



International Covenant on Civil and Political Rights

31 August 2012

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Human Rights Committee

Consideration of reports submitted by States parties under article 40 of the Covenant

Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012

Kenya

1. The Committee considered the third periodic report submitted by Kenya (CCPR/C/KEN/3) at its 2906th and 2907th meetings (CCPR/C/SR.2906 and 2907), held on 17 and 18 July 2012. At its 2917th and 2918th meetings (CCPR/C/SR.2917 and 2918), held on 25 July 2012, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the third periodic report of Kenya and the information presented therein. It expresses appreciation for the opportunity to renew its open and constructive dialogue with the State party's high level delegation on the measures that the State party has taken during the reporting period to implement the provisions of the Covenant. The Committee is grateful to the State party for its written replies (CCPR/C/KEN/Q/3/Add.1) to the list of issues which were supplemented by the oral responses provided by the delegation.

B. Positive aspects

3. The Committee welcomes the following legislative and institutional steps taken by the State party:

- (a) The adoption of the new Constitution, in 2010;
 - (b) The enactment of the Witness Protection (Amendment) Act, 2010 and the establishment of the Witness Protection Agency, in 2011;
 - (c) The enactment of the Prohibition of Female Genital Mutilation Act, 2011;
 - (d) The enactment of the Kenyan Citizenship and Immigration Act No. 2 of 2011;
 - (e) The progress made in conducting judicial reforms including the establishment of the Supreme Court of Kenya in 2010;
 - (f) The enactment of the Vetting of Judges and Magistrates Act, 2011 and the establishment of the Magistrates and Judges Vetting Board in 2011;
 - (g) The establishment of the National Gender and Equality Commission in 2011; and
 - (h) The establishment of the Independent Police Oversight Authority in 2012;
4. The Committee welcomes the ratification by the State party of the Convention on the Rights of Persons with Disabilities of 2006 in 2008.

C. Principal matters of concern and recommendations

5. While taking note of the State party's explanations concerning article 2(6) of the new Constitution which provides that any treaty ratified by the State party shall form part of the law under the Constitution, the Committee is concerned at the present lack of clarity in the jurisprudence of the courts on the status of the Covenant in the domestic legal order (art. 2).

The State party should take all necessary measures to ensure legal clarity on the status and applicability of the Covenant in the legal system of the State party. In this regard, the Committee urges the State party to ensure that the draft bill on Ratification of Treaties clarifies the status of the Covenant and other human rights treaties in domestic law.

6. While welcoming the establishment of the National Gender and Equality Commission and the inclusion of the principle in article 27(8) of the Constitution that requires that "no more than two-thirds of members of elective and appointive bodies shall be of the same gender", the Committee notes with concern that women remain underrepresented in the public sector and other elected and appointed bodies. The Committee is also concerned at the lack of data on the representation of women in the private sector (arts. 2,

The State party should strengthen its efforts to increase the participation of women in the public and private sectors, and where necessary, through appropriate temporary special measures to give effect to the provisions of the Covenant. In this regard, the Committee recommends that the State party ensure that the two-thirds rule enunciated by the new Constitution is implemented as a matter of priority. Furthermore, the Committee urges the State party to include in its next periodic report, disaggregated statistical data on the representation of women in the private sector.

7. The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 10) and regrets that the draft Marriage bill endorses polygamous marriages. The Committee also regrets that the Law of Succession Act discriminates between the property interests of widows and widowers. The Committee also regrets that the State party has not passed the Matrimonial Property bill (arts. 2, 3, 23 and 26).

The Committee reiterates its recommendation in its previous concluding observations (CCPR/CO/83/KEN, para. 10) that polygamous marriages undermine the non-discrimination provisions and are incompatible with the Covenant. The State party should, therefore, take concrete measures to prohibit polygamous marriages. Furthermore, the State party should revise the Law on Succession Act to guarantee equality between men and women in the devolution and succession of property after the death of a spouse. The State party should also enact legislation reforming its matrimonial property law

8. The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 27) and regrets that the Penal Code continues to criminalize sexual relations between consenting adults of the same sex. The Committee also regrets reports of acts of violence, harassment and abuse against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons based solely on their sexual orientation or gender identity (arts. 2, 17 and 26).

The Committee reiterates its previous concluding observations (CCPR/CO/83/KEN, para. 27) and recommends that the State party decriminalize sexual relations between consenting adults of the same sex in order to bring its legislation in line with the Covenant. The State party should also 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.

9. The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 15) and welcomes the enactment of the HIV and AIDS Prevention and Control Act, 2006 and the adoption of the National HIV and AIDS Strategic Plan of 2009/10 – 2012/13. The Committee, however, regrets the continued reports of high rates of deaths resulting from AIDS and the unequal access to appropriate treatment for those infected with HIV. The Committee also regrets reports of HIV/AIDS prevalence among homosexuals which is partly attributable to the laws that criminalize consensual same-sex relationships and the societal stigmatization of this group that hampers access to treatment and medical care by this group (arts. 2, 6 and 26).

The Committee reiterates its previous concluding observations (CCPR/CO/83/KEN, para. 15) and recommends that the State party take concrete measures to raise awareness on HIV/AIDS with a view to combating prejudices and negative stereotypes against people living with HIV/AIDS, including homosexuals. The State party should also ensure that persons living with HIV/AIDS, including homosexuals, have equal access to medical care and treatment.

10. While noting the de facto moratorium on the death penalty since 1987 and the commutation of sentences of 4,000 convicts from death to life imprisonment by the President on 3 August 2009, the Committee regrets that a total of 1,582 convicts still face the death penalty. The Committee also regrets that the death penalty remains on the statute books of the State party and that it applies to crimes such as robbery with violence that do not qualify as “most serious crimes” within the meaning of article 6, paragraph 2 of the Covenant (arts. 6 and 7).

The Committee reiterates its recommendation in its previous concluding observations (CCPR/CO/83/KEN, para. 13) that the State party consider abolishing the death penalty and acceding to the Second Optional Protocol to the Covenant. In this context, the State party should intensify awareness campaigns with a view to changing the mindset of the public regarding the retention of the death penalty on the statute books of the State party.

11. The Committee is concerned at the slow pace of investigations and prosecutions into allegations of torture, extrajudicial killings by the police and by vigilante groups. The Committee is particularly concerned that the State party has not conducted conclusive investigations of alleged excessive use of force by the police during operation Okoa Maisha in Mt. Elgon and operation Chunga Mpaka in the Mandera district as well as Operation Mathare. The Committee is also concerned at the lack of conclusive investigations and prosecutions into the killing of Oscar Kamau King'ara and John Paul Oulu who cooperated with the Special Rapporteur on extrajudicial, arbitrary and summary executions during his visit to the State party in 2009. The Committee is further concerned at regular reports of serious and unlawful use of force by State security forces and as to whether adequate training and planning procedures are in place to prevent excessive use of force in security operations (arts. 2, 6 and 7).

The State party should strengthen its efforts to ensure that police officers suspected of committing extrajudicial killings and other offences are thoroughly investigated and perpetrators brought to justice, and that the victims are adequately compensated. The State party should also conclude investigations into the killing of Oscar Kamau King'ara and John Paul Oulu and ensure that the alleged perpetrators are prosecuted, and if convicted, punished with appropriate sanctions. The State party should initiate training programmes for State security officers and law enforcement officials which emphasize 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.

12. While appreciating the efforts made by the State party to receive asylum seekers and refugees, and to protect their rights, the

Committee is concerned at the insecurity around refugee camps, particularly at Dadaab refugee camp. The Committee is also concerned at acts of physical and sexual violence by the police towards refugees following bomb explosions that claimed the lives of some police officers at Dadaab camp (arts. 2, 6 and 7).

The State party should take concrete measures to provide adequate security at refugee camps, particularly at Dadaab camp. The State party should conduct thorough investigations into all incidents of violence including allegations of violence by law enforcement personnel and bring those responsible to justice. The State party should also ensure that the victims of the violence are adequately compensated.

13. While noting the efforts by the State party to cooperate with the International Criminal Court in prosecuting those who bear the greatest responsibility for the post 2007 election violence and the continuing work of the Truth, Justice and Reconciliation Commission (TJRC), the Committee regrets the lack of investigations and prosecutions of the other categories of perpetrators which exacerbates the climate of impunity that prevails in the State party (arts. 2, 6 and 7).

The State party should, as a matter of urgency, pursue all cases of post 2007 election violence to ensure that all allegations of human rights violations are thoroughly investigated and that the perpetrators are brought to justice, and that victims are adequately compensated. In this regard, the State party should ensure that the recommendations of the Commission of Inquiry into the Post-Election Violence (Waki Inquiry) are duly implemented.

14. While noting the rising incidents of terrorist attacks in the State party and the establishment of an Anti-Terrorism Unit in the police service, the Committee is concerned at the lack of a legal framework that clearly sets out the human rights that must be respected in the fight against terrorism. The Committee is also concerned at allegations of the State party's involvement in extraordinary renditions and the refoulement of individuals suspected of being involved in terrorist acts to countries where they are likely to be tortured or face serious human rights violations (arts. 2 and 7).

The State party should enact legislation on counter-terrorism and ensure that it (a) define terrorist crimes both in terms of their purpose and their nature with sufficient precision, and (b) not impose undue restrictions on the exercise of rights under the Covenant. The State party should desist from any acts of extraordinary rendition and should ensure that the proposed Refugee bill 2011 complies with the absolute prohibition of refoulement under article 7 of the Covenant which also applies to cases of persons deemed a threat to national security.

15. While welcoming the enactment of the Prohibition of Female Genital Mutilation Act, 2011 and the adoption of a National Policy for the abandonment of female genital mutilation (FGM), the Committee is still concerned at the prevalence of female genital mutilation and other harmful traditional practices such as "wife inheritance" and "ritual cleansing" in various parts of the State party. The Committee is also concerned at continuing reports of gender-based violence throughout the State party (arts. 3 and 7).

The State party should adopt a comprehensive approach to preventing and addressing FGM, and gender-based violence in all its forms and manifestations. In this regard, the State party should improve its research and data collection methods in order to establish the extent of the problem, its causes and consequences on women. The State party should vigorously implement the Sexual Offences Act of 2006 and finalize the draft Prosecution Guidelines on Sexual Offences and Gender Based Violence, and enact legislation on the protection against domestic violence. The State party should ensure that cases of FGM and domestic violence are thoroughly investigated and that the perpetrators are brought to justice, and the victims adequately compensated.

16. The Committee is concerned at continued reports of overcrowding, torture and ill-treatment in prisons and places of detention by law enforcement personnel. The Committee is also concerned that the Prevention of Torture bill has not yet been enacted into law (arts. 7 and 10).

The State party should take urgent measures to address overcrowding in detention centres and prisons, including through increased resort to alternative forms of punishment such as parole and community service. The State party should also ensure that allegations of torture and ill-treatment are effectively investigated and that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims are adequately compensated. In this connection, the State party should ensure that law enforcement personnel continue to receive training on torture and ill-treatment by integrating the 1999 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) in all training programmes for law enforcement officials. The State party should ensure that the Prevention of Torture bill includes a definition of torture that is in line with article 1 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

17. While welcoming the adoption of the Counter Trafficking in Persons Act of 2010, the Committee is concerned at continuing reports of trafficking in persons for labour, sexual exploitation and for body parts, particularly of people with albinism (arts. 6, 7 and 8).

The State party should continue to strengthen its efforts to eradicate trafficking in persons by raising awareness among the public and relevant stakeholders, particularly in the hospitality industry, regarding the problem of trafficking in persons. Furthermore, the State party should vigorously pursue efforts aimed at ensuring that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims are adequately compensated.

18. While welcoming the State party's efforts to reform the police service through the enactment of the National Police Act of 2011, the National Police Service Commission of 2010 and the establishment of the Police Reforms Implementation Task Force in 2008, the Committee is concerned at the limited impact of these reforms. In particular, it is concerned at the continuing reports of widespread unlawful or arbitrary arrests by the police, including for the purposes of extorting bribes. The Committee is also

concerned that not all arrested persons are brought before a judge within 24 hours as prescribed by the Constitution (art. 9).

The Committee recommends to the State party:

- (a) To step up efforts to reform the police and to allocate the necessary resources for this purpose;**
- (b) To implement without delay the envisaged devolution of courts to the local level in order to enhance access to justice also in the rural areas;**
- (c) To ensure, by providing clear instructions to the police, that the 24 hour rule in the Constitution is respected in all cases.**

19. While welcoming the introduction of a pilot National Legal Aid (And Awareness) Programme and the establishment of a National Legal Aid (And Awareness) Steering Committee in 2007, the Committee regrets that access to legal aid and courts is unduly constrained by lack of funding for a legal aid scheme and physical accessibility factors. The Committee is also concerned that the Legal Aid bill has not been passed into law. The Committee is also concerned that the right of arrested persons to contact counsel is often not respected (arts. 2, 9 and 14)

The State party should give full effect to the rights of accused persons to contact counsel before and during interrogation, and when they are brought before courts. Furthermore the State party should take appropriate measures to ensure access to courts and to provide adequate funding to the legal aid scheme. The State should also, as a matter of urgency, enact a comprehensive legal aid law.

20. The Committee while appreciating efforts to provide humanitarian assistance to those displaced by the post-election violence in 2007, is also concerned at the slow pace of finding durable solutions for all internally displaced persons (art. 12).

The State party should expedite durable solutions for all internally displaced persons who were displaced by the 2007 post-election violence by resolving existing problems that delay resettlement and those constraining the recognition of self-help groups. The State party should also, as a matter of priority, adopt an IDP policy and enact legislation on internally displaced persons.

21. The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 22) and regrets reports of continuing forcible evictions of inhabitants from informal settlements without prior consultation and notification of the concerned populations. (art. 17).

The Committee reiterates its previous recommendation (CCPR/CO/83/KEN, para. 22) that the State party develop transparent laws, policies and procedures for conducting evictions to ensure that they are only undertaken when the affected populations have been consulted and appropriate resettlement arrangements have been made. To this end, the State party should ensure that its agencies desist from carrying out any evictions until proper procedures and guidelines have been put in place.

22. The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 24) and regrets that the age of criminal responsibility in the State party remains at 8 years. The Committee is also concerned that the juvenile justice system in the State party is underdeveloped and in many instances juveniles are held in detention facilities and prisons with adults (arts. 2, 10 and 24).

The Committee reiterates its previous recommendation (CCPR/CO/83/KEN, para. 24) that the State party raise the minimum age of criminal responsibility in line with international standards. The State party should also, as a matter of priority, develop its juvenile justice system so that it extends to rural areas. Furthermore, the State party should ensure that juveniles are segregated from adults in all places of detention and prisons.

23. While welcoming the recent legislative developments with regard to citizenship under the new Constitution and the Kenya Citizenship and Immigration Act of 2011, the Committee is concerned at the slow registration of children's births in the State party. The Committee is also concerned that the State party has not yet resolved the problem involving the rights of children of Nubian descent to citizenship and national identification cards, and notes that the decision of the African Committee of Experts on the Rights and Welfare of the Child in the case *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya* has not been implemented (art. 2 and 24)

The State party should adopt necessary programmes and budgetary measures to ensure universal birth registration at an early stage in the life of all children born in the territory of the State party. The State party should also ensure that the rights and entitlements of all children of Nubian descent, and other children in a similar situation, to citizenship and national identity cards are fully respected.

24. The Committee is concerned at reports of forced evictions, interference and dispossession of ancestral land by the Government from minority communities such as the Ogiek and Endorois communities who depend on it for economic livelihood and to practice their cultures. The Committee is further concerned at reports that the Ogiek community is subjected to continued eviction orders from the Mau forests complex. The Committee notes that the State party has not implemented the decision of the African Commission on Human and Peoples' Rights in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*. (arts. 12, 17, 26 and 27).

The Committee recommends that, in planning its development and natural resource conservation projects, the State party respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected. In this regard, the State party should ensure that the inventory being undertaken by the Interim Coordinating agency with a view to obtaining a clear assessment of the status

and land rights of the Ogiek community be participatory and that decisions be based on free and informed consent by this community.

25. The State party should widely disseminate the Covenant, the text of the third periodic report, the written responses it has provided in response to the list of issues drawn up by the Committee, and the present concluding observations so as to increase awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, as well as the general public. The Committee suggests that the report and the concluding observations be translated into the written official languages of the State party. The Committee also requests the State party, when preparing its fourth periodic report, to broadly consult with civil society and non-governmental organizations.

26. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 6, 13, and 16 above.

27. The Committee requests the State party, in its next periodic report, due to be submitted by 27 July 2015 to provide, specific, up-to-date information on all its recommendations and on the Covenant as a whole.