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**Human Rights Committee**

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

**Third periodic report of States parties**

**Kenya\***

[19 August 2010]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not edited before being sent to the United Nations translation services.

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## I. General introduction and country information

1. The Government of Kenya is honoured to present to the Human Rights Committee, Kenya's third periodic report, covering the period from April 2005 to June 2010. The organization of the present report is in line with the general guidelines of the Human Rights Committee regarding the form and content of periodic reports to be submitted by States parties (CCPR/C/66/GUI/Rev.2). The report is the result of a highly participatory and collaborative effort between government departments, civil society organizations and the Kenya National Commission on Human Rights under the leadership of the Ministry of Justice, National Cohesion and Constitutional Affairs.

2. This report has been prepared in the context of dramatic changes in Kenya's political, social, cultural and economic environments ensuing from the political crisis that was witnessed after the disputed 2007 presidential elections. Soon after the outcome of elections were announced on 29 December 2008, violence ensued, spreading all over the country and lasted until March 2008, with some parts of the country experiencing the violence for a longer period. During that time, the country witnessed unprecedented levels of violence, resulting in the death of at least 1,133 people, destruction of property worth billions of shillings and internal displacement of at least 350,000 people in Kenya.

3. In keeping with Committee's guidelines on the form and content of reports (CCPR/C/66/GUI/Rev.2), this report presents, on an article-by-article basis, progress made on the implementation of the Covenant and how the measures undertaken translate into enhanced promotion, protection and realization of the civil and political rights of the people, as well as emerging and enduring challenges to these rights since the last report in 2005 (CCPR/C/KEN/2004/2). Under each article, this report includes information on the progress and the challenges which the country has faced, which also provide further answers to the concluding observations and recommendations given by the Committee during the presentation of the last report.

### Contextual background

4. The violence that broke out after the December 2007 presidential election precipitated the most severe human rights crisis in Kenya's independent history. That Kenya could slide into a state of near-anarchy brought into sharp focus the limitations of the country's democratic governance systems which generally failed to diffuse the conflict and to prevent human rights violations from occurring. For the most part, the perpetrators of human rights violations are yet to be held accountable which suggests that the mechanisms for human rights protection is still largely inadequate.

5. The post-election crisis has however brought a renewed sense of urgency within the Grand Coalition Government for far-reaching constitutional, legal, policy and institutional reforms that have a bearing on the interdependent issues of human rights, democratic governance, the rule of law and security. Besides the need for structural reforms, the crisis emphasized the critical need to address historical injustices and grievances that fuelled violence in many parts of the country.

6. To address the crisis, the National Accord was signed on 28 February 2008, under the Kenya National Dialogue and Reconciliation Framework. The framework identified four main agenda items. The final goal of this political dialogue is to achieve sustainable peace, stability and justice through the rule of law and respect for human rights. Within this framework, there is commitment to address long-standing issues including constitutional

and institutional reforms, land reforms, police and judicial reforms, socio-economic inequalities, corruption, accountability and youth unemployment.

7. Implementation of these agenda items is expected to have a lasting impact on human rights protection and realization in Kenya. This is reinforced by Vision 2030, in which Kenya has restated its commitment to ensuring equitable, accountable and people-centred development in a human rights respecting state.

8. Vision 2030 recognizes that problems of inequality and human rights violations are interlinked with economic, social and political challenges. Consequently, it aims at economic growth while ensuring that the political system is issue-based, people-centred, result-oriented and accountable. Out of these challenges, poverty remains a major impediment to both the fulfilment of basic needs and the realization of the full potential of many Kenyans, particularly women and children. The extent of absolute poverty is estimated at 45.9 per cent of the population (2009). The economy has been characterised by stagnation in economic growth in the last two decades. Currently, approximately 56 per cent of Kenyans live below the international poverty line of less than \$1 per day. According to the Kenya Economic Report 2009, the percentage of Kenyans depending on others is 84 per cent.

## **II. Background information on Kenya**

### **Land and people**

9. Kenya is an East African country that lies astride the Equator covering a total area of 582, 650 km<sup>2</sup> of which 560,250 km<sup>2</sup> constitutes dry land while water takes the rest of about 13,400 km<sup>2</sup>. Approximately 80 per cent of the land area is arid or semi-arid, and only 20 per cent is arable.

10. The total population of Kenya is estimated at 40,000,000 people (2009 estimates), 75 per cent – 80 per cent of whom live in the rural areas. The population distribution varies from 230 persons per km<sup>2</sup> in high potential areas to three persons per km<sup>2</sup> in arid areas. Only about 20 per cent consists of high to medium potential agricultural land, and supports 80 per cent of the population. The remaining 20 per cent of the population lives in the 80 per cent of the land, which is arid and semi-arid.

11. The country's population is characterized by high mortality rates (10.95 deaths/1000), low and declining life expectancy (between 47 and 55 years), total fertility rate 4.82, high infant mortality and death rates (57–77/1,000 live births). Kenya is also faced with a high dependency burden, with over 42 per cent of the population below 15 years (all 2009 estimates).

12. Kenya is a multi-racial, multi-ethnic, multi-cultural and multi-religious society. The national language is Kiswahili while the official language is English (though numerous other local languages are spoken). People of African descent constitute about 90 per cent of the population; divided into 42 main ethnic groups. These groups belong to three linguistic families: Bantu, Cushitic, and Nilotic. The main groups comprise of: Bantus consist the Kikuyu (22 per cent), Luhya (14 per cent) Kamba (11 per cent), Meru (6 per cent), Embu (1.20 per cent), Kisii (6 per cent) and the Mijikenda (4.7 per cent), Taita (0.95 per cent), Pokomo (0.27 per cent), Banjuni (0.20 per cent), Boni-Sanye (0.05 per cent), Taveta (0.07 per cent); Kuria (0.52 per cent), Mbeere (0.47 per cent) Basuba (0.50 per cent) Nilotes include the Luo (13 per cent), Kalenjin (12 per cent), Turkana (1.32 per cent), Teso, (0.83 per cent), Samburu (0.50 per cent), and the Maasai (1.8 per cent); and the Cushites, include the Somali (0.21 per cent), Oromo (0.21 per cent), Rendile (0.12 per cent), Boran (0.37 per

cent Gabra (0.17 per cent). It should be noted that these major groups are further grouped into many smaller sub tribes.

13. The major religious orientations include Christianity (78 per cent), Islam (10 per cent), African Traditional Religions (10 per cent), Hinduism and Sikhism (1 per cent). Religion is increasingly perceived by some minorities in Kenya as a major factor in the determination of citizenship and the acquisition of citizenship entitlements. For example, some adherents of the Islamic faith argue that Kenya is governed as a Christian country. Those who adhere to the African traditional beliefs often complain that rights given under the English system of laws take precedence over those obtainable under customary laws which are intertwined with traditional religious convictions.

14. Poverty remains a major impediment to both the fulfillment of basic needs and the realization of the full potential of many Kenyans, particularly women and children. The population in absolute poverty is estimated at 45.9 per cent (2009) mainly due to the expected negative impact of the post-election violence witnessed in the country at the beginning of 2008 and the global crisis.

15. Kenya's economy has been characterized by stagnation in economic growth in the last two decades. Between 1997 and 2002, the economy grew by an annual average rate of only 1.5 per cent, below the population growth estimated at 2.5 per cent per annum, thus leading to a decline in per capita incomes. Currently, approximately 56 per cent of Kenyans live below the international poverty line of less than \$1 per day. The economy however has been registering some modest improvement in some sectors. In 2005, economic growth rate was 5.8 per cent, and this rate grew to 6.7 per cent by the end of May, 2007. The post-election violence, 2008, has been a major setback to this growth.

#### **General political structure**

16. Kenya gained independence in 1963 and has, in the last two decades, evolved into a multi-party electoral democracy. After years under a single-party State system, the Constitution of Kenya ("the Constitution") was amended in 1991 and the first multi-party elections were held in 1992. The change to a multi-party system was a political transition, which involved fundamental constitutional re-engineering aimed at transforming the state apparatus from instruments of repression and exploitation to agents of African development and self-actualization. Kenya African National Union (KANU) not only won the independence elections in 1964 but also managed to retain power for 39 years through eight general elections. Only in 2002 did KANU lose the general elections for the first time to the National Rainbow Coalition (NARC), a grouping of 14 political parties. Despite the political crisis witnessed after the general elections held in December 2007, there is renewed hope that with good governance, relationships with bilateral and multilateral donors will improve, thus increasing the chances of progressive realization of human rights in general.

#### **The Government**

17. There are three arms of the Government: the Legislature, Executive, and Judiciary. Chapter III of the Constitution establishes the Parliament. Section 30 provides that the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly. This National Assembly consists of 222 members elected in constituencies spread throughout the 8 provinces, 12 nominated members and ex officio members (Speaker and the Attorney General). The Presiding Officer in Parliament is the Speaker, who is elected by the members.

**The Executive**

18. The President heads the Executive arm of the Government. The Executive acts through a Cabinet which at the time of writing this report consists of the President, the Prime Minister, Vice President, two Deputy Prime Ministers, and other Ministers. The function of the Cabinet is to aid and advise the President in the governance of the country. As a check against excesses of Government, section 17 (3) of the Constitution provides that the Cabinet shall be collectively responsible to Parliament for all things done by or under the authority of the President or the Vice President or any other minister in the execution of his/her office.

**The Judiciary**

19. Chapter IV of the Constitution establishes the Judiciary. Section 60 thereof provides for the High Court as a superior court of record and with unlimited original jurisdiction in civil and criminal matters. Section 64 provides for the Court of Appeal. This is the highest court in the country. It only hears matters on appeal from the High Court and has no original jurisdiction to hear any matter.

20. The Judiciary is headed by the Chief Justice, and consists of Judges of the Court of Appeal and High Court, as well as magistrates courts, which are subordinate courts to the High Court established by Parliament in accordance with the Constitution. Such courts only have such jurisdiction and powers as law may confer on them. The High Court also has inherent jurisdiction to hear cases of violations of fundamental rights. Thus, a complaint touching on the rights in the International Convention on Civil and Political rights would be dealt with as a violation of fundamental rights, and would be heard by the High Court. If any person alleges that any of their fundamental rights have been, are being or are likely to be contravened in relation to them, then that person may apply to the High Court for redress. The High Court hears and determines such an application, and issues appropriate orders in accordance with section 84 of the Constitution.

**Legislative authority**

21. The Parliament of Kenya is vested with the power to enact legislation. In the field of human rights, Parliament has established the following institutions:

- The Kenya National Commission on Human Rights (KNCHR)
- The Kenya National Commission on Gender and Development (KNCGD)
- The Kenya Anti-Corruption Commission (KACC)
- National Council for Children Services (NCCS)
- National Council on Persons with Disabilities (NCPD) and
- The Kenya Law Reform Commission (KLRC)

**Human rights instruments that Kenya is a State party to**

22. Kenya has ratified the following international human rights conventions:

- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- The International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination against Women

- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The Convention on the Rights of the Child
- The Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes against Humanity
- The International Convention against Corruption
- The Convention Relating to the Status of Refugees
- The Optional Protocol to Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- The Rome Statute of the International Criminal Court
- Forty-nine ILO Conventions, with 43 of them in force

23. At the regional level, Kenya has ratified the following key human rights Instruments:

- The African Charter on Human and Peoples' Rights
- The African Charter on the Rights and Welfare of the Child
- The OAU Convention Governing Specific Aspects of Refugee Problems in Africa
- The OAU Convention Against Corruption

**The extent to which human rights treaties have been domesticated.**

24. International treaties are not considered as part of the law of Kenya and cannot be directly applied by the courts, tribunals or administrative authorities in the absence of domestic legislation domesticating the same. The practice is that after ratification, legal and administrative measures are taken to support such instruments. However, some courts interpret the laws of Kenya so that they do not conflict with treaties Kenya is a party to. Most of the Instruments have been domesticated to different degrees. In this regard, the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have been substantially domesticated by promulgation of the Children Act (Chapter 586 of the Laws of Kenya) and the Convention relating to the Status of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa by the Refugees Act (No. 13 of 2006). The provisions of these laws are closely modeled on those of the international and regional instruments, with necessary exceptions as necessitated by the circumstances of Kenya. The country has also fully domesticated the four Geneva Conventions through The Geneva Conventions Act (Chapter 198 of the Laws of Kenya).

25. Further, in order to domesticate the Rome Statute of the International Criminal Court and enable Kenya comply with its obligations thereto, the International Crimes Act, 2008 is in place. Many other international instruments are given effect in different laws. While some instruments are given effect by a single law, others may be given effect through more than one law. For example, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of Racial Discrimination have substantially been domesticated through different legislations.

26. This situation will change after the promulgation of the Proposed Constitution which provides that any treaty or convention ratified by Kenya shall form part of the law of

Kenya. It further provides that the general rules of international law shall form part of the law of Kenya.

27. The text of this report also highlights the Judiciary's application of international and regional human rights instruments that Kenya is a State party to.

### **III. Responses to the concluding observations of the Human rights Committee**

28. In June 2006, the Republic of Kenya submitted responses addressing paragraphs 10, 16, 18, and 20 of the Committee's concluding observations on its second report. This chapter will provide an update of the other concerns expressed by the Committee as indicated in paragraphs 8, 9, 11, 12, 13, 14, 15, 17, 19, 21, 22, 23, 24, 25, 26 and 27 of the Committee's concluding observations.

#### **Recommendation No. 8**

**Kenya should take appropriate measures to allow Covenant rights to be invoked in the domestic courts.**

29. As stated above, Kenya is a dualist State and therefore the country's Courts will not customarily invoke international treaties in their decisions unless Parliament enacts legislation to that effect. However, with the promulgation of the Chief Justice's Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules', judicial decisions are increasingly moving towards this direction. For example, in *Mary Rono v. Jane Rono*, Civil Appeal No. 66 of 2002 (Court of Appeal at Eldoret, Kenya), the judge substantially considered the relevance and applicability of international law to the determination of the case. The judge observed that Kenya has ratified the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights and that although the country ascribes to the Common Law theory that international customary and treaty law only forms part of domestic law where it has been specifically incorporated by implementing legislation, the current thinking on the Common Law theory is that both international customary and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. This led the court to reach the conclusion that the central issue relating to discrimination, which the matter raised, could not be fully addressed by reference to domestic legislation alone and that the relevant international laws which Kenya has ratified, specifically, the Convention on the Elimination of All Forms of Discrimination against Women, would also inform the court's decision. The decision, which was issued in April 2005, is now the guiding authority on matters of inheritance, especially where inheritance rights of daughters and widows are in question and has been used by High Court judges when deciding on succession cases in several different communities whose customary laws discriminate against the inheritance of a deceased person's property by daughters.

30. Along this recommendation, the draft constitution which will be the subject of a referendum in August, 2010, provides that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. It proceeds and makes all the three generations of rights justiciable. Currently, the International Covenant on Civil and Political Rights is the most substantially domesticated human rights instrument under Kenya law, having many of its provisions already contained

in the Constitution and the various Acts of Parliament. More information is provided under article 3.

### **Recommendation No. 9**

**Kenya should ensure that all individuals subject to its jurisdiction have equal access to judicial and other remedies.**

31. This observation is dealt with substantially in under article 2.

### **Recommendation No. 11**

**The Committee is disturbed by the fact, acknowledged by the delegation, that domestic violence against women remains a recurrent practice in Kenya and that women do not benefit from adequate legal protection against acts of sexual violence – another widespread phenomenon. The State party should adopt effective and concrete measures to combat these phenomena. It should sensitize society as a whole to this matter, ensure that the perpetrators of such violence are prosecuted and provide assistance and protection to victims. The draft Family Protection (Domestic Violence) Bill should be enacted as soon as possible.**

32. This matter is exhaustively addressed under articles 3 and 23.

### **Recommendation No. 12**

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

33. Apart from section 14 of the Children’s Act 2001, which forbids the carrying out of female genital mutilation on children, there are no laws making FGM illegal in Kenya. However, Kenya Vision 2030 explicitly recognizes that sexual and gender-based violence is one of the vices that continue to bedevil social and economic progress in the country and therefore, the Government commits to undertake deliberate efforts to “prohibit retrogressive cultural practices such as Female Genital Mutilation and other social ills.

34. To this end, the following measures have been taken:

- Establishment of a National Committee on the Abandonment of FGM (NaCAF) and a fully fledged secretariat based at the Ministry of Gender, Children and Social Development
- Formulation of National Policy on FGM which is awaiting Cabinet approval
- Formulation of a Draft Bill against female genital mutilation
- Development of a National Plan of Action on FGM
- Working with parliamentarians to influence abandonment of FGM in their respective constituencies
- Formation of regional networks across the country for the various actors to work collectively towards the abandonment of FGM in the high prevalence areas
- Undertaking community dialogues with various groups; elders, professionals, women, men, and boys on various aspects of FGM

35. The measures have begun to bear fruit and, female genital cutting which is practiced in all but five communities in Kenya has been on the decline. The Kenya Demography and Health Survey (KDHS) preliminary report 2008/2009 shows a decline from 32 per cent in 2003 to 27.1 per cent in 2008/09. However, there are wide disparities within regions in the country with some areas posting a high prevalence of 98 per cent.

#### Prevalence of female circumcision

<i>Residence</i>	<i>1998</i>	<i>2003</i>	<i>2008</i>
Urban	23.1	21.3	16.5
Rural	42.0	35.8	30.6
<b>Total</b>	<b>37.6</b>	<b>32.2</b>	<b>27.1</b>

*Source:* KDHS preliminary report 2008/09.

36. To consolidate these gains, a multi-pronged approach has been adopted in the fight against gender based violence, which includes FGM. Specifically, the Government in collaboration with different stakeholders has developed and launched a National Framework towards Response and Prevention of Gender-Based Violence in Kenya in December 2009 to form the basis of investigation of instances of sexual violence and strengthen coordination of responses to stem it.

37. Actions to address the problems set out in the Framework include:

- Establishment of community structures that are responsive to sexual and gender-based violence at grass-root levels
- Increase of awareness on prevention within communities and community-based institutions, strengthening behaviour change programmes addressing sexual and gender-based violence
- Increase of male participation in measures for prevention of sexual and gender-based violence at community levels
- Training and equipping of law enforcement agencies, including the police to respond adequately to cases of sexual and gender based violence
- Identifying victims and taking necessary response actions
- Establishing comprehensive referral structures to address instances of sexual and gender-based violence
- Establishing rescue shelters across the country
- Outlawing customary practices that promote gender-based violence
- Creating a specific legislation against gender-based violence
- Providing free and accessible legal advice to victims of violence
- Reviewing national guidelines for medical management of rape and other forms of gender-based violence
- Establishing national guidelines for psycho-social care, identifying reform agenda for the judicial sector, and
- Enhancing capacity of the Kenya Police to respond adequately to cases of sexual and gender based violence

### **Recommendation No. 13**

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

38. Although the death penalty has been in Kenya's statute books for a long time, there has been a de facto moratorium in force since 1987. This is based on the government's belief that the penalty is in conflict with the fundamental human right norms as embodied in international instruments of which Kenya is a party. On 3 August 2009, the President commuted 4000 death sentences to life imprisonment. It should be noted that the Kenyan public is still not ready for the abolition but the Government and the Kenya National Commission for Human Rights has intensified efforts of educating the public on the need to abolish it in conformity with the international standards and trends.

### **Recommendation No. 14**

**The State party should adopt measures to improve access to family planning services for all women. It should review its abortion law, with a view to bringing them into conformity with the Covenant.**

39. The Family and Reproductive Health Bill was tabled in Parliament in 2008 and seeks to promote information on and access to both natural and modern family planning methods, which are medically safe and legally permissible. It assures an enabling environment where women and couples have the freedom of informed choice on the mode of family planning they want to adopt based on their needs, personal convictions and religious beliefs. The Bill once enacted will protect women from death and injury due to backstreet abortions, providing humane treatment of women in life-threatening situations.

40. However abortion in Kenya is a highly emotive issue as is evidenced by the reactions to the bill by the religious leaders, pro-choice and pro-life groups. Some argue that the termination of life is morally wrong and alien to African culture. Pro-choice activists on the other hand, argue that a woman has a right to safe medical procedure if they choose to terminate a pregnancy. The same issues have also influenced the unity of the Christian religious groups against the current draft constitution which provides "abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life of the mother is in danger, or if permitted by any other written law". To the religious groups, this amounts to legalizing abortion.

41. The Government adopted the country's first national reproductive health policy in 2007. The policy provides a framework for equitable, efficient, and effective delivery of high-quality reproductive health (RH) services throughout the country, and emphasizes reaching those in greatest need and most vulnerable.

42. This policy also seeks to:

- Promote adolescent health and accessibility to family planning services by youth, and eventually incorporate this aspect into all health and family planning programmes, and
- Strengthen Primary Health Care (PHC) in general and Maternal, Child Health and Family Planning (MCH & FP) services in particular to ensure active participation of men and women in health care planning and provision

43. A Division of Reproductive Health has been established at the Kenyatta National Hospital, in collaboration with other non-state actors. The division is decentralized to all the provinces of Kenya and offers medical and counselling services to victims of botched abortions and other reproductive health problems. The Government also distributes contraceptives to small health centers across the country for free.

44. Through Government and civil society efforts, awareness of modern methods of contraception has increased over the years and currently stands at 96 per cent for women aged 15–49 and 98 per cent for men aged 15–54. Despite this, only 39 per cent of married women and 46 per cent of sexually active unmarried women use any method of family planning, thus exposing themselves to the unwanted pregnancies and various sexually transmitted infections.

### **Recommendation No. 15**

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

45. Kenya has undertaken various legislative as well as administrative measures, within its means, to ensure that all those infected with HIV/AIDS have equal access to treatment. One of the biggest obstacles that the country has had to and is still dealing with is one of stigma. Since the advent of HIV/AIDS; sufferers have been branded sexually immoral. This has bred stigma and discrimination and many self confessed HIV positive people have been ostracized and lost jobs, families and friends. To combat discrimination against the disease, the HIV/AIDS Prevention and Control Act, was enacted in 2006. The Act makes it illegal to discriminate against anyone on the basis of their HIV status.

46. To ensure access to health:

- **Section 15** of the Act provides that that the minister in charge shall ensure that facilities for HIV testing are made available to persons who voluntarily request for the test or are required under the Act to undergo the test
- **Section 19 (1) directs** all health institutions whether public or private to facilitate access to healthcare to persons with HIV without discrimination on their HIV status
- **Section 19 (2)** obligates mandates the government, to the maximum of its available resources, to take necessary steps to ensure the access of essential healthcare services, including access to essential medicines at affordable prices by persons living with HIV or AIDS and those exposed to the risk of HIV infection

47. The Sexual Offences Act enacted in 2007 contains detailed provisions protecting persons from the deliberate transmission of HIV or any other life threatening sexually transmitted diseases.

48. Currently the Government with the help of various partners is providing 213,000 patients with free anti retroviral therapy with a monthly increase of 5,000 new patients. The cost of treating 213,000 patients for one year is Kshs 3.42 billion shillings and is anticipated to rise to Ksh 3.8 billion shillings to cater for new infections. VCT services which include counselling sessions are also available free of charge throughout the country.

49. The HIV/AIDS workplace policy for the public sector was developed in 2006 to provide guidance on the management of employees who are infected and affected by the scourge and the prevention of further infections. The policy further provides guidance for those who deal with the day to day HIV and AIDS related issues and problems that arise within the workplace and also outlines the employers' responsibilities, rights and expected behavior in the workplace.

## Recommendation No. 17

**Kenya should ensure that those accused of the capital offence of murder fully benefit from the guarantees of article 9, paragraph 3 of the covenant. It should further guarantee the right of persons in police custody to have access to a lawyer during the initial hours of detention.**

50. Section 37 of the Criminal Procedure Code (CPC) provides that an arrested person must be brought to court within a stipulated time. If not, the Investigating Officer is required to make an apprehension report explaining the delay. However there is no stipulation on the period within which an accused person can contact a lawyer or his family. In practice, it is difficult to exercise this right largely due to poor infrastructure in police cells and the socio-economic circumstances of the arrested persons. Where communication facilities exist, the right to a phone call is guaranteed. This has been made easier by the fact that a considerable number of people now own mobile phones and are usually allowed to use them in front of the police officers to contact persons of their choice before they are surrendered to the arresting authority.

51. To give effect to this provision, Judges in Kenya have been firm in cases where the accused is not brought before the Court within the requisite time. Where no concrete explanation is given for the delays the accused is acquitted, no matter how overwhelming the evidence against them may be. For example, In *Albanas Mwasia Mutua v. Republic*, CR 120/04 the Court of Appeal acquitted a robbery with violence suspect who had been held in Police custody for eight months before being brought to court. This was held to be a contravention of Section 72 b) of the Constitution which requires that capital offenders must be produced in court within 14 days of their arrest.

## Recommendation No. 19

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

52. Since the consideration of Kenya's second periodic report, the Government has revamped the Kenya prison service by putting in place programmes that focus on strategic issues that are human rights based, promote good governance and democratic practices in prison management. The main objectives of these programmes are to create an environment for prisoners and prison staff that are safe, secure and humane.

53. In terms of Legislative Review: the Prisons Act (CAP 90) has been reviewed and the draft document is awaiting publication. Plans are also underway to review the Borstal Act (Cap 92) to synchronize it with the Children's Act in order to capture the multiple needs and challenges of juveniles in prison custody.

54. The Government has also embarked on development programmes for the prisons with a view to improving prisons condition through infrastructural upgrades and civil works in many prison facilities countrywide specifically to address the problem of overcrowding in prisons. The construction of additional prisoners' accommodation blocks is ongoing whilst the refurbishment of the existing facilities is also being carried out. The Government has made concerted effort to built new prisons in the newly created districts, this includes: Vihiga, Mutomo, Chuka, Rachuonyo, Nyamira, Mwingi and Makueni. These facilities will increase spaces for the accommodation of prisoners and therefore humanize the general prison conditions.

55. The provision and improvement of access to safe and clean water for the prisoners and the staff through the installation of water purification plants and sinking of boreholes is being undertaken at a continuous basis in all the prisons. These efforts have to a large extent addressed perennial water shortages and sanitation problems in prisons with the resultant reduction in the outbreak of water borne diseases which had been common before. Works on the sewage system are also ongoing and flush toilets have been built to replace pit latrines and bucket toilets in some of the prisons.

56. Through partnership with development partners under the Governance, Justice, Law and Order Sector (GJLOs) Reform Programme, the Government has modernized the prison transport system which has led to a more humane and prompt transportation of offenders to courts, hospitals and administrative functions. These programs have also opened up prisons for scrutiny by the Kenya National Commission on Human Rights, civil society and other interested parties.

57. In order to guarantee quality health care to prisoners, staff and the neighbouring communities, the Government has taken steps to upgrade prison health centres and dispensaries to fully fledged hospitals and health centres in order to enhance the provision of supply kits and equipment to these facilities. In addition the prisons' department has embarked on the recruitment of qualified medical personnel to ensure prompt care for the inmates and prison staff.

## **Recommendation No. 21**

**Kenya should facilitate the access of individuals to legal assistance in all criminal proceedings where the interest of justice so require. The envisaged expansion of the legal aid scheme should be pursued actively.**

58. The Kenyan legal system poses a number of formidable challenges to its users. These are due to the nature of the system itself, while other challenges relate to the nature and status of the people it serves. The law is written in difficult, technical language, is in inaccessible statute books, and judicial institutions are physically far from a majority of Kenyans. The laws and legal system also treat all citizens equally without regard to their unequal status. They are solemn and intimidating, employ complex procedures which citizens cannot comprehend and follow, are inefficient, and may not be sensitive to minimize the effects of these factors.

59. Other challenges include general and legal illiteracy among the citizens, lack or inadequacy of resources, negative attitudes towards the institutions among citizens and marginalization of certain sections of the citizenry, particularly women, children and persons with disabilities, through insensitive laws, legal procedures, institutional and general social practice. In addition, advocates who may assist citizens to use the institutions effectively are concentrated in the major urban areas and are expensive to retain.

60. There is a shift in State policy, which among other things, emphasizes access to justice as a basic right and the provision of affordable, accessible, efficient, convenient and fair dispute resolution mechanisms as critical for poverty reduction and sustainable economic development. Since 2001, there have been policy pronouncements recognizing the importance of Legal Aid and Awareness as part of the process of development in Kenya. The Poverty Reduction Strategy Paper for 2001–2004 noted that “communities and the poor cited lack of access to socially responsive and affordable legal and judicial services as critical issues that need to be addressed by the Government in the fight against poverty. It is the poor who suffer most from the effects of weak, unaccountable and insensitive legal and judicial systems.” The paper recognized that delivery and access to adequate and quality legal services is an insurance against abuse of human rights, especially

for the disadvantaged groups in society. It concluded that: “Efficient and easy access to timely, efficient and affordable legal and judicial services encourages the culture of law-abiding citizenry which is a prerequisite for social, political and economic development ... Administration of justice is critical in alleviating poverty as it creates an enabling environment for investment.” The Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation, 2003–2007, the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme’s Medium Term Strategies, 2005/06 to 2008/09 and the *Vision 2030* all underscore the connection between access to justice and sustainable development.

61. Consequently, the Government has fully operationalized a national legal aid (and awareness) programme intended to provide legal aid, advice, awareness, and representation mainly to the poor, the marginalized, and the vulnerable in society. The National Legal Aid (And Awareness) Steering Committee was appointed in November 2007, to oversee, coordinate, and monitor the overall implementation of the programme. The Committee provides policy direction to the programme, develops guidelines and regulations, and facilitates the development of programmes that will enhance access to justice by all.

62. Currently the programme is operating on a pilot basis at six sites:

- The Nairobi High Court Family Division Pilot Project
- The Moi University Law Clinic (Eldoret) Pilot Project
- The Nairobi Children’s Court Pilot Project
- The Nakuru Juvenile Justice Pilot Project
- The Madiany Paralegal Advice Office Pilot Project
- The Mombasa Capital Offences Pilot Project

After the piloting phase the Programme will be evaluated for rolling out in the whole country.

## **Recommendation No. 22**

**The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those evictions and appropriate settlement arrangement have been made.**

63. Access to adequate housing in Kenya remains a major challenge. Between 60 to 80 per cent of residents in Kenya’s largest urban centres, Nairobi, Mombasa and Kisumu live in informal settlements where they have no security of tenure, putting them at risk of eviction and homelessness. It is estimated that at the current growth rates, the population in Nairobi’s informal settlements will double over the next 15 years. The Government has intermittently over the years carried out evictions in different informally settled areas mainly due to environmental and safety concerns. Most of these informal settlements are built along river basins or along the railway lines, posing great danger not only to the slum dwellers but also to the environment as a whole.

64. The new national land policy approved by Parliament in 2009 recommends the development of guidelines to oversee evictions and settlements in Kenya. A Government Taskforce has been set up to develop guidelines on Eviction and Settlement and has already started the policy. In addition, the Government has developed a National Policy for Human Rights in which the Government has committed to doing the following to enhance the right to housing:

- Recognize and provide for the right to housing

- Implement the Housing Policy and ensure compliance with human rights principles and develop appropriate legislation
- Upgrade housing in all informal settlements
- Create an economic and financial infrastructure that facilitates those living in informal settlements and low income earners to enjoy the right to housing

65. By way of implementation, the Government has: created a specific Ministry for Housing to ensure better implementation of programmes; developed a National Housing Policy for Kenya and passed a Sessional paper for the same leading to the development of a National Housing Bill; and is currently upgrading informal settlements under the Kenya slum Upgrading Programme (KENSUP).

### **Recommendation No. 23**

**The State party should guarantee the right to peaceful assembly and impose only those restrictions that are necessary in a democratic State.**

66. This is dealt with under article 21.

### **Recommendation No. 24**

**Kenya is urged to raise the minimum age of the criminal responsibility.**

67. The Government of Kenya, through the Law Reform Commission, is in the process of reviewing the Children's Act, 2001. The review among other things, seeks to address the issue of the age of criminal responsibility in Kenya in order to bring it in line with international standards.

### **Recommendation No. 25**

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

68. The Government of Kenya has made commendable efforts to comply with the minimum standards for the elimination of trafficking, which has been recognized as a form of modern day slavery. These efforts relate to investigation of human trafficking offences protecting the victims of human trafficking and educating the public on the vice.

69. Although Kenya does not prohibit all forms of trafficking, trafficking of children and adults for sexual exploitation is a criminal offence under the Sexual Offences Act, 2006. The Act prescribes penalties that are sufficiently stringent and commensurate with those for rape. The Employment Act, 2007 outlaws forced labour and also contains additional laws outlawing labour trafficking. There is increased cooperation between the Kenya Police Interpol to investigate the suspected trafficking of Kenyans out of the country. In order to track cases of human trafficking, the Ministry of Home Affairs collects information on trafficking cases from the police, media, foreign governments, and the UNODC.

70. Since the last report, efforts have been made to improve protective services provided to trafficking victims. These include:

- Removing victims from situations of trafficking and putting them in shelters

- Referring those trafficked from outside the country to the International Organization for Migration (IOM) for assistance
- Setting up shelters to rehabilitate street children vulnerable to forced labour and commercial sexual exploitation and providing services to children exploited in the commercial sex industry at these facilities including establishment of a half-way home in Mombasa to offer a safe haven to victims of trafficking, including psychosocial support before reintegration back to their communities
- Availing a toll-free hotline that enables children and adults to report cases of child trafficking, labor, and abuse
- Hiring and training of children officers in investigations, counseling and follow-up skills for victims of human trafficking
- Initiating a sensitization forum for Foreign Service officers on their responsibilities in assisting Kenyan victims in the investigation and prosecution of trafficking crimes to ensure that they are not inappropriately incarcerated or otherwise penalized for unlawful acts committed as a direct result of being trafficked

71. Significant progress to publicly highlight the dangers of human trafficking and taking steps to combat it, have also been made since the last report. These include:

- Public pronouncements by the political leadership of the country during raising events, including the Day of the African Child
- Reporting by the Kenyan media, especially the government-owned Kenya Broadcasting Corporation, on cases of suspected human trafficking
- Establishment of the National Steering Committee in July, 2007, to Combat Human trafficking
- Mounting aggressive campaigns to create awareness among hotels and tour operators on the evils of child prostitution and child sex tourism and encouraging them to sign the Code of Conduct against Child prostitution

72. On 22 June, 2010, Parliament gave preliminary approval to the Counter-Trafficking in Persons Bill, 2010 which would domesticate the Palermo Protocols (The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and Protocol against the Smuggling of Migrants by Land, Sea and Air) which the Government has ratified. The proposed legislation is also intended to bring Kenya in full compliance with the United Nations Convention against Transnational Organized Crime. It will impose life sentences on traffickers involved in organized trafficking efforts and subject individual traffickers to a minimum sentence of 15 years in prison or a minimum fine of KSH. \$5 million (USD \$62,000), and a life sentence for a repeat offence. Courts will also be empowered to order restitution to the victims of human trafficking under the bill for medical and psychological treatment, living expenses, and otherwise “just compensation”. Victims will also be immunized against prosecution for any crime committed as a direct result of being trafficked, and the government will be required to establish a National Assistance Trust Fund for Victims of Trafficking, consisting of the forfeited assets of traffickers.

## **Recommendation No. 26**

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

73. Child labour continues to be a developmental challenge in Kenya, with grave impact on individual children, families, communities and nationally. It is widespread in the country and is visibly present in both rural and urban areas. The Child Labour Analytical Report, 2008 showed that in 2006, of the total of 1.01 million working children 909,323 (89.8 per cent) were in the rural areas compared to 102,861 (10.2 per cent) in the urban areas. In terms of age structure, there were more working children in the ages 15–17 years (47.8 per cent) compared to 36.4 per cent and 15.8 per cent in the age brackets 10–14 and 5–9 respectively. Overall working children comprised of 7.9 per cent of the total children aged 5–17. The Provinces with the highest proportion of working children were Central 10.2 per cent, Rift Valley 10.2 per cent and Eastern 9.1 per cent. The proportion of working children in Western and Nyanza Provinces was 7.7 and 6.5 per cent respectively. The provinces with the least proportion were North Eastern 4.1 per cent, Coast 3.5 per cent and Nairobi 2.0 per cent.

74. Majority of the working children were found in the agricultural sector comprising 79.5 per cent of the total working children in 2006. The other major employers were the Service Industry (community social and personal services) where 11.8 per cent of the total working children were found followed by the trades sector at 4.2 per cent. This study confirmed the finding of 1998/99 Integrated Labour Force Survey where majority of children were working in commercial and subsistence agriculture, fishing and domestic services. Subsequent studies have also shown an increase of child labour in ‘miraa’ growing, sand harvesting, mine and quarry, hawking, scavenging, transport, domestic work, construction, and commercial sex work sectors.

75. Lack of update and comprehensive information on the nature and magnitude has led to inconsistent intervention measures. In addition, the persistent incidences of factors associated with child labour, poverty, increased orphan hood especially due to HIV and AIDS, high levels of unemployment and limited income generating opportunities have aggravated the problem. The government has made efforts to address the problem of child labour through targeted policies on Education, Youth, Orphans and Vulnerable Children (OVC) among others, but without a coherent framework. These measures have only yielded modest results due to uncoordinated approach and ineffective implementation thereby raising many challenges.

76. To address the issue of coordination, the Government has developed the National Child Labour Policy is to ensure protection of all children in Kenya from all forms of harmful child labour practices, and to safeguard the wholesome development of the child socially, psychologically, and physically. In line with international instruments on child labour, this policy gives priority to children exposed to worst forms of child labour conditions to constitute the most urgent protection target. Policies targeting children already exposed to child labour are also critical to avoiding more children entering adulthood in a disadvantaged position, adversely affected by early work experiences. This policy emphasizes that direct action is needed to identify and rescue children exposed to forms of child labour that pose a direct threat to their health and safety or that violate fundamental human rights.

77. The policy aims at preventive and protective strategic measures. Firstly, protective measures are needed to reduce the flow of vulnerable children from the risks of becoming child labourers. Secondly, preventive measures are needed to rescue or withdraw the existing stock of child labourers, facilitate their recovery and reintegration, and prevent them from re-entering work. While protection is a right of every child, the Government recognizes that “children in difficult circumstances” are more vulnerable than others and need special attention. In addition to providing a safe environment for these children, it is imperative to ensure that all other children also remain protected. Child protection is integrally linked to every other right of the child. Failure to ensure children’s right to

protection adversely affects all other rights of the child. For example, the Millennium Development Goals (MDGs) cannot be achieved unless child protection is an integral part of programming strategies and plans.

78. Kenya has made major strides towards improving the protection of children against exploitation and inhuman working conditions since the last report. The new Employment Act enacted in 2008, contains elaborate provisions prohibiting the worst form of child labor. These are defined as: slavery or practices similar to slavery, including the sale and trafficking of children; child prostitution and child pornography; involvement in illicit activities, including drug production and trafficking; and work likely to injure the health, safety, or morals of a child. The Act further provides for hefty penalties for employers who flout these rules. However it allows employment of children from the ages of 13 to 16 years for light work and defines those of 16 to 18 employable.

79. The Children's Act, at Section 10 protects a child from "child labour, economic exploitation and work that is hazardous". Hazardous work for children has been designated as: deep-lake and sea fishing; scavenging; begging; carpet and basket weaving; mining; stone crushing; sand harvesting; picking miraa; making bricks; performing domestic service for third-party households; working in a glass factory or tannery; engaging in internal armed conflicts; working in agriculture, transportation, construction, or industrial undertakings; and working in the production of matches and fireworks.

80. The Children's Act further prohibits the recruitment of children less than 18 years into the military and holds the Government responsible for protecting, rehabilitating, and reintegrating children involved in armed conflict into society. However, the Armed Forces Act permits the enlistment of children less than 18 years with the permission of a parent, guardian, or district commissioner.

81. The Occupational Health and Safety Act (2007) prohibit the employment of children in workplaces where their health is at risk and encourages entrepreneurs to set achievable safety targets for their enterprises.

82. The introduction of compulsory free primary education by the Government in 2003 has contributed towards decreasing the incidences of child labour in Kenya. The Children's Act imposes hefty sanctions to any person who violates this important right, thus ensuring that a large number of children are not working but are in school.

83. In 2008, the Government expanded its cash transfer programme for orphans and vulnerable children to cover 25,000 children in 17 districts. The program provides monthly cash transfers to families of working children to help meet basic needs, including school costs, to prevent children from having to work. The child must attend school as a prerequisite for receiving these financial incentives.

84. A toll-free, nationwide hotline to help children in need was set up in May 2008, by the Ministry of Gender, Children and Social Development, in partnership with a civil society organization. The hotline is used to provide callers with counseling and /or linkages to child labour and child prostitution prevention organizations.

85. The Ministry of Labour is in the process of forming District Child Labour Committees in most districts to spearhead the war against child labour. This is a broad based committee drawing its membership from trade unions, civil society organizations, Government ministries / departments, faith based organizations and the private sector. The Ministry working with the International Labour Organization is also in the process of finalizing a training manual to harmonize/ standardize the training of district child labour committees.

## **Recommendation No. 27**

### **Kenya is urged to repeal section 162 of the penal code.**

86. Kenya may not decriminalize same sex unions at this stage as such acts are considered as taboo and offences against the order of nature which are repugnant to cultural values and morality. Indeed the public gave overwhelming presentations to the Committee of Experts against the inclusion of same sex rights under the new constitution. It must however be reiterated that the government does not discriminate against anyone in the provision of services. No one is ever required under the law to declare their sexual orientation under any circumstances.

## **IV. Other measures taken since the last report**

87. This part provides an account of the legislative, judicial, administrative and other measures that the Government has taken to comply with the Convention as well as the difficulties and the shortfalls observed in giving effect to other provisions of the Convention that were not subject to recommendations during the last report. It also highlights the strategies currently in place or underway to address any existing gaps. Where there are no new developments, the reports states so.

### **Article 1**

#### **All people have a right to self determination**

88. There are no new developments under this article.

### **Article 2**

#### **Non-discrimination**

89. The Government of Kenya is committed to the eradication of all forms of discrimination and to the development of legislation, policy and administrative measures which effectively tackle discrimination, negative ethnicity and related intolerance.

90. Poverty, economic imbalances, ethno-political factors, corruption and historical injustices have been identified as having contributed economic and social inequality in the Kenyan society. These have led to the feeling and perception by a large segment of the society of discrimination and sidelining leading to ethnic and societal tensions. The post-election violence witnessed in the country in 2008 was largely seen as a direct culmination of some of these ethnic and societal tensions.

91. As a consequence, and conscious that development is predicated upon peace, stability and security in the country, the Coalition Government has put in place laws, policies and programmes to address geographical historical economic and developmental inequalities that have contributed to ethnic tensions. These measures are supposed to ensure that public resources are be distributed equitably as far as is practicable geographically taking into account the diversity, population and poverty index. It is illegal for a public officer to distribute resources in an ethnically inequitable manner and it is also illegal for a person to discriminate against another in terms of leasing, sale, disposal or management of public property wholly meant for the public.

92. The Proposed New Constitution, reflects the desire by the Government and Kenyans to prohibit discrimination including addressing the problem of marginalization.

Discrimination is given a very wide meaning where “The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”. This provision goes further to make provisions for affirmative action programmes and policies designed to benefit individuals or groups who are disadvantaged, whether or not as a result of past discrimination.

#### **National Cohesion and Integration Act of 2008**

93. The National Cohesion and Integration Act, 2008 addresses the effects of and the elimination of ethnic discrimination. It provides for the promotion of equality and harmonized relations in the society and outlines the measures that should be taken to tackle issues related to negative ethnicity. It further stipulates that all public institutions should not have more than one third of its employees from one community.

94. The Act establishes the National Cohesion and Integration Commission to oversee its implementation. The Commission facilitates and promotes equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya. Specifically, the Act provides that; all public entities must seek representation of diversity in the employment of their staff who shall not comprise of more than a third from one tribe. It is illegal for an employer to discriminate in the way he employs or offers terms of employment or dismisses staff or to discriminate in membership of organizations or discriminate the services or benefits a person can access as a member on ethnic grounds.

95. The Act further criminalizes the use of hate speech – language used to stir up ethnic hatred. The Act also bars the media from publishing utterance that intend to incite feelings of hostility on the basis of ethnicity or race.

#### **The Employment Act**

96. Employment Act 2007 (Act No. 11 of 2007) contains elaborate provisions aimed at protecting persons from discrimination in the employment sphere. The Act prohibits discrimination in employment within three main aspects: (i) promotion of equality of opportunity in employment; (ii) elimination of discrimination in any employment policy or practice, including against prospective employees based on their race, color, sex, ethnic origin, HIV status, disability, pregnancy; and (iii) the payment of equal remuneration for work of equal value [Section 5, Employment Act 2007]. The Act further mandates the Minister for Labour to promote and guarantee equality of opportunities in employment for all persons including migrant workers and members of their families who are lawfully in the country.

#### **The Equal Opportunity Bill 2007**

97. The Bill has been drafted and published. Once enacted into law it will promote equal opportunities for all persons, prohibit discrimination and provide for remedies for victims of discrimination.

#### **Political Parties Act**

98. The Political Parties Act was enacted in 2007 and prohibits the registration of any party that is founded on, among other things ethnic basis or uses words, slogans, emblems or symbols which could arouse ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious division. It also prohibits the registration of a party that has a constitution or operational ethic that provides in any way for discriminatory practices contrary to the provisions of the Constitution or of any written law.

**Persons with Disabilities Act**

99. Kenya ratified the United Nation Convention on the Rights of People with Disability in May, 2008. The Persons with Disabilities Act is under review to ensure that the provisions of the Convention are fully domesticated. The council for Persons with Disabilities has been fully operationalized to oversee the implementation of the obligations that Kenya has signed to under the Convention. The Council also has the mandate ensure that the National Fund for the Disabled of Kenya, an endowment fund established under the Perpetual Succession Act Cap 164 of the Laws of Kenya, utilizes its income for the benefit of the disabled persons within Kenya.

100. Several other policies to ensure protection of other vulnerable groups include the Draft National Policy on older persons and ageing and the Draft National Policy on Social Protection which are currently awaiting Cabinet approval.

**The National Land Policy**

101. Mindful of the fact that the issue of land in Kenya has been the main cause of deep ethnic conflicts and tension, Parliament approved the National Land Policy in December, 2009. The policy provides a systematic framework for the management and administration of land and its resources in Kenya. It is believed that the policy will provide a platform on which communities can relate with each other without feeling discriminated against or marginalized. The policy, among other things, provides for the: recognition of marginalized groups, informal settlements and small communities like the Ogieks; the harmonization of land laws to ensure better and more effective land administration; the repossession of public land that had hitherto been allocated to private individuals and the development of a land use master plan to guide the optimal utilization of land resources.

**Economic Stimulus Programme (ESP) 2009**

102. The Economic Stimulus Programme (ESP) was operationalized by the Government in 2009. This is a short to medium-term, high intensity, and high impact programme aimed at jumpstarting the economy towards long term growth and development, securing the livelihoods of Kenyans and addressing the challenges of regional and Inter-generational inequity. The ESP is anchored within the principles of the Vision 2030 and recognition of global concerns on environmental sustainability.

**Constituency Development Fund**

103. The Fund introduced in 2003 continues to play an important role of ensuring equitable and balanced development across all regions of the country through increased devolved public fund allocation for both social and income-generating programmes. The Constituency Development Fund (CDF)'s processes are under constant review to fight poverty at the grassroots level through the implementation of community based projects which have long term effects of improving the peoples' economic well being. The Fund has been up-scaled and ensures that a specific proportion of the annual Government ordinary revenue is devoted to the constituencies taking into account the poverty index of every constituency.

104. Most importantly the country is at the verge of getting a new constitutional order that envisages a stronger policy, legal and institutional framework for the enforcement and promotion of human rights, rule of law, prevention of corruption and other forms of social injustice thus eliminating the seeds of ethnic hostilities which may have fuelled the post election violence. Some of the national values pronounced in the new Constitution include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

105. The 10th Parliament of Kenya has also through its new Standing Orders adopted in 2008, established a new Parliamentary Select Committee on Equal Opportunities. The Committee is mandated to monitor and promote measures designed to enhance equality and improvement in the quality of life and status of all Kenyans. It will inquire into and report on all matters relating to discrimination and marginalization of groups on the basis of gender, age, disability, health status, ethnic, racial, cultural or religious background or affiliation and make proposals, including legislative proposals, for the protection and promotion of the welfare of the affected persons and groups.

### **Higher education**

106. With regard to institutions of higher learning, there are seven public universities established by Acts of Parliament and seventeen private universities. Discrimination on the grounds of ethnicity, sect, or creed is barred under the various Public Universities Acts. All the constitutive Acts of public universities have a common provision; “Admission to the university as candidates for degrees, diplomas, certificates or other awards of the University shall be open to all persons accepted as being qualified by the Senate without distinction of ethnic origin, sect or creed and no barrier based on such distinction shall be imposed upon any person as a condition of his becoming or continuing to be, a professor, lecturer, graduate or student of the university or of his holding any office therein, nor shall any preference be given to, or advantage be withheld from, any person on the basis of ethnic origin, sect or creed.”

107. However the same provision is absent from the Universities Act Cap 210B [1986] and the Universities Rules 1989, under which Private universities are authorized to offer degrees, post graduate diplomas and certificates. Likewise, the Education Act (Cap 211 Laws of Kenya) does not expressly prohibit discriminatory practices in private primary and secondary educational institutions.

### **Civil society organizations**

108. S.10 (c) of the NGO Council Code of Conduct obligates all civil society organizations to “ensure equality of opportunity for all regardless of nationality, ethnic background, gender, religion or creed”. This code is written and enforced by a statutorily-established council of voluntary agencies. [NGO Coordination Act, ss. 23-24]. The Council can recommend the suspension or cancellation of an NGO’s registration certificate for violation of the code of conduct.

109. The Constitutive legislations of certain national institutions also make it mandatory to have at least one third representation of women in their composition. This ensures equalization of opportunities for all individuals, to facilitate mainstreaming of equality and non-discrimination and to monitor the implementation of mechanisms aimed at ensuring non-discrimination. Some of these institutions include: the Kenya National Commission on Human Rights, the National Commission on Gender and Development, the National Council of Persons with Disabilities and the National Aids Control Council.

### **Access to justice/administration of justice**

110. In order to ensure that a large number of Kenyans are able to access justice, The Government, has in its Vision 2030, committed itself to the provision of equal justice for all, since the last Government embarked on substantial and outreaching reforms aimed at establishing legal and institutional reforms to enhance access to justice to the poor, marginalized and vulnerable. Some of these reforms include:

- The National Legal Aid and Awareness Program launched in September 2008 under the Ministry of Justice, National Cohesion and Constitutional Affairs discussed above
- Setting up of additional courts houses with over 50 courtrooms in Nairobi alone
- The Court of Appeal now also sits in other major towns and High Court Judges have also been sent to other towns to ensure that Kenyans will not have to travel long distances to access justice

### **The Judiciary**

111. The Government has taken various measures aimed at ensuring that persons whose rights under this Covenant have been violated shall have effective remedies:

- The “Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules”, provide that where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is found, an application may now be made directly to the High Court. These rules strengthen the ability of individuals to enforce fundamental rights and freedoms by clarifying the procedure to apply to the High Court under Section 84 of the Constitution.

112. A Taskforce on Judicial Reforms established in 2009 made wide-ranging recommendations aimed at creating a judicial system that is independent and effective. The recommendations once implemented will promote high standards of conduct and discipline in the judiciary, address the backlog and delay of cases, improve the administration and enhance performance and accountability and ultimately promote the speedy and effective dispensation of justice. The Task Force recommended the increase of Court of Appeal judges to 30 and that of the High Court to 120.

113. The High Court has increased its divisions to handle cases of a specialized nature expediently. For example a Special court division has been established to deal with land and environmental disputes. This follows the delay of many cases involving land and environment. The new division started its operations in July 2009 and it is a prelude to the establishment of a fully-fledged land and environmental court.

114. The Small Claims Courts Bill has been published by the Attorney General. It is the intent and purpose of this law to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

115. The Alternative Dispute Resolution Sub Committee of the Rules Committee of the High Court of Kenya has partnered with the Chartered Institute of Arbitrators to set up a court as a pilot scheme that would compel parties in dispute to attend mediation before going for litigation.

116. The Judiciary has also published the Litigants’ Charter which is designed to promote understanding by the litigating public of the processes of the court and their rights and obligation in the courses of litigation. The Charter disseminates information on the court, its processes and methods of approaching it all in a simple language. In addition, plans are at an advanced stage to computerize court proceedings in order to avail electronic versions of case law and statutes for reference by lawyers, judicial staff and the general public.

117. Other institutions which ensure the expedient dispensation of disputes include:

- The Kenya National Commission on Human Rights – a State-established national human right institution formed in 2002 by an Act of Parliament. The Commission is

bestowed with the function of investigating, on its own initiative or upon a complaint made by any person or group of persons, the violation of any human rights. There has also been an increase in the number of individual citizens and groups reporting their human rights complaints to the Commission. Below is information on the number of complaints lodged at KNCHR from 2005–2009:

- (a) 1 July 2004 to 30 June 2005 = 1,796 complaints;
  - (b) 1 July 2005 to 30 June 2006 = 2,481 complaints;
  - (c) 1 July 2006 to 30 June 2007 = 2,580 complaints;
  - (d) 1 July 2007 to 30 June 2008 = 1, 465 complaints;
  - (e) 1 July 2008 to 30 June 2009 = 1,861 complaints.
- The Public Complaints Standing Committee was established in 2008 to investigate complaints against public officials and institutions in a coordinated manner. It is hoped that it will be converted into an ombudsman. The Ombudsman Bill has been developed to provide the necessary legislative framework to create a stronger Office of the Ombudsman to investigate complaints of improper or inadequate administrative conduct on the part of public entities.

### Article 3

#### Equality between men and women

*(Cross reference with Kenya's seventh periodic report under the Convention)*

118. In striving to achieve equality between men and women, Kenya is cognizant of the obligations assumed under the international human rights instruments it is a State party to including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the African Charter on Human and Peoples Rights.

119. Despite the equality pronounced in the Constitution of Kenya, some form of discrimination against women in matters of personal law is discernible. Cultural practices and economic realities and situations combine to hinder women from realizing their human rights on an equal basis with the men. The area in which most customary laws disadvantage women is in respect of property rights and inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage.

120. To some extent the Law of Succession Act (Cap. 160, Laws of Kenya) has tried to redress these imbalances by providing that both girls and boys have equal rights in succession. However, by exempting agricultural land from its application, the Act serves to restrict women's full enjoyment to the right to property ownership as it in essence allows for application of customary law of succession or inheritance which is discriminatory against women.

121. Persons professing the Muslim faith are exempted from the operations of the Succession Act. They can however apply the Islamic law which does not apportion equal shares in the estate to daughters and wives. Widows do not enjoy the same rights as widowers under the Succession Act. For example widows only have a life interest in their husband's property which is extinguished by remarriage whereas widowers continue to enjoy their rights over their deceased spouse's property regardless of whether or not they remarry. Where an unmarried adult without offspring dies intestate, the Succession Act

provides that land is first and foremost inherited by the deceased's father, then mother, then siblings.

122. Nevertheless Courts in Kenya, as discussed in paragraph 21, have given a wider interpretation to the provisions of this section to give effect to the provisions of international conventions with respect to women's rights to property. The 2008 High Court decision of Peter Lerionika Ole Ntutu (High Court Succession Cause No. 1263 of 2000 – was a landmark case which stated in part that daughters and sons have equal rights to property. This decision was reaffirmed by the Court of appeal in *Mary Rono v. Jane Rono & William Rono* [Civil Appeal No. 66 of 2002. The Court of Appeal cited article 1 of the Convention on the Elimination of All Forms of Discrimination against Women, to justify awarding daughters of a polygamous man (married under customary law) who had died intestate equal shares in his property.

123. The Convention on the Elimination of All Forms of Discrimination against Women has also been used by the High Court to rule against forced widow inheritance in *Ngoka v. Madzomba* in the absence of specific national legislation against widow inheritance. A traditional custom that would force a woman to be married against her will was held to be repugnant to justice and morality and in breach of human rights. These decisions in effect reaffirm that in the absence of domestication, courts are free to use international instruments that Kenya is a state party to in determining matters before them. Besides that, the Kenya Law Reform Commission has embarked on reform of the Law of Succession Act and called on members of the public to submit memoranda to align to modern thinking and development.

124. A key legislative development in ensuring that women's rights and equality are upheld is the Marriage Bills. (Matrimonial Property Bill, Marriage Bill, Equal Opportunities Bill and Domestic Violence (Family Protection) Bill, all of 2007). These have already been tabled before Cabinet. The Bills provide for an amalgamation of all the existing marriage Acts, to provide for a single regime for marriage, recognize customary marriages which are potentially polygamous and provide full protection of the law for children born out of such unions. This is important for succession under section 29 and 2 (5) of the Succession Act. The Matrimonial Property Bill provides for the equal status between men and women in respect of the matrimonial property.

125. Kenya has also developed a National Policy and Action Plan on human rights. It articulates the most urgent human rights issues which were identified by the members of the public during a national views collection exercise. These are the issues that the public want prioritized towards the full realization and enjoyment of human rights for both men and women in Kenya.

126. In a broad sense, Kenya has taken measures that guarantee the equality of men and women to vote, be elected to public office and participate in the formulation of government policy, implementation and to participate in social and national activities. The number of women members of Parliament has increased over the years and stand at twenty one in the current Parliament. The margin between men and women however still remains wide. The following table shows an appreciable increase in the number of women in the National Assembly over the years.

**Members of national assembly by sex, 1998–2008**

<i>Year</i>	<i>Women</i>	<i>Men</i>	<i>Total</i>	<i>% women</i>
1998	9	213	222	4.1
2003	18	204	222	8.1
2008	21	201	222	9.5

Source: Electoral Commission of Kenya, 2008.

127. Similar increases have been witnessed in women's participation in local government, as illustrated in the table below.

#### Women's participation in local authorities (civic positions)

	1998		2002		2008	
	Total	Female	Total	Female	Total	Female
Counties	2 455	201	1 847	24.8	1 618	252
Municipals	596	52	446	60	391	63
City council	69	7	113	13	99	15
Town councils	572	40	431	56	378	63
<b>Total</b>	<b>3 692</b>	<b>300</b>	<b>2 837</b>	<b>377</b>	<b>2 486</b>	<b>393</b>

Source: Electoral Commission of Kenya, 2008.

128. In recent years the Government has worked actively to put in place measures that ensure that both men and women enjoy equal rights and opportunities. In 2006, The President of the Republic of Kenya decreed that 30 per cent of all public appointments, recruitments, promotion and training should be filled by women. This was intended to create equity in employment of men and women and promotion to senior positions in the public sector. Since this decree the contribution of women in governance and leadership has increased gradually although the directive is yet to lead to the desired target. This has led to the introduction of a national framework to monitor and document gender mainstreaming in Government planning, budgeting, legislation and policy formulation. Every government Ministry and agency must contract for targets towards gender mainstreaming. It is one of the compulsory performance contracting domains.

129. Several institutions have also been established to ensure the equality of opportunities for all individuals, to facilitate mainstreaming of equality and non-discrimination and to monitor the implementation of mechanisms aimed at ensuring non-discrimination. These include the Kenya National Commission on Human Rights, the National Commission on Gender and Development, the National Council of Persons with Disabilities and the National Aids Control Council.

130. The Political Parties Act (Act No. 10 of 2007, which came into effect in January 2009) is supposed to ensure that political parties embrace the principle of affirmative action in their party manifestos and provide a legal framework for participation of men and women in the formation and management of political parties. The Act provides that a third of party officials should be of either gender. This is an important step in promoting internal democracy and accountability.

#### National Executive Council (NEC) of political parties segregated according to gender

Political party	No. of NEC members	No. of women
Orange Democratic Movement	56	25
Orange Democratic Movement – Kenya	15	4
National Rainbow Coalition	21	7
FORD – Kenya	60	23
NARC – Kenya	36	13

<i>Political party</i>	<i>No. of NEC members</i>	<i>No. of women</i>
KANU	41	12
Party of National Unity	38	11

*Source:* Registrar of Political Parties.

131. Although there are still huge disparities in appointments at different levels of government, the proposed draft constitution incorporates numerous gains for women including the elimination all forms of discrimination against women.

132. The Government, through Parliament has also passed Laws to address gender based violence and human rights concerns. These legislations go a long way in safeguarding the rights of women. These include:

- The Sexual Offences Act – the Government has established a National Taskforce on the Operationalization of the Sexual Offences Act, 2006 that comprises of both Government and civil society organizations. The Task Force has developed regulations to operationalize the Sexual Offences Act, 2006. A Data Bank of Sexual Offenders is envisaged to be established by these regulations. This National Task Force is developing a National Policy on Sexual Offences.
- Witness Protection Act – the Government enacted a Witness Protection Act in 2006 which has recently been amended by the Witness Protection (Amendment) Act that was passed by the National Assembly in April 2010. This legislation will encourage women who are victims of sexual abuse, domestic violence and other abuses and who fear reprisals to come forward and seek legal redress.
- A Prosecutor’s Manual on Sexual Offences has been developed and is currently being used train investigators and Police Officers on the investigation and prosecutions of sexual offences. Gender desks have been established in police stations in Kenya to assist the Kenya police handle cases with a gender dimension that may arise. There is ongoing sensitization of police prosecutors and investigators on sexual offences at the national and provincial levels in the country.
- A Gender Based Violence Centre was set up at the Kenyatta National Hospital in 2008 to provide medical and psychosocial support to victims of sexual abuses. The Center is working in close collaboration with the police, the Government Chemist and non-governmental organizations to ensure that the survivors of sexual abuse get assistance from one centre. The centre has been replicated in other provincial hospitals in the country.
- The HIV and AIDS Prevention and Control Act (2006) – seeks to protect and promote the rights of women living with AIDS in recognition of the fact that women suffer more from the effects of the scourge.

133. In the area of economic empowerment for women, the Women Enterprise Fund (WEF) was set up in 2007 to facilitate women’s access to microfinance credit and other financial services to address poverty. The funds are disbursed through Micro-financial institutions for lending to women and through the Constituency Women Enterprise Scheme. Divisional Women Enterprise Committees have been formed and are opened and are operational in all constituencies. A total of Kshs 586 million has been disbursed to individuals and groups as of June, 2010 benefitting a total of 9300 individual women for various investment projects.

134. Kenya has made huge strides in the field of education by formulating various legislative and policy frameworks for the advancement of equality between men and

women in education at all levels. Kenya has both an Education Act and a Children's Act 2001 which incorporate the rights to education for all. In terms of policy, Kenya has put in place Sessional Paper No. 1 of 2005, a Framework for Educating, Training and Research. It is a comprehensive and strategic roadmap towards the achievement of gender parity. It aims at ensuring that boys and girls, women and men participate equally in the learning and management of education at all levels. Also, the provision of free primary and secondary education by the Government has increased the rate of transition of girls from primary schools to secondary schools. During the current reporting period, the rate of transition steadily increased from 40.2 per cent in 2005 to 50 per cent in 2008.

## **Articles 4 and 5**

135. There are no new developments to report under these articles.

## **Article 6**

### **Right to life**

136. Despite the Constitutional and legislative guarantees to the right to life in Kenya, there has been a major challenge arising out of unlawful killings by the police. The Government has been unequivocal in condemning this whenever it happens as one of the most serious human rights violations. Any allegation of unlawful killing is investigated by the authorities and perpetrators are tried and convicted by a competent court if found to have used unreasonable force.

137. In addition, the post-election violence witnessed in Kenya in 2008 was not only a serious affront to the right to life in Kenya but a blatant manifestation of embedded impunity. Following the violations that were witnessed and having failed to set up a local tribunal to try the perpetrators of the violence, Kenya has agreed to cooperate with the Prosecutor of The International Criminal Court to ensure that those with the greatest responsibility in the post-election violence are brought to justice and impunity does not go unpunished.

138. Recognizing the urgent need to fight impunity and to promote the rule of law, the government has prioritized reforms of the Judiciary, the Police and the Attorney General's office in order to build their capacity to handle the cases. In this respect, a National Task Force on Police Reforms was established in 2009. The Taskforce report which has been adopted by the Government contains far reaching recommendations and measures aimed at creating a more efficient, effective and accountable Police service. Some of the recommendations of the Task force were: the establishment by law of an independent civilian police oversight body that will monitor police conduct; the review of the training curriculum of all police officers; reviewing the police recruitment procedures to ensure that only individuals of the right character and temperaments are recruited into the police service; and a general improvement of the human resource management package for police officers including the terms and conditions of police service. The Police reforms secretariat is in the process of getting into partnership with foreign police services with a view to adopting best policing practices. The Government has established an Implementation Committee to oversee the implementation of the recommendations.

139. With regard to the judiciary, the Government established a Taskforce on Judicial Reforms in May, 2009 with a mandate to carry out an overhaul of the Judiciary and recommend ways of expediting justice. The Task Force report came up with far ranging recommendations to streamline and strengthen the Judiciary and therefore, increase its capacity to administer justice. The Task Force has since submitted its report with

recommendations to the Government. Some of the measures recommended are as follows: Strengthening of the Judicial Service Commission that is responsible for the recruitment and disciplinary action against judicial officers in Kenya and granting of financial autonomy to the Judiciary. There is a proposal that 1 per cent of the national budget be allocated to the judiciary. The Task Force also recommended the vetting of all judges, and this has been included in the proposed constitution. This will enhance professionalism and meritocracy in the Judiciary.

140. A Truth, Justice and Reconciliation Commission has also been established as a transitional justice mechanism under the principles of partnership of the coalition government signed on 28 February 2008, under the Kenya National Dialogue and Reconciliation Framework. The framework identified four main agenda items to move the country out of the political crisis that was witnessed after the 2007 presidential elections. The Commission has mandate to enquire into historical injustices and the underlying causes.

#### **Moratorium on the death penalty**

141. There has been a de facto moratorium on the death penalty in force since 1987. This is based on the government's belief that the penalty is in conflict with the fundamental human right norms as embodied in international instruments to which Kenya is a state party. On 3rd August 2009, the President commuted 4000 death sentences to life imprisonment. At this juncture, Kenya is unable to abolish the death penalty as the Kenyan public has overwhelmingly rejected the abolition of the death penalty for the most serious crimes. However, the government in collaboration with the Kenya National Commission on Human Rights and other stakeholders continue to raise public awareness regarding the abolition of the death penalty.

### **Article 7**

#### **Protection from torture, inhuman, cruel and other degrading treatment or punishment**

142. The measures taken under this article should be cross referenced with what was reported under CAT/C/KEN/CO/1.

143. Following the presentation of Kenya's initial report to the Committee against Torture in November, 2008, the Government in response to the committee's recommendation and to the public concern on the high levels of torture amongst law enforcement officers in the country, has drafted a Bill on Torture. It not only provides a definition of the crime of torture, which had been lacking in our legal framework, but also makes provisions for the punishment of crimes of torture thus domesticating the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

144. The Kenya Law Reform Commission is also conducting a review of other related legislation, such as The Penal Code, Evidence Act and the Criminal Proceedings Act to ensure that there are in conformity with the obligations assumed under the Convention against Torture.

145. In recognition of the fact that a prisoner is entitled to the basic freedoms guaranteed by the Constitution and other international human rights standards, the Government has overhauled the Kenya Prison Service by putting in place programmes that focus on strategic issues that are human rights based, promote governance and democratic practices in prison management. The Prisons Act (cap 90) has been reviewed to reflect this. The Borstal Act

(Cap 92) is under review to synchronize it with the Children's Act in order to capture the multiple needs and challenges of juveniles in prison custody.

146. The Government has also embarked on structural development programmes for the prisons with a view to improving prisons conditions through infrastructural upgrades and civil works in many prison facilities countrywide. These facilities will increase spaces for the accommodation of prisoners and therefore humanize the general prison conditions.

147. The recently enacted Community Service Order Act may also be regarded as having a positive impact in the prevention of torture or other cruel, inhuman and degrading treatment in prison and detention facilities. 11,000 convicted persons who would otherwise be serving custodial sentences in the overcrowded jails are now engaged in working on community projects from their homes. These are supervised by the Provincial Administration. If these are accused of committing acts of torture, they are subject to disciplinary measures both internally by the Government as their employer and externally they risk suffering prosecution under the criminal law.

148. Police and Prison Officials are subject to internal disciplinary measures by the Government as their employer. They also risk prosecution under the law in cases where they have been accused of committing acts that constitute torture according to Article 1 of the Convention.

## **Article 8**

### **Freedom from slavery and forced labour**

149. The measures taken under this article include those discussed in reference to recommendation 25 of the concluding remarks in paragraphs 53–57 as enshrined in the Kenya Constitution.

150. A lot of legislative initiatives have been taken to ensure the operationalization of the constitutional guarantee that “No Citizen of the Republic of Kenya shall be held in slavery or servitude or required to perform forced labour”. In the year 2007 alone, The Employment Act 2007, The Labour relations Act 2007, The Work Injury Benefits Act 2007 and The Occupational Safety and Health Act, 2007 were enacted.

151. This guarantee from slavery and forced labour has also been envisaged in the Proposed Constitution. It contains a Bill of Rights which lays down the principle of equality, the freedom from discrimination, the freedom from slavery and forced labour and the freedom of association. It also provides for the rights of workers, employers and trade unions, in particular the right to fair remuneration, the right to reasonable working conditions, the right to join a trade union or employer's organization, the right to strike and the right to engage in collective bargaining.

152. The 2009 Counter Trafficking in Persons Bill discussed elsewhere will among other things curb what is acknowledged to be modern day slavery. The Bill defines human trafficking as the exploitation of a person by keeping them against their will, subjecting a person to practices similar to slavery. The law proposed seeks to curb the illegal trade in Kenya and imposes a fine of at least Sh 5 million or imprisonment for 15 years for employing a house girl aged below eighteen. The violent use of any human being for removal of organs or body parts, forced labour and forced marriages are also recognized as illegal by the Bill.

## Articles 9 to 12

153. There are no new developments under these articles since the last report except more focus on juvenile justice under Article 10. Since June 2005, Youth Alive! Kenya has been implementing a Juvenile Justice Project in partnership with the Department of Children Services and with support from Action Aid International Kenya, GOAL Ireland Kenya, the Finish NGO Foundation for Human Rights and the Safaricom Foundation. The project seeks to promote an effective juvenile justice system in Kenya bent on restoration of young offenders by improving the quality of institutional rehabilitation while strengthening community linkages to support reintegration of discharged offenders.

154. This is a project under the Justice & Human Rights Programme which seeks to ensure access to justice by the most vulnerable and most marginalized to promote the respect for and the protection of human rights in Kenya. In particular, the programme hopes to:

- Improve access to justice for disadvantaged children and young people from marginalized settings in Kenya.
- Promote an effective justice system critical to the development of communities, accountable for public safety and the restoration of young offenders. and
- Inculcate the respect for human rights and promote human rights principles as the basis of peace and development.
- In order to protect juvenile persons from being detained together with adults, a Diversion Project for Children In Conflict With the Law in Kenya was initiated by key NGO partners working with government agencies to ensure the protection of children from inappropriate institutionalisation and as a viable alternative to custodial care. Among the measures included in the Diversion Programme is the assignment of a social worker to each police station desk to ensure that children's views are taken into account and that their rights are not overlooked in efforts to settle disputes out of court. Since the judiciary and other legal officers are also involved in the diversion process, they are available to provide advice to the police on how to safeguard children's rights.

## Article 13

### Expulsion of an alien lawfully in Kenya

155. Kenya has prioritized the fight against terrorism. The key factors contributing to this prioritization include:

- Kenya's general international counterterrorism obligations pursuant to the relevant United Nations Security Council resolution 1373
- Its geographical proximity to Somalia
- Previous terrorist attacks on US and Israeli interests in Kenya

156. Kenya has acceded to all thirteen conventions set out in Resolution 1373 and has submitted three reports to the Counter-Terrorism Committee as required by paragraph 6 of Council resolution 1373. The Counter-Terrorism Committee visited Kenya in 2005 and praised it for its honest reporting and its plans to establish a unit to combat the financing of terrorism. During this visit, the Executive Director of the Counter-Terrorism Committee's Executive Directorate "stressed the importance of having in place in Kenya "legislation for

the criminalization of terrorism as well as instruments to control the financing of terrorism”.

157. Despite Kenya’s closure of her border with Somalia in January 2007, the fifth special meeting with international, regional and sub-regional organizations of the Counter-Terrorism Committee on “Prevention of Terrorist Movement and Effective Border Security” was also held in Nairobi in October 2007. Kenya explained and still holds the position that this was necessary in order to allow the Security forces to distinguish between genuine refugees and insurgents who wished to use Kenya to wage attacks on Somali’s Islamic Court’s Union and later the Transitional Federal Government.

158. Over the years Kenya has hosted thousands of refugees including refugees from warring neighbours. This has proved to be a security challenge for the country. The proliferation of small arms and light weapons and the attendant increase of armed criminal gangs are directly attributed to this fact. This has called for stringent operations a situation which may be exploited by corrupt law enforcement officers to extort bribes from potential refugees. Corruption among the law enforcement officers is a top priority currently within the wider police reforms.

159. In addition, Kenya has enacted the Refugee Act, 2006 which has clear provisions for the promotion and protection of refugees in Kenya. This Act domesticates the African Union and United Nations Conventions on Refugees. It provides protection from discrimination to asylum seekers, refugees and the families of refugees upon entering Kenya. Section 16 states that every recognised refugee and every member of their family in Kenya shall be entitled to all rights contained in international treaties to which Kenya is a party while they reside in the country. This provision therefore extends the protections against discrimination as contained in the various international instruments. Section 18 (a) of the Act further provides that no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country where he would be persecuted on account of race, religion, nationality, religion, membership of a particular association or political opinion.

160. In 2009, the Government published the Refugee Regulations which are operational guidelines to ensure the effective implementation of the Refugee Act, 2006. The challenge for the Government remains as the modalities of distinguishing genuine Somali asylum seekers from those persons who may be a threat to the security of the country. At the time of writing this report, the Government is also in the process of developing a National Refugee Policy.

## **Article 14**

### **Equality before the courts and right to a fair and public hearing by a competent, independent and impartial tribunal established by law**

161. The right to a fair trial is a fundamental right that is well enshrined in the Kenyan Constitution as well as other human rights instruments that Kenya has ratified. The provision of effective, prompt and equitable justice that is accessible to all is one of the key priorities of the Government of Kenya. Indeed, the Government is determined to radically reform the Judiciary to ensure that it plays its rightful role in a democratic dispensation. Radical reforms are being under taken in the criminal justice system in Kenya to ensure effective delivery of services. A Taskforce on Judicial Reforms was established in May, 2009 and mandated to carry out an overhaul of the judiciary and recommend ways of expediting justice.

162. The Task Force report came up with far ranging recommendations to streamline and strengthen the judiciary and make it more in consonance with the needs of the people. The

major recommendations were as follows: strengthening of the judicial and administrative processes and a more transparent method of recruiting judges; enhancing the operational autonomy and independence of the Judicial Service Commission through the enactment of the Judicial Service Bill; additional funding for the Judiciary; the introduction of permanent mechanisms to handle complaints against judicial officers. Also recommended is that the Judicial Service Commission investigates complaints against staff and officers, the number of Appellate Judges be increased to 30 and that of the High Court to 120, in order clear the backlog of cases in court among others.

163. Continuing Professional Development programmes (CPD) also known as Continuing Legal Education, have been introduced for judges and lawyers to ensure that they keep up with modern practices. A Judicial Training Institution was established in 2008.

## **Article 15**

164. There are no new developments under this article.

## **Article 16**

### **Right to recognition everywhere as a person before the law**

165. Under Kenyan law, refugees cannot naturalize and children of unknown origin, who might otherwise be stateless, including some orphans and street children, are not automatically granted citizenship. Security concerns, as well as stringent vetting measures on groups with historical or ethnic ties to other countries, have led to complaints of arbitrary, biased scrutiny and unnecessary long delays in order to obtain citizenship.

166. The provisions relating to Kenyan citizenship are found in Chapter VI of the Constitution and the Kenya Citizenship Act, Cap 170, of the laws of Kenya. They outline the four ways through which a person may acquire Kenyan citizenship which is, either by birth, descent, registration or naturalization. The latter three methods generally apply to persons born outside Kenya.

167. The registration process requires proof of age, usually shown by a birth certificate, and proof of citizenship. This second requirement has been criticized as creating the most obstacles for certain minorities like the Somalis, Nubians and the Coastal Arabs. Typically, individuals obtaining citizenship by birth only need to demonstrate one parent is a Kenyan citizen, usually by presenting a parent's national ID. However, for Nubians, Kenyan Somalis, and coastal Arabs, the standard is higher and has been perceived to be more arbitrary in practice.

168. The Government has taken deliberate steps to expedite the processing and issuance of identity cards, passports, and birth certificates. Birth certificates are critical to the issuance of either the identity card or the passport. The two documents are critical to the conduct of a citizen's affairs and the exercise of many civil and political rights.

169. These are important documents because Kenyan citizenship is mainly determined by *jus sanguinis* (based on parentage), although the law also provides for citizenship of persons who were in Kenya at the time of independence due to historical reasons.

170. There is evidence that registration procedures which have been viewed as discriminative in the past are being redressed as recognized in the Independent World Report, 2009. The enactment of the Refugees Act, 2006 is a step towards the fulfilment of this provision. In 2006, the Nubian Community filed a communication with the African

Commission on Human and Peoples Rights (ACHPR) at The Gambia alleging discrimination. The case is still pending but Nubian leaders attribute recent administrative changes to these efforts. Nubians must still submit to vetting committees, but obtaining the Kenyan national identity card has become much easier. National institutions are taking steps to streamline the registration process, construing national identification as a right rather than a privilege. The National Registration Bureau issued a nationwide directive in 2006 to desist requests for grandparents' documentation, though the implementation of the directive continues to be experienced differently in different places.

## **Articles 17 and 18**

### **Right to respect privacy, family, home and correspondence and protection of honor and dignity, Freedom of thought, conscience and religion**

171. There are no new developments under these articles.

## **Article 19**

### **Freedom of expression**

172. As stated in the earlier report, the Constitution of Kenya guarantees the freedom of expression and freedom to hold one's opinion. These rights are also enshrined in the Proposed Constitution. Article 33 of Proposed Constitution includes a radically revised provision on freedom of expression. It states that every person has the right to freedom of expression, which includes: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. However, the right to freedom of expression does not extend to: propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in article 27 (4).

173. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. The "limitations of the rights and fundamental freedoms", including freedom of expression, are contained in article 27 (4) which states that: the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

174. The Communications (Amendment) Act contains a number of provisions relevant to the regulation of hate speech and freedom of expression. The act amends the Kenya Communications Act, 1998 and makes minor amendments to other statute law. The function of the Communications Commission includes the promotion of "diversity and plurality of views for a competitive marketplace of ideas" and provides that the government may "make regulations generally with respect to all broadcasting services and without prejudice to ... the facilitation, promotion and maintenance and plurality of views for a competitive marketplace of ideas". These provisions are consistent with Kenya's obligations in ensuring that the international standards on the establishment of a public policy and regulatory framework which promotes pluralism and diversity are adhered to.

175. In addition, the Communications (Amendment) Act states that all licensed broadcasters should provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community; ... and ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast ..."

176. When the Communications (Amendment) Act was passed, concern was raised by the media fraternity on some provisions of the Act seen as suppressing the freedom of the media. The area of contention in particular centred on the provisions of section 88 (1) which gave wide powers to the Minister in Charge over the electronic and print media. Following dialogue between the Government and the media practitioners the (Miscellaneous Amendments) Bill has been introduced in Parliament. The Amendment Bill provides for the establishment of a Broadcast Content Advisory Council, mandated to manage the content of television and radio broadcasts as opposed to the vesting of this same power exclusively in the Minister of Information and Telecommunications, under the Kenya Media Law.

## Article 20

### **Prohibition of propaganda of war and advocacy of national, racial or religious hatred**

177. Kenya has adopted a number of legislations prohibiting any advocacy of national racial, ethnic or religious hatred that constitutes incitement to discrimination, hostility or violence. However, following the post election violence witnessed in 2008, there is need to review and harmonize laws on hate speech to ensure they conform to acceptable international standards. There is general agreement that there is no need for an additional legislation on hate speech in Kenya, but the need to stringently enforce current legislation.

178. In 2008, Parliament enacted the National Cohesion and Integration Act prohibiting the use of hate speech or language that would stir up or incite ethnic hatred. The Act also established a Commission whose purpose is to facilitate inter alia good relations, harmony peaceful coexistence between persons of different ethnic communities in Kenya. Section 13 of the National Cohesion and Integration Act, deals with “hate speech” in express terms. Hate speech covers speech which “is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up”. In this section, the term “ethnic hatred” is conceived as “hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”.

179. The types of speech which are covered encompass the use of “threatening, abusive or insulting words or behaviour, or displays any written material”; the publication or distribution of written material; the presentation or direction of the performance the public performance of a play; the distribution, showing or playing of a recording of visual images; or the provision, production or direction of a programme. The penalty for anyone who commits an offence under this provision is a fine not exceeding one million shillings or imprisonment for a term not exceeding three years, or both.

180. The Penal Code of Kenya 20, as revised in 2009, contains a number of provisions which are relevant to the regulation of hate speech in Kenya in various ways. Although the Penal Code does not refer to hate speech or incitement to hatred directly, Section 77 (1) on “Subversive activities” states that: “any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years ...” Section 77 (3) goes on to define “subversive” to include supporting, propagating ... or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice; inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority as well as actions intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya provided that the provisions of

this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities.

181. Therefore, speech intended or calculated to promote feelings of hatred and enmity between different races or communities in Kenya as long as it is not uttered in good faith and is not aimed at combating the roots of discrimination, constitutes a subversive activity under Section 77 (3) (e) and attracts a prison sentence of up to seven years. There has been criticism that the Section 77 (3) (e) does not address the concerns article 20 of the International Covenant on Civil and Political Rights particularly to address the issue of an imminent risk of discrimination, hostility or violence against persons belonging to the targeted group. However the preventive measures under the National Cohesion and integration Act, address this short fall.

182. Moreover, Section 96 of the Penal Code provides that a person would be found guilty of an offence punishable by a prison sentence of up to five years if he or she “utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated to bring death or physical injury to any person or to any class, community or body of persons ...” This incitement to violence refers to statements which actually create an imminent risk of violence against persons belonging to a targeted group.

183. The Media Act, 2007, establishes the Media Council of Kenya whose functions include the mediation or arbitration of “disputes between the government and the media, between the public and the media, and intra-media”. The Second Schedule of the Media Act contains the “Code of Conduct for the Practice of Journalism” which is relevant to the regulation of hate speech and the protection of freedom of expression in Kenya in various ways. Some of the provisions relevant to this article include:

- Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided
- Racist or negative ethnic terms should be avoided
- Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms

184. Section 34 (2) of the broadcasting regulations also states that in considering a programme code submitted by broadcasters to the Communications Commission of Kenya for its approval, the Commission shall have regard to specified standards and rules in relation to, among other things, individual rights, privacy, discrimination and personal attacks and whether the programming is likely to incite, promote hatred or vilify any person or community on the basis of ethnicity, race, gender, religion, culture, age or disability.

185. The courts have also been called upon to interpret some of the laws. In criminal case No. 5812 of 2006, *R. v. Michael Otanga Mulei and three others*, the issue of contention was whether the four accused missionaries were guilty of incitement to violence on allegations that they had distributed literature that contravenes Islamic norms. The court held that, there is freedom of religion in Kenya and thus both Muslims and Christians were free to propagate their religion in their own way and this could not be perceived as incitement to violence.

186. Under the provisions of the Political Parties Act (CAP 10 of 2007), a party that accepts or advocates the use of force or violence as a means of attaining political objectives will not be registered. The Act also prohibits the registration of any party that uses words, slogans, emblems or symbols which could arouse ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious division.

## Article 21

### Right to peaceful assembly

187. As mentioned in the previous report, Section 80 of the Constitution of Kenya guarantees the right to freedom of Assembly. The Public Order Act, Chapter 56 Laws of Kenya regulates the exercise of this right. However, the period following the disputed presidential elections in 2007 posed a major challenge to the respect of the right to peaceful assembly. In January 2009, the international NGO, Freedom House, reported that Kenya's democracy rating had deteriorated from "free" to "partly free". This in their view arose from the fact that the fundamental rights, freedoms and liberties of Kenyans, especially with regard to peaceful assembly had been seriously curtailed throughout 2008. The police were accused of violently dispersing public gatherings and demonstrations, including those of internally displaced persons protesting over insecurity, citizens campaigning to have Members of Parliament pay taxed like other Kenyans, and the media demanding a review of the Kenya Communications Amendment Act, over contentious provisions that were perceived to have the potential to gag the media.

188. It must be observed that, though the violations experienced during this time are regrettable, the country was undergoing unprecedented times and the security machinery was also overwhelmed. There exist lawful restrictions to the right to assemble which are accepted in any democratic society and the Government has therefore introduced extensive training courses for security officers in crowd management in order to ensure peaceful and safe handling of different situations during public gatherings. A number of law enforcement officers have been prosecuted for using excessive force during the dispersal of unlawful assemblies.

189. For the avoidance of doubt the proposed new constitution reiterates the right of every person to peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities.

## Article 22

### Freedom of association and right to form and join trade unions

190. Kenya is a member of the ILO since January, 1964 and has ratified 49 ILO conventions with 43 of them in force. Since the last report, Parliament has enacted new Labour laws designed to strengthen labour standards and trade union freedoms. In particular, the Labor Relations Act (2007) provides for freedom of association, recognition of trade unions, collective agreements and dispute resolution. The freedom of association is further protected in other legislation in force, such as the Cooperative Act and the Societies' Act. Kenyan Law also protects many professional associations and organizations, such as the medical association, the Bar Association, the Architectural Association of Kenya.

191. The Freedom of association and the right to form and join trade unions has also been recognised in the proposed Constitution. Section 36 provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. Registration of an association of any kind shall not be unreasonably withheld or withdrawn and the right to a fair hearing before a registration is cancelled is provided for.

## Article 23

### Protection for the family and the institution of marriage

192. Since the last report, some legislative initiatives have been undertaken, in the form of Marriage Bills, designed to modernize Kenya's marriage and family law. The Bills are currently undergoing National debate. These include the Marriage Bill, The Matrimonial Property Bill, The family Protection bill.

193. The new Marriage Bill (2007) tabled in Parliament in 2009, is a key legislative development in. The main aim of the Bill is to ensure that rights and equality are upheld in marriage. The Bill outlaws forced marriages and wife inheritance. This Bill recognizes both monogamous and polygamous marriages. However, those married under monogamous marriages cannot contract polygamous marriages. Further those who have chosen polygamy cannot contract monogamous marriages. The Bill also provides for an amalgamation of all the existing marriage Acts.

194. The issue of Matrimonial property has always been seen as a threat to the institution of marriage in Kenya. Since the celebrated case of *Kivuitu v. Kivuitu*, (1991) two Kenya Appeal reports, 241, courts of law have held that even without clear evidence of the extent of actual contribution made by both spouses, since the property was acquired through a joint venture it would be considered joint property. In the case of *Echaria v. Echaria*, (Civil Appeal No. 75 of 2001 (Judgment issued on 2 February, 2007), the High Court judgment recognised nonmonetary contribution by the wife. This was overturned by the Court of Appeal which held that the principle of non-monetary contribution in *Kivuitu v. Kivuitu* was mere obiter and thus has no basis in law. This decision has left a legal lacuna that the Matrimonial Property Bill, 2007 hopes to fill. The Matrimonial Property Bill (2007) provides for a framework that guarantees equality for married men and women in dealing with matrimonial property in terms of right to ownership, access, control and disposition of matrimonial property.

### The Family Protection Bill 2007

195. The Bill seeks to make provisions for the protection and relief of victims of domestic violence and to provide for related matters. Various forms of domestic violence are criminal acts under the laws of Kenya. However there is evidence that, socio-cultural and economic factors together with the complex court procedures have prevented many victims of domestic violence from getting protection under the law. Kenyans have recognized that domestic violence and all its manifestations is unacceptable and there is need therefore to ensure that where it happens, the victims are protected by having a facilitative law under which courts can protect survivors of domestic violence, ensure speedy, inexpensive and simplified procedures to access justice, requiring perpetrators of such violence to undergo counseling programmes with a view to preventing the violence; and Providing counseling programmes for the survivors of domestic violence.

196. The proposed constitution recognizes that the family is the natural and fundamental unit of society and the basis of social order, and therefore shall enjoy the recognition and protection of the state. It therefore provides that every person has the right to marry a person of the opposite sex and that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This provision has been criticized as being discriminative on the basis of sexual orientation but during the collection of views on the same, the Kenyan public overwhelmingly made presentations against the recognition of same sex unions which they viewed as unnatural and culturally unacceptable.

## Article 24

### **Rights of the child to protection, registration and nationality**

197. This should be cross referenced with Kenya's second periodic report under the Convention on the Rights of the Child (CRC/C/KEN/2). The rights recognized under this article have also been recognised under the proposed constitution which provides under section 53, that every child has a right to: a name and nationality from birth, free and compulsory basic education, basic nutrition, shelter and health care, protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. In addition, the child shall have a right to parental care and protection and not to be detained except as a measure of last resort and when detained, to be held for the shortest appropriate period of time and separate from adults and in conditions that take into account the child's sex and age.

## Article 25

### **Right to take part in the conduct of public affairs, suffrage right and right to equal access to public services**

198. Every Kenyan citizen has the right to vote and to take part in the conduct of public affairs, directly or through representatives. However the exercise of this right was deeply challenged by the disputes that followed the 2007 presidential elections. There were allegations of irregularities. The Government to established the Independent Review Electoral Commission (IREC), chaired by Justice Kriegler, to probe all aspects of the elections and come up with recommendations on how to improve the electoral process in Kenya.

199. The Commission noted deep legal, constitutional, institutional and operational weakness and inconsistencies in the electoral system. Serious anomalies were revealed in the delimitation of constituencies that impaired the legitimacy of the electoral process even before polling started. The Commission recommended the establishment of the two new Commissions – The Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundary Review Commission (IIBRC). The IIEC was established and is overseeing electoral reforms and in particular the creation of a new voter register, development of modern system for collection, collation, and transmission and tallying of electoral date, promotion of voter education and efficient conduct of elections and referenda. At the time of submitting this report, the Commission has already successfully conducted two by-elections.

200. The IIBRC is in the process of establishing, reviewing and drawing up new administrative and constituency boundaries. It will also make recommendations for delimitation of constituencies and local authorities' electoral units and recommend the optimal number of constituencies on the basis of equality of votes.

201. The Political Parties Act, 2007 establishes the Political Parties Fund managed by the Registrar of Political Parties. The Act ensures that the funds provided to the parties are used for purposes that are compatible with democratic principles, such as promoting the active participation of individual citizens in political life and the provision by the party of civic education in democracy and other electoral processes.

202. Section 38 (2) of the Proposed Constitution also provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the electors for any elective public body or office and 38 (3), has a right to be registered

as a voter, to vote by secret ballot in any election or referendum and to be a candidate for public office, or office within a political party.

203. These provisions are a milestone for the most vulnerable and marginalized persons in Kenya in ensuring participation in public life, particularly women, persons with disabilities and minority groups. This echoes one of the outstanding cases brought under Section 84 of the current Constitution, *Rangal Lemeiguran & Others v. Attorney General and others*, commonly known as the Ilchamus case where the Ilchamus, a minority group in Kenya, sought for a declaration from the Court for a special nomination seat in the National Assembly. The applicants argued that their rights as enshrined in the Bill of Rights, including the right to equal treatment and participation in public life, would continue to be violated if they did not have representation in Parliament.

204. In giving an affirmative decision, the Court echoed the principles in a previous ruling by Ringera J, in *Njoya & Others v. AG & Other*, 2004, which stated that “the concepts of equality before the law, citizens rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight of equal votes and dictates that minorities should not be turned into majorities in decision making bodies of the State. However, that cannot be the only consideration; it must be remembered that minorities of whatever shade and colour are entitled to protection and that in the context of the Constitution which is for all, majorities and minorities alike, the voices of all should be heard.”

## **Article 26**

### **Equality before the law**

205. This should be cross referenced with responses under article 2. In addition the right to equality and freedom from discrimination has been recognised in the Proposed Constitution. Section 27 states that every person is equal before the law and has the right to equal protection of the law. Equality in this case includes the full and equal enjoyment of all rights and fundamental freedoms. Further the section mandates the State to take legislative and other measures to, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

## **Article 27**

### **Right of minorities to culture, profess and practice religion and use own language**

206. Out of Kenya’s 40 million people, there are some ethnic, linguistic, and religious minorities with diverse cultures. Although this has never been a disputed fact, recent developments and court decisions have led to the need for tangible action and express recognition of this fact. The Preamble to the proposed Constitution states, “proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation”. This is an acknowledgement that Kenya’s diversity need not compromise National identity. It is in this light that the Proposed Constitution then provides that the sovereign power of the people is to be exercised both at the national level and the county level. Section 6 (3) then requires the state to ensure access to services throughout the country unlike in the past when some areas were gravely marginalized.

207. In addition, Section 7 makes English and Swahili official languages, but requires the state to promote and protect the diversity of language in Kenya and Section. 8 declare that there is no state religion, meaning that all religions must be treated equally before the law.

208. Among the national values and principles of governance are patriotism, national unity, sharing of power, inclusion, social justice, equality, non-discrimination and protection of the marginalized, all of which aim at fairness and national integration. Section 12 (1) assures all Kenya citizens equal “rights, privileges and benefits with an emphasis on particular groups who are deemed and acknowledged to be more vulnerable than other Kenyans and requires the state to address the needs of, among others, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. For emphasis section 27 guarantees equality and freedom from discrimination on any ground including race, ethnic origin, colour, religion, conscience, belief, culture or language and affirmative action must be taken to redress past disadvantages due to discrimination.

209. In a more focused manner, Section. 44 protects the rights of minorities to the use of their language and the exercise of their culture and Section 56 requires affirmative action for minorities and marginalized groups in respect of participation in state affairs, access to education, economy and employment, basic needs, and their culture. Section 100 requires Parliament to make laws to promote the legislative representation of ethnic, minority and marginalized communities.

210. When the new constitution comes into force and is fully operationalized, then Kenya will, to a large extent have fulfilled the requirements of article 27 of the Covenant although as had been recognized during the presentation of the first report, the rights to one’s language, culture and religion have always been guaranteed both under the current Constitution and other laws.

#### **IV. Conclusion**

211. For Kenya, the nature of the challenges that have been experienced in the exercise of civil and political have historical contexts which the proposed Constitution has recognized and has therefore safeguarded all the categories of rights. This is a firm recognition that all human beings are equal and as was reaffirmed in Vienna in 1993, that all human rights are universal, inter-dependent and inter-related.

212. To consolidate the human rights gains over the years, Kenya has finalized the development of a National policy and Action Plan for Human rights through a very wide consultative process. It will be used to: audit the country’s strengths, weaknesses, opportunities and threats in the protection and promotion of human rights; enable the government to rationally set human rights goals and priorities within achievable time frames; and will be a tool for planning the allocation and management of resources in a manner that is consistent with the priorities identified for the promotion, protection and enhancement of human rights in Kenya. The National Policy and Action Plan for human rights will therefore clearly link human rights issues to the country’s national planning and development agenda especially in ensuring that Kenya achieves one of the Vision 2030 goals of becoming a more human rights respecting state.