

<b>AFRICAN UNION</b>		<b>UNION AFRICAINE</b>
<b>الاتحاد الأفريقي</b> <b>African Commission on Human &amp; Peoples' Rights</b>		<b>UNIÃO AFRICANA</b> <b>Commission Africaine des Droits de l'Homme &amp; des Peuples</b>
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## **Forty-First Ordinary Session**

**16-30 May 2007, Accra, Ghana**

### **Consideration of Reports submitted by States Parties in accordance with Article 62 of the African Charter on Human and Peoples Rights**

#### **Concluding Observations and Recommendations on the Initial Report of the Republic of Kenya**

#### **I- Introduction**

1. The Republic of Kenya is a State Party to the African Charter on Human and Peoples' Rights (the African Charter) which it ratified on 23 January 1992.
2. The Report of the Republic of Kenya, submitted in accordance with Article 62 of the African Charter, was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Commission) in July 2006 and was considered at the 41<sup>st</sup> Ordinary Session of the African Commission held from 16 to 30 May 2007 in Accra, Ghana.
3. The Report was presented at the 41<sup>st</sup> Ordinary Session by the Minister of Justice and Constitutional Affairs, also head of delegation, Hon. Martha Karua, who was accompanied on this occasion by Ms. Dorothy N. Angote, Permanent Secretary of the Ministry of Justice; Ms. Mryann Mothoni Nyau-K, Senior Legal Adviser and Ms. Jeanette Mwangi, Senior State Counsel.
4. These concluding observations arise from the presentation of the Report and the oral submissions by representatives from the Republic of Kenya in respect of concerns raised by the African Commission.

5. The report was complemented by several shadow reports from various NGOs such as the Center for Reproductive Rights based in New York, USA, and Land and Housing Rights in Kenya. These different shadow reports also provided the African Commission with additional information on the human rights situation in Kenya.
6. These concluding observations give an account of the positive factors identified in the Report as well as the factors restricting the effective enjoyment of human and peoples' rights as stipulated in the African Charter. They also underline areas of concern where, in the Commission's view, action needs to be taken.
7. Finally, the concluding observations contain recommendations on measures to be taken to enhance the enjoyment of human rights in general and the rights guaranteed in the African Charter in particular.

## **II- Positive Factors**

### **The African Commission:**

8. Notes with appreciation that Kenya's Constitution makes provision for a bill of fundamental human rights and freedoms. The Constitution also provides for various constitutional bodies to promote and protect fundamental rights and freedoms in Kenya.
9. Commends the Republic of Kenya for submitting its report in accordance with Article 62 of the African Charter. The African Commission highly appreciates the efforts being made by the government of Kenya to guarantee the enjoyment of the rights and freedoms as enshrined in the African Charter on Human and Peoples' Rights.
10. Welcomes the fact that the Bill of Rights (Chapter 5 of the Kenyan Constitution) makes provision for fundamental rights and freedoms of the individual, which apply regardless of race, tribe, place of origin or residence or other local connections.
11. Welcomes with appreciation the establishment of the following human rights institutions by Kenya's Parliament:
  - a. The Kenya National Commission on Human Rights;
  - b. The Gender Commission;
  - c. The Kenya Anti-Corruption Commission;

- d. National Council for Children Services;
  - e. National Council on Persons with Disabilities; and
  - f. The Law Reform Commission.
12. Also takes note of the fact that Kenya has ratified major international and regional human rights instruments. These include the following:
- The International Covenant on Civil and Political Rights (ICCPR);
  - The International Convention on the Elimination of all forms of Racial Discrimination (CERD);
  - The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);
  - The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and
  - The Convention on the Rights of the Child;
13. In addition, the country has ratified:
- 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 the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and
  - The Rome Statute of the International Criminal Court.
14. 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; and
  - The Protocol on the Rights of Women in Africa.
15. Welcomes the enactment by Kenya of the Children's Act, which domesticates the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; and for the establishment through this Act, of statutory structures to facilitate the administration and safeguard of the rights of children including the National Council for Children Services (NCCS).
16. Welcomes the initiative in tackling police brutality by referring reported cases to the Attorney General for investigation.

17. Notes with appreciation the efforts against the proliferation and the misuse of small arms and light weapons;
18. Notes the efforts made by the Republic of Kenya in establishing the National Council for Persons with Disabilities which is competent to look into the issues affecting persons with disabilities.
19. Welcomes the efforts being made to combat the Human Immunodeficiency Virus and the Acquired Immunodeficiency Syndrome (HIV/AIDS) pandemic, including the adoption of the "National Policy for the Prevention and Control of HIV/AIDS and Sexually Transmitted Infections (STI)";
20. Commends the initiatives being taken by Kenya to fight against corruption,
21. Encourages Kenya to continue with the Universal Free Primary Education (UFPE) Policy ;
22. Commends Kenya on the de facto moratorium on death penalty;
23. Takes note of the commitment of the Republic of Kenya to promote and protect human rights and the establishment of a committee to address the problems and challenges faced by the country in the area of human rights.

**IV- The factors restricting the enjoyment of the rights enshrined in the African Charter:**

24. The report indicates that Kenya's economic performance in the last decade and the declining per capita income from \$ 271 in 1990 to \$239 in 2002, have a negative effect on the overall well-being of the people of Kenya.
25. The report acknowledges that about 17 million people or 56% of the population live below the poverty line. Poor economic growth, widespread corruption and the HIV/AIDS scourge have negatively affected the government's ability to implement the provisions of the Charter.
26. The report further shows that Structural Adjustment Programmes introduced by the World Bank & the IMF, have led to reduced funding for social benefits. The liberalization of World Trade has also created balance of payments problems between developing countries and the developed world in favor of the latter.

27. The report indicates that agriculture alone accounts for 62% of overall employment, hence the importance of this sector. However, due to the drought conditions, which have prevailed in the country in the last decade, the agricultural sector has generally experienced low and declining productivity. The decline in productivity in the sector is a major constraint in the realization of the provisions of the Charter on the right to food, work, education, health etc.
28. The report reveals that gender-based violence is on the increase in Kenya. Sexual abuse of women remains a challenge. In many incidents of robbery, women fall victim to rape. They are also more susceptible to defilement, incest and sodomy cases.
29. High levels of illiteracy and poverty affecting women in Kenya make them unable to access employment. In terms of accessing means of production for business, most women lack collateral and security to get loans because ownership of property is still largely in the hands of men.
30. The report indicates that very few women own meaningful property in Kenya. The 1998 (recent statistics) Kenya Country Gender Profile showed that while men owned the majority of building structures, the highest proportion of women 32.8% owned structures in shanties. Shanties are often demolished by the city council without notice.

### **III - Areas of Concern**

While acknowledging efforts by Kenya to promote and protect human rights and raise awareness about the principles and provisions of the African Charter, the African Commission is concerned by the fact that :

31. Lack of consultations prevailed among Government organs in the drafting of the initial report which was a combination of seven overdue reports by Kenya; in particular, a large segment of civil society appears not to have been involved in the preparation process
32. The report indicated on Paragraph 182 (p.43) that its reporting guidelines which were first published in 1989 have been reduced in number to address the complaints from Member States.
33. The Commission notes that Kenya is yet to domesticate the African Charter and other instruments it has ratified. Furthermore, Kenya is yet to ratify the Protocol of the Court of Justice of the African Union; the African Union Convention on

the Elimination of Mercenaries in Africa; the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights and the AU Convention on Combating Corruption in Africa;

34. Poverty among women and gender-based violence remain widespread in Kenya;
35. The HIV pandemic is still ravaging the Kenyan population due to the fact that many people infected have limited resources to get appropriate drugs;
36. The continued marginalization of indigenous populations coupled with the position of the Kenyan government on the issue of indigenous peoples is an area of concern for the Commission;
37. Corruption remains a serious issue in Kenya and the Commission is concerned about the non-ratification by Kenya of the OAU Convention on Combating Corruption in Africa.
38. Kenya having ratified the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, the Commission is concerned at the closing of its borders with Somalia to people fleeing conflict zones, and the reported violation of the principle of *non refoulement*.
39. The death penalty is still on the Statute books in Kenya in spite of the demonstrated commitment not to carry out this sentence.
40. The low level of women's representation in decision-making institutions in the Government, including in appointed positions.

## **VI- RECOMMENDATIONS**

41. The African Commission recommends to the Government of Kenya to:
42. Domesticate the African Charter and related protocols it ratified as this exercise would enable the Country to take the necessary measures to implement the provisions and take concrete actions to give effect to the provisions of the African Charter;
43. Take the necessary steps for the ratification and the domestication of:

- The Protocol to the African Charter establishing an African Court on Human and Peoples' Rights and make a Declaration under article 34 (6)
  - The OAU Convention on Combating Corruption in Africa
44. Enact a more stringent law to address domestic violence and sexual offences ;
  45. Domesticate the OAU Convention Governing Specific Aspects of Refugee Problems in Africa;
  46. Review the policy on the border issue with Somalia with respect to Somalian refugees; and more specifically, observe the principle of *non refoulement*.
  47. Initiate a consultative process aimed at involving all stakeholders in the drafting of the report in line with the African Commission's guidelines for State reporting;
  48. Initiate a policy that includes the Robben Island Guidelines as well as the United Nations minimum standard rules concerning prisons;
  49. Reduce the marginalization of indigenous populations by strengthening central government services to eradicate poverty, overcome insecurity and foster development;
  50. Ensure that the rights of indigenous and socially disadvantaged persons are respected; and deliberately develop policies that will enhance the participation of these persons in their affairs and the governance of the country.
  51. On Discrimination against women, undertake deliberate, concrete steps and policies which will enhance the participation of women in government and in key positions.
  52. Take adequate measures, legislative and others to address the right to mental health of Kenya people,
  53. Collaborate with civil society, international and regional organizations, to sensitize people and address Kenya's difficulties, in particular problems related to insecurity, corruption, unemployment and development.

54. Consider abolishing the death penalty altogether;

55. Follow the African Commission's guidelines on state reporting, and collaborate with NGOs and academic institutions during the process of preparing reports to be submitted to international and regional treaty bodies.

56. Indicate to the Commission in its 2009 periodic report, what measures Kenya has taken to give effect to these recommendations.

**Adopted at the 41<sup>st</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 16 to 30 May 2007 in Accra, Ghana**