recommendations, (i) Ratify International Convention on Migrant Workers, International Convention for the protection of all persons from enforced disappearance. (ii) Ratify all optional protocols

Human Rights Concerns; and Recommendations

7. ***National Policy and Action Plan for Human Rights***; KNCHR and other stakeholders took part in the development of the National Policy and Action Plan and submitted it to the state for adoption; the same has not been adopted. **Recommendation, (i) Accelerate the process of finalizing its National Policy and Action Plan**

8. ***Access to Justice***: During the last UPR review, several recommendations were made to the state to undertake judicial and police reforms in a bid to enhance access to justice. KNCHR commends the state for undertaking judicial reforms. The vetting of judges and magistrates to establish their suitability to serve in the judiciary⁸ and transparent appointments to the Judiciary has increased public confidence in the Judiciary. KNCHR notes however that the Judiciary is still understaffed and unable to clear the backlog of cases and handle new cases. Security Sector reforms have not been realized.

Recommendations (i) pursue Police reforms which have been lagging behind other institutional reforms (ii) Ensure the Judiciary is adequately staffed; ensure sufficient budgetary allocation.

9. ***Terrorism***: Kenya continues to be under grave threat of terrorist attacks. The Westgate Mall attack in on 21st September 2012 claimed the lives of 67 people, wounded several others and destroyed property worth millions of Kenyan shillings.⁹ The Prevention of Terrorism Act was passed in 2012 and together with the Constitution, provides the framework for dealing with terrorism.¹⁰ The government responded by carrying out an operation which saw many Kenyans of Somali Origin profiled Many of whom were later deported despite some having valid Kenyan identification documents and without basic legal safeguards. Asylum seekers were also deported and the government revived its

encampment policy despite a court order issued earlier declaring such encampment policy unlawful.¹¹ Such measures, despite their intended aim, are unconstitutional and outside the rule of law. **Recommendations : (i) Ensure all counter-terrorism measures undertaken fully comply with the constitution and the rule of law**

10. **Transitional Justice:** The Truth Justice and Reconciliation Commission,¹² constituted to *inter alia* establish an accurate, complete and historical record of violations and abuses of human rights between 12 December 1963 and 28 February 2008,¹³ finalized and submitted its report¹⁴ to the president on 21st May 2013.¹⁵ One year later, the state is yet to act on the recommendations of this report.

Recommendations (i) Publicize and make the full TJRC report widely available¹⁶. (ii) Put in place Legislative and Administrative framework for the implementation of the TJRC recommendations. (iii) Ensure implementation of all recommendations made therein¹⁷ and provide reparations to victims of historical injustices

11. **Forced Evictions:** KNCHR has profiled forced eviction as a human rights violation; it has raised these concerns especially in relation to Indigenous people¹⁸. The evictions are conducted in breach of the rights¹⁹ of the communities; in some cases the state has evicted the settlers in the face of court order/s stopping such evictions²⁰. The state has not implemented the recommendations made to it in relation to the rights of Indigenous groups and minorities during the 1st cycle of the UPR process despite the greater protection of their rights in the constitution²¹. **Recommendations; (i) Ratify ILO Convention 169, and take steps to implement the United Nations Declaration on the Rights of Indigenous People, (ii) Enact specific Legislation to regulate key industrial sectors to ensure protection of Indigenous people rights (iv) Enact the Community Land Bill and the Eviction and Resettlement procedure Bill (v) Fully implement The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act**

12. **Human Right Defenders:** HRDs continue to experience intimidation, threats, harassment, attacks, arbitrary arrest and detention, malicious prosecution, death threats

and sometimes killing²², in a general environment of impunity and lack of options for redress²³. **Recommendation (i) Enact legislations that promotes the work of HRDs and domesticate the UN Declaration on Human Rights Defenders, (ii) Repeal or amend existing laws which may hinder operations or development of a vibrant civil society and extend an open invitation to the Special Rappaporteur on HRDs**

13. **Torture:** Though the constitution prohibits torture²⁴; in practice however, torture continues to be practiced²⁵ despite the recommendations made to the state during the 1st cycle²⁶. the state has not put in place measure to eliminate torture. **Recommendation, (i) Enact the Prevention of Torture Bill (ii) Ratify the Optional Protocol to the Convention Against Torture and other cruel inhuman and degrading punishment (iii) implement all concluding observations made by Committee Against Torture²⁷**

14. **Right to Health:** The state is commended for introduction of free maternity services in public hospitals; however, Access to highest attainable standards of health is still a challenge, despite the UPR recommendations made to the state in 2010; Access to reproductive health services has not improved despite constitutional provisions and policy directive.²⁸ **Recommendations, (i) Increase Budgetary allocations to the health sector (ii) implement the various recommendations and concluding observations of various treaty bodies relating to the rights to health²⁹ (iii) guarantee the enjoyment of free maternal services by mothers in Public hospitals by enacting enabling legislation**

14. **Right to Education:** The State has introduced free primary and secondary education which has been implemented on the principles of equality, vulnerability and non discrimination. There's also an increase in number of universities; however, there are concerns over the quality of education provided under both the free primary and secondary education. It is noted that the funding availed is insufficient to meet the material and professional conditions of staff and to provide for specialized trained staff to handle special needs of students³⁰. **Recommendations, (i) increase budgetary allocation to both primary and secondary schools. (ii) Reduce teacher-student ratio**

(iii) Consider increasing the primary schools under the school feeding programme. (iv) Address Gender and regional disparities in access to education. (v) Put in place measures to ensure that the education is relevant, quality and flexible.

15. ***Extractive Industries***: The state has taken a lead in developing a legal framework³¹ in respect to the extractive industries; we however note that frameworks as developed are weak. **Recommendations, (i) Make provisions for human rights due diligence within its policies and legislation in line with the UN Guiding Principles on Business and Human Rights**

Conclusion

The State's key Human rights Priorities during the next four years should include tackling rising poverty level and ensuring Institutional and Individual accountability implementation of the Constitution, Adoption of National Policy and Action Plan for Human Rights and Ratification of the Optional Protocols. The state should also commit to implementing all the recommendations received from the previous review well as recommendations from the current review.

END NOTES

¹ It was established in 2003 by Statute with the mandate of protecting, promoting and monitoring the exercise of human rights in Kenya. The Commission was re-established in 2010 under Article 59 of the Constitution and KNCHR Act (No. 2 of 2011).

² This submission is largely drawn from the Annual Progress Reports published over the past three years on the progress of implementation of the recommendations. It is also drawn from other reports and studies which KNCHR has undertaken during the period 2010-2014. This includes investigative reports on violations, advisories made to State organs, assessments of the extent to which the State is fulfilling its human rights obligations, reports and briefings to international human rights mechanisms.

³ Due to limitations of space, this submission does not provide substantive information on matters such as Kenya's Legal and constitutional situation which it is assumed will be covered by the State Report

⁴ Constitution of Kenya, 2010 was Promulgated on 27th August 2010>Available on <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

⁵ Kenya has ratified all core Human Rights Treaties except Convention on the Protection of the Rights of all Migrant Workers and Members of their families, Optional Protocol to the Convention against torture (OPCAT) and International Convention for the Protection of all Persons from Enforced Disappearance

⁶ Kenya has not ratified International Convention on the Protection of the rights of all Migrant Workers and members of their families, and International Convention for the Protection of All Persons from Enforced Disappearance

⁷ Treaty Making and Ratification No 45 of 2012>Available on <http://www.cickenya.org/index.php/legislation/acts/item/60-treaty-making-ratification-act-2012>

⁸ Pursuant to the Vetting of Judges and Magistrates Act; All information on the vetting process is available at <http://www.jm vb.or.ke/>

⁹ The terrorists did not stop at this but launched several attacks in the country (put incidents and dates). These indiscriminate attacks have led to loss of lives and suffering by several civilians, including women and children. KNCHR condemns these attacks in the strongest and gravest terms possible. KNCHR commends the state for the efforts it has put in place to combat terror and thereby protect innocent civilians from this scourge.

¹⁰ Terror must be fought within the law. KNCHR in this regard faults some of the counter-terrorism measures undertaken by the state which are out rightly against the constitution; The profiling, rounding up and extradition of Somalis in Kenya East-Leigh area, in March 2014 under the ‘Operation Usalama’ initiative is one example where the state acted outside the law

¹¹ Kituo Cha Sheria v Attorney General [2013] Petition 19 of 2013

¹² The commission (TJRC) was established under the, Truth, Justice and Reconciliation Act No.6 of 2008, The Act received Presidential Assent on 28 November 2008 and came into operation on 17 March 2009.

¹³ The broad mandate of the Commission was to inquire into gross violation of human rights and historical injustices that occurred in Kenya from 12 December 1963 when Kenya became independent to 28 February 2008 when the Coalition Agreement was signed>available on http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_1.pdf

¹⁴ TJRC report available on><http://www.kenya-today.com/facing-justice/the-final-report-of-the-truth-justice-and-reconciliation-commission-of-kenya>

¹⁵ <http://www.capitalfm.co.ke/news/2013/05/tjrc-report-indicts-kenyas-top-leaders/>The report was and published in the Kenya Gazette on 7th June 2013 and was to be tabled in parliament after 21 days after the publication in the Kenya gazette.

¹⁶ See section 48(3) TJRC Act and the provisions of Article 35(1)(a)-(b)(3)

17 Truth, Justice and Reconciliation Act, sec 50(2) All recommendations [of the Commission] shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.

¹⁸ <http://www.knchr-idp.org/>

¹⁹ The rights breached are the rights protected under Article 28,43,44,53 and 63(d) of the Constitution of Kenya.

²⁰ <http://citizennews.co.ke/news/2012/local/item/16492-court-issues-order-to-stop-embobut-evictions>

²¹ Constitution of Kenya Article 22, 28,43,44,53 and 63(d)

²² www.the-star.co.ke/news/article-131581/rights-group-probe-moyale-activists-death

²³ Credible investigations into the 2009 killings of HRDs Oscar Kingar'a, Chief Executive Officer and John Paul Oulu, Communications and Advocacy Officer at the Oscar Foundation Legal Aid Clinic have still not taken place

²⁴ See Article 25 of the constitution of Kenya

²⁵ Torture and related violations in Kenya available on ><http://www.imlu.org/2011-06-30-23-44-4/reports/finish/2-reports/46-torture-and-related-violations-in-kenya/0.html>

²⁶ See recommendation 101.46 Available on ><http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/88/PDF/G1014488.pdf?OpenElement>

²⁷ Concluding observations of the Committee against Torture-CAT/C/KEN/CO/1 CAT 2009 and CAT/C/KEN/2 CAT 2013

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http://countryoffice.unfpa.org/filemanager/files/kenya/cabinet_secretary_health_speech.pdf<http://www.knchr.org/Portals/0/EcosocReports/Implementing%20Free%20Maternal%20Health%20Care%20in%20Kenya.pdf>

²⁹ State should consider implementing the recommendations made by the committee on the rights of the child and those by CEDAW the concluding observation are contained in the following documents; CRC/C/15/ADD.160 (CRC, 2001), CEDAW/C/KEN/CO/7 (CEDAW, 2011), CEDAW/C/KEN/CO/6 (CEDAW, 2007)

³⁰ See the Draft Policy on Aligning education to the constitution of Kenya available on ><http://fieldmarshamfoundation.org/wp-content/uploads/tumblr/References/Policy%20Framework%20For%20Education%20Paper%20Kenya%20School%20Libraries.pdf>

³¹ The state has developed legislations to govern mining, see mining bill available on www.cickenya.org/index.php/legislation/item/329-the-mining-bill-2013 and *Energy bill and policy*, Available on www.kplc.co.ke/.../National_Energy_Policy_-_Third_Draft_-_May_11