REPORT TO THE COMMITTEE AGAINST TORTURE ON
THE REVIEW OF KENYA’S THIRD PERIODIC REPORT
ON THE IMPLEMENTATION OF THE PROVISIONS OF
THE CONVENTION AGAINST TORTURE AND OTHER
CRUEL, INHUMAN AND DEGRADING TREATMENT
AND/OR PUNISHMENT.

FEBRUARY, 2020
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INTRODUCTION

1. The Kenya National Commission on Human Rights (KNCHR) submits this report to the Committee against Torture to inform its review of the State’s third Periodic Report under the International Convention against Torture, and Other Cruel, Inhuman and Degrading Treatment and/or Punishment (CAT).

2. The Kenya National Commission on Human Rights is established under Article 59 of the Constitution of Kenya, 2010 and operationalized under the Kenya National Commission on Human Rights Act 2011 (revised 2012).1 It is the successor to the Kenya National Commission on Human Rights established in 2003 under the Kenya National Commission on Human Rights Act 2002.2 In May 2017, the Commission was re-designated by the Honourable Attorney General to act as the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities.3 In addition to the functions of the Commission outlined in Article 59 (2) Constitution of Kenya 2010 and section 8 of the Kenya National Commission on Human Rights Act, 2011 the Commission has been given additional functions to oversight implementation of the Prevention of Torture Act under section 12 of the Prevention of Torture Act.4 The Kenya National Commission on Human Rights has since 2004 enjoyed an Affiliate Status with the African Commission on Human and Peoples’ Rights.5 The Commission is also a member of the Network of African National Human Rights Institutions (NANHRI), the regional umbrella body that brings together National Human Rights Institutions in Africa. Since conferment of ‘A’ status in 2005 on its compliance with the Paris Principles, the Commission has been subsequently reaccredited with ‘A’ status by the Global Alliance of National Human Rights Institutions (GANHRI) in the succeeding three five year cycles in 2008, 2014 and 2019.

3. The Constitution and Article 8 (f) of KNCHR Act mandate the Commission to act as the principal organ of the State in ensuring compliance with obligations under international

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2 Act No 9 of 2002 (repealed). The History of the institution however dates further back in 1996 when the then His Excellency President Moi set up a Standing Committee on Human Rights (SCHR) vide a gazette notice of June 1996.
and regional treaties and conventions relating to human rights. KNCHR in fulfillment of this mandate submits alternative reports to United Nations Treaty bodies as well as the regional treaty bodies and participates in the review of the State by the various Committees. KNCHR also disseminates the concluding observations of the various treaty body committees and works with the State to set time-lines for implementation and monitor achievement of the various recommendations made by these Committees.

4. KNCHR presents this report to the Committee Against Torture in fulfilment of its constitutional and statutory obligations and in line with its regional and international obligations as a national human rights institution; in order to advise the Committee on efforts made towards implementation of the provisions of CAT at the domestic level and highlight the key concerns and challenges in implementing CAT in Kenya.
INFORMATION ON IMPLEMENTATION OF THE CONVENTION AT DOMESTIC LEVEL


The Committee requested for up to date information on when the Prevention of Torture Bill (2014) will be tabled for adoption by Parliament. The Committee further requested for information on the measures taken by the state party to ensure its prompt consideration, adoption and implementation.

1. Prevention of Torture Act, 2017 (No. 12 of 2017) was passed by the National Assembly on 6th April 2017; it was signed into law by H.E. the President on the 13th April 2017 and took effect as from 20th April 2017. The Prevention of Torture Act 2017, seeks to give effect to Articles 25 (a)\(^6\) and 29 (d) of the Constitution\(^7\) as well as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”).

2. The Act in its current form provides appropriate protection against torture. The Act provides for a broad definition of torture in tandem with that provided for in Article 1 of the Convention and creates the offences of torture on the one part and cruel, inhuman or degrading treatment on the other. The punishment prescribed for the offence of torture under section 5 of the Act is imprisonment for a term not exceeding twenty five years.\(^8\) If the victim dies as a result of the torture, the penalty prescribed is life imprisonment.\(^9\) The penalty prescribed for the offence of cruel, inhuman or degrading treatment or punishment is imprisonment for a term not exceeding fifteen years and/or a fine not exceeding one million shillings (USD 10,000).\(^10\)

3. The Act under Section 6 provides that no justification can be invoked for torture, cruel, inhuman or degrading treatment or punishment. The Act further makes evidence or confession obtained by means of torture, cruel, inhuman or degrading treatment inadmissible in any proceedings.\(^11\) The Act prohibits the grant of amnesty or immunity to a person who is accused of the offence of torture, or cruel, inhuman or degrading treatment or punishment.\(^12\)

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\(^6\)Article 25(a) of the Constitution of Kenya, 2010 lists ‘freedom from torture and cruel, inhuman or degrading treatment or punishment’ as one of the rights and fundamental freedom that may not be limited.
\(^7\)Article 29(d) of the Constitution secures the freedom and security of the person including the right not to be ‘subjected to torture in any manner, whether physical or psychological’.
\(^8\)Section 5(1), Prevention of Torture Act, 2017.
\(^12\)Section 10, Prevention of Torture Act, 2017.
4. The Act under Section 12 bequeaths the Kenya National Commission on Human Rights with the powers to: investigate alleged violations of the Act; promote the right to freedom from torture, cruel, inhuman or degrading treatment; call for information from any public or private body to facilitate monitoring of compliance with the act; monitor compliance by the state with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment; issue summons; recommend effective measures for the prevention of torture, cruel, inhuman or degrading treatment, create awareness among public on their right to freedom from torture, cruel, inhuman or degrading treatment; receive reports from public entities with respect to implementation of the Act; Advise the government on matters relating to prevention of torture; and work with enforcement agencies towards the promotion of compliance with international best practices and prevention of torture and cruel, inhuman or degrading treatment and punishment.

5. In terms of accountability and enforcement on implementation of the provisions of the Act, section 25 of the Act mandates the Commission to submit an annual report to the National Assembly, which report is to include an overall assessment of Government’s performance with regard to prevention of torture and cruel, inhumane and degrading treatment during the period under review by the Commission. The Commission may also at any time submit special reports to the Cabinet Secretary responsible for matters relating to justice on any matter relating to its functions. The section further obligates the Cabinet Secretary to report to the National Assembly annually on steps which the government has taken in implementing the recommendations made by the Commission.

6. With respect to victims, the Act provides a victim of torture with the enforceable right to adequate reparation; adequate compensation and rehabilitation. In the event of the victim’s death, the victim’s dependants are entitled to reparation. The Act obligates the State to put in place programmes to provide specialised care for victims of torture which include psychological support, appropriate medical assistance and legal assistance or legal information on relevant judicial and administrative procedures. It also provides that the cost of medical and professional counselling incurred by a victim of torture is to be incurred by the State through the Victim Protection Trust Fund created under section 27 of the Victim Protection Act, 2014.

7. The Act under Section 21 proscribes the expulsion, return or extradition of a person to another country where there is reason to believe that the person is in danger of being subjected to torture, or cruel, inhuman or degrading treatment or punishment. It compels the State to provide assistance to a persons who has been detained in respect

13Section 17, Prevention of Torture Act, 2017.
to an offence committed under the Act by being allowed to communicate with a family member, the nearest of the person or state of which he or she is a national.

8. Lastly, the provisions of the Act will prevail in the event that there is a conflict between the provision of the Act and the provisions of any other law in regard to the crime of torture or cruel, inhuman or degrading treatment or punishment.\(^\text{15}\)

9. The KNCHR highly welcomes and commends the enactment of the Prevention of Torture Act. The Commission is of the view that this is a timely intervention especially at this time when the country is grappling with cases of extrajudicial killings and torture. It is however important that the State shifts its focus to full operationalization of the Act.

**Proposed recommendations.**

10. The Commission recommends that the State allocates the Kenya National Commission on Human Rights adequate funding to enable it perform the functions given to it under the Act.

11. The Commission notes that the Victim Trust Fund is yet to be fully operational, years after establishment. The Commission therefore strongly recommends the full operationalization of the Act for the full impact to be felt.

12. The State also needs to put in place concrete measures to sensitise members of Police Service, the Office of the Director of Public Prosecutions and other relevant actors on the provisions of this Act.

**Paragraph 2 of the List of Issues- Penalty for the offence of torture and ill-treatment against children.**

The Committee requested up to date information on measures taken to ensure that national legislation provides appropriate penalties for torture and ill-treatment of children.

13. Section 5 of the Prevention of Torture Act prescribes twenty-five years imprisonment terms for the offence of torture and life imprisonment if a person dies as a result of torture. In addition, section 7 of the Prevention of Torture Act prescribes a punishment of fifteen years imprisonment or a fine not exceeding one million shillings for the offence of cruel, inhuman and degrading treatment. The penalties also apply to torture and ill-treatment of children.

\(^{15}\) Section 31, Prevention of Torture Act, 2017.
14. However, Basic Education Act, 2013\(^{16}\) as well as the Children Act, 2001\(^{17}\) prescribe lower penalties for offence of torture and cruel inhuman or degrading treatment or punishment of a child. The Basic Education Act prescribes a penalty of imprisonment not exceeding six months or fine not exceeding one hundred thousand Kenya shillings (USD 1000).\(^{18}\) The Children Act on the other hand prescribes a penalty of imprisonment for a term not exceeding one year or a fine not exceeding fifty thousand shillings (USD 500).\(^{19}\)

15. Section 31 of the Prevention of Torture Act provides that in the event of a conflict of law between the provisions of the Act and any other law in regard to the crime of torture or cruel, inhuman or degrading treatment or punishment, the provisions of the Prevention of Torture Act will prevail. This means that in respect to torture and ill-treatment of children, the provisions of the Prevention of Torture Act will prevail over the provision of the Children Act and the Basic Education Act.

16. The Commission takes cognisance that the review of the Children Act is ongoing being spearheaded by the Ministry of Labour and Social Protection. The State has an opportunity to ensure that the Children Act is amended to provide for appropriate penalties for the acts of torture and ill treatment of children taking into account the gravity of the offence and to bring it in consonance with the superseding law on this matter; the Prevention of Torture Act.

**Proposed recommendation.**

17. The Committee should therefore recommend that the State party reviews the Children’s Act and the Basic Education Act with a view to ensuring that national legislation provides for appropriate penalties for acts of torture and ill-treatment of children.

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16 No 14 of 2013 available at http://www.kenyalaw.org/lex//actview.xql?actid=No.%2014%20of%202013#part_XI.

17 No 8 of 2001 available at http://www.kenyalaw.org/lex//actview.xql?actid=No.%208%20of%202001#part_II.

18 Section 36 (2) Basic Education Act.

19 Section 18 (1) as read with section 20 of the Children Act.
Paragraph 3 of the List of Issues - Prosecution for the offence of torture.

The Committee requested for up to date information as to whether any law enforcement, intelligence, prison, or military personnel have been prosecuted for the crime of torture. The Committee further requested for details on the relevant cases and their outcomes.

18. The crime of torture and ill-treatment is defined within the Prevention of Torture Act, National Police Service Act,\textsuperscript{20} the Kenya Defence Forces Act,\textsuperscript{21} and the National Intelligence Service Act\textsuperscript{22}. This means that law enforcement, military and intelligence officials may be held liable for the crime of torture in the course of their work. In addition, the Persons Deprived of Liberty Act, 2014 makes it a criminal offence to subject a person deprived of liberty to cruel, inhuman or degrading treatment attracting a penalty of 2 years imprisonment or a fine of Kshs. 500,000 (USD 5,000).\textsuperscript{23} This applies to law enforcement, prison and military officials when handling persons in their custody.

19. Notably though, the provisions of the law as cited above contradicts the penalty accorded under the Prevention of Torture Act, 2017 and thus need to be aligned to the latter superseding law.

20. To date, there has been no prosecution of military personnel for the crime of torture despite numerous complaints of torture against the military documented by the Kenya National Commission on Human Rights in the fight against terrorism.\textsuperscript{24} The Commission in exercise of its mandate to monitor, investigate, and report on observance of human rights by national security organs\textsuperscript{25} has been denied access to information and detention facilities crucial to carrying out its investigations into allegations of torture of civilians in military custody. In addition, intimidation of victims and witnesses has frustrated efforts to seek accountability for allegations of torture.\textsuperscript{26}

\textsuperscript{20}Section 95 National Police Service Act.
\textsuperscript{21}Section 133 A of the Kenya Defence Forces Act as amended by the Kenya Defence Forces (Amendment) Act of 2016. Penalty for torture is fine of ten million shillings equivalent to USD 100,000 or imprisonment for 25 years. Penalty for ill treatment is fine of five million shillings equivalent to USD 50,000 or imprisonment for 15 years.
\textsuperscript{22}Section 51(2) and 51 (3) National Intelligence service Act. Penalty for Torture is imprisonment for 25 years and for ill treatment is 15 years.
\textsuperscript{23}Section 5, Persons Deprived of Liberty Act, 2014.
\textsuperscript{25}Article 59 (2) (d) Constitution of Kenya, 2010.
\textsuperscript{26}Error of Fighting Terror with Terror page 38.
21. During the reporting period, four (4) police officers have been charged with the offence of cruel, inhuman and degrading treatment under section 95 of the National Police Service Act following investigations by the Independent Policing Oversight Authority. It is critical to note that the prosecutions have been brought under the provisions of the Penal Code. There is no known reported case of cruel, inhuman and degrading treatment that has been prosecuted under the Prevention of Torture Act, 2017.

22. It is important to note that whereas the National Intelligence Service Act criminalises torture, it is quite possible for intelligence officers who perpetrate acts of torture to use the defence under section 73 National Intelligence Service Act to evade prosecution. Section 73 of the National Intelligence Service Act provides that: ‘proceedings shall not lie against the Director General or any member of the service for anything done or omitted to be done in good faith in the performance of the functions of the service or the exercise of powers of the service in the Act.’ The Act needs to be revised in line with the provisions of the Prevention of Torture Act 2017 to ensure that operatives do not rely on the provisions of section 73 of the National Intelligence Act in respect to acts of Torture.

23. Nonetheless, if there is any conflict between the provisions of the Prevention of Torture Act and the National Intelligence Service Act in respect to crime of torture, cruel, inhuman or degrading treatment, the provisions of the Prevention of Torture Act shall prevail.

24. Worth noting, although the Commission has power under Article 59 as read with section 8 of the KNCHR Act to, ‘monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs’, there is no express power to monitor places of detention. This is unlike the repealed Kenya National Commission on Human Rights Act, 2002 which contained an express function to, ‘to visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon’. This express function was scraped in the KNCHR Act of 2011. Although as a matter of principle nothing should stop the Commission from such visits in exercise of its broad constitutional and statutory

27 The Independent Policing Oversight Authority ‘the Policing Lens: IPOA Investigations’ (IPOA Newsletter, 2016). Charges have been preferred against IP Agnes Mwendwa Magiri and PC Sarah Wacira for subjecting a minor to cruel, inhuman and degrading treatment Contrary to Section 95 of the National Police Service Act. The ODPP has also preferred charges against Jamal Hussein and Police Inspector Zuhura Khan following investigations by IPOA.


29Section 31 Prevention of Torture Act No 12 of 2017.
mandate, there is great value in restoring the express powers of the Commission particularly in order to more effectively discharge its role as member of the consultative committee under the Persons Deprived of Liberty Act, 2014 and the sections 12 and 25 of the Prevention of Torture Act.

**Proposed recommendation.**

25. The Committee should recommend that the military allows the KNCHR access to military detention facilities to enable KNCHR complete investigations into allegations of torture, cruel, inhuman or degrading treatment or punishment by military personnel.

26. The Committee should recommend that the State amends the National Intelligence Service Act to align its provisions to the Prevention of Torture Act.

27. The Committee should recommend that Parliament amends Section 5 of the Persons Deprived of Liberty Act, 2014 specifically the penalty for the offence of cruel, inhuman or degrading treatment so as to align it with sections 5 and 7 of the Prevention of Torture Act, 2017.

28. The Committee should recommend that the State amends section 8 of the Kenya National Commission on Human Rights Act (No. 14 of 2011) and section 12 of the Prevention of Torture Act so as to include an express power to visit prisons and places of detention including military facilities, police stations, mental health institutions and children homes with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon.
Paragraph 4 List of Issues- Accountability for extra-judicial killings, enforced disappearances and excessive use of force by security personnel.

The Committee requests for up to date information on prosecutions undertaken during the reporting period concerning extra-judicial killings, enforced disappearances and excessive use of force allegedly committed by police, intelligence, prison, military, or other security personnel such as municipal guards (city askaris); the charges levied against the accused in each case; the number of cases in which prosecutions resulted in convictions; and the punishments in each case.

Extra-judicial killings and excessive use of force

29. During the reporting period, members of the Police Service have come under increased oversight to ensure compliance with the law when executing their duties. The Independent Policing Oversight Authority in exercise of its mandate to provide civilian oversight to the work of the Police, has investigated and forwarded 103 files to the Office of the Director of Public Prosecutions for further action.\(^{30}\) As a result of its work, IPOA has secured conviction of 6 police officers for excessive use of force and extra-judicial killings. The cases are:

(i) Republic versus IP Veronicah Gitahi and PC Issa Mzee\(^{31}\) - Involved the shooting of 14 year old girl in Kwale who died after being shot by Police. The accused were found guilty of the offence of manslaughter contrary to section 202 of the Penal Code and sentenced to 7 years imprisonment.

(ii) Republic versus PC Titus Ngamua Musila\(^{32}\) - Involved the shooting of a 26 year old male at Githurai 45 bus station, Kiambu by Police. The accused person was found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and was sentenced to death.

(iii) Republic versus PC Bonjamine Kahindi and PC Stanely Okoti\(^{33}\) - Involved the shooting of Geoffrey Mogo, Amos Makori and Joseph Onchuru in Kangemi, Nairobi by Police. The accused persons were charged and convicted with three counts of murder under section 203 as read with section 204 Penal Code. The three officers were sentenced to death.

(iv) Republic versus CIP Nahashon Mutua\(^{34}\) - Involved the killing of one Martin Koome while he was detained in custody at Ruaraka Police Station, Nairobi. The accused was charged and convicted for the offence


of murder contrary to section 203 as read with 204 of the Penal Code. The officer was sentenced to death.

30. The Commission is concerned over the low rate of prosecution of security officers for extra-judicial killings and excessive use of force vis a vis the number of complaints lodged. The Commission in the reporting period (excluding the period of the 2017 General Election) has received 54 complaints of non-fatal police shooting, 32 complaints of fatal police shooting, 28 complaints of death in police custody, 123 cases of extra-judicial executions, 45 cases of shooting by other armed services/forces and 2 cases of death in prison custody. The top government agency against whom complaints were made against was the Kenya Police Service (146 complaints) and the Kenya Wildlife Services (38 complaints).

![Figure 1: Source of data from KNCHR Complaints Management System (2015-2020).](image)

31. From the Commission’s complaints database, the majority of victims of extra-judicial killings, fatal police shootings and death in police custody are mostly male at 78.4 per cent compared to females at 19.7 per cent as depicted in the pie chart below. Also notable from the Commission’s records is the fact that a majority of the victims are youth (see figure 3 below).
Figure 2: Categorization of complaints on extrajudicial executions, fatal and non-fatal police shootings and death in police custody by sex. Source: KNCHR Complaints Management System (2015-2020).

Figure 3: Categorization of complaints on extra-judicial executions, fatal and non-fatal police shootings and death in police custody by age (2015-2020). Source: KNCHR Complaints Management System.
32. The Commission further documented a total of 99 cases of deaths and 216 cases of injuries attributable to the National Police Service following the disputed 8th August, 2017 elections.\textsuperscript{35} The number of deceased persons, who include ten children is attributable to the Police using live ammunition and from police bludgeoning using truncheons. Of concern is the death of a six-month-old baby (baby Pendo) who was allegedly clobbered by armed security agents whilst under the care of the Mother in Kisumu County. As at the time of reporting, no action has been taken to investigate and hold to account security agents involved, save for the finding by the Magistrate’s Court in Kisumu that there is sufficient evidence pointing to culpability of members of the National Police Service. On the basis of command responsibility, the Court has found the commanders in charge of operation that saw to the death of baby Pendo as liable and has recommended the Director of Public Prosecutions to take action.\textsuperscript{36} The inquiry findings are crucial towards securing accountability for use of excessive force during the electioneering period.


\textsuperscript{36} In the Matter of Baby Samantha Pendo (Deceased) Inquest Number 6 of 2017.
During the reporting period, the Commission also recorded complaints on cases of excessive use of force used against University of Nairobi students by National Police Service following protests by a section of the students on the 28th September 2017. The Police in an attempt to quell protests, stormed into University of Nairobi Department of Architecture, Design and Development Complex, student halls of residence and lecture rooms where they are accused of severely beating students, hurling teargas into lecture rooms and halls of residence, looting and damaging personal property of students, extorting bribes in exchange for release and sexual harassment. Many students were injured as a result. Efforts towards seeking accountability for the violations have been hampered due to unwillingness of victims and witnesses to testify.
against the perpetrators for fear of reprisals from police and university administration.

**Proposed recommendations**

34. The State through IPOA and Internal Affairs Unit to take action against officers-in-charge of various deployment units for the use of live ammunitions and excessive force used by officers under their command.

35. The State to take action against security agents who are found culpable for using excessive force against civilians during the electioneering period.


37. The State should fully operationalize the National Coroners Service Act, 2017 (No. 18 of 2017) including by appointing members of the National Coroners Service.

**Enforced disappearances**

38. Enforced disappearance is not defined as distinct criminal offence within the statute books outside the realm of international crimes. This makes it difficult to prosecute law enforcement officials for their role in effecting enforced disappearances. Enforced disappearance is criminalized as a crime against humanity when committed as part of a widespread or systemic attack directed against a civilian population in the International Crimes Act.\(^{38}\) The effect of this is that many isolated acts of enforced disappearance and not necessarily occurring as part of systemic or widespread attack against civilians will remain outside the scope of domestic criminal law or the jurisdiction of national courts.

39. The closest definition of enforced disappearance can be found in chapter 25 of the Penal Code which provides for offences against liberty such as kidnapping,\(^{39}\) abduction and wrongful concealing or keeping in confinement kidnapped or abducted persons. However, the Working Group on Enforced Disappearances has pointed out that using the term kidnapping alone is inappropriate in defining enforced disappearances as it ‘does not mirror the complexity and the particular serious nature of enforced

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\(^{39}\) Section 254 as read with section 257 Penal Code which define kidnapping as unlawfully conveying a person beyond the limits of Kenya without the consent of the person or person legally authorised to consent on behalf of that person. The penalty for kidnapping is seven years.
The offences against liberty defined in Chapter 25 of the Penal Code do not cover with sufficiency all the elements of enforced disappearances which are: ‘deprivation of liberty against the will of the person concerned; involvement of a government official or indirectly through acquiescence; and refusal to disclose the fate and whereabouts of the person concerned.’ The sanctions listed for offences against liberty do not take into account the gravity of enforced disappearances therefore fall short of providing comprehensive protection.

The lack of distinct definition of enforced disappearance as criminal offence outside the scope of crimes against humanity comes in the backdrop of about 81 complaints of enforced disappearances that have been documented by the Kenya National Commission on Human Rights, during the reporting period specifically in the fight against terrorism. Of concern are reports of persons who have been held in military facilities which are not recognised as places of detention for civilians therefore placing the affected individuals outside the protection of the law. Of further concern is that KNCHR has been denied access to these facilities while carrying out investigations into allegations of torture and ill-treatment as well as detention of persons within military facilities.

In 2016 instituted in the High Court seeking compensation for the victims in which the Commission has applied for joinder as an interested party. The only recourse for victims and families of disappeared persons is an order of habeas corpus or an inquiry. The non-derogable right to habeas corpus petition to determine the legality of detention is provided for under Article 51(2) as read with Article 25 (d) of the Constitution of Kenya. Section 389(1) of the Criminal Procedure Code gives power to the High Court to direct, ‘that any person illegally or improperly detained in public or private custody within those limits be set at liberty’. Despite the provisions of the Constitution and the law, the effectiveness of order of habeas has been called into question especially in the context of the fight against terrorism. In the case of Masoud

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41 Ibid
42 KNCHR’s report titled ‘Error of Fighting Terror with Terror report’ (n 7)
44 Phyllis Tamnai & 17 others v KDF & the AG [HC PET No. 1 of 2016].
Salim Hemed and another versus Director of Public Prosecution and 3 others, the court declined to grant an order of habeas despite glaring evidence that Salim Hemed had disappeared in the hands of the police during the raid of Masjid Musa on 2nd February 2014. Instead, the court went ahead to invoke section 387 of the Criminal Procedure Code and declare Salim as missing but believed to be dead and ordered for further investigations into his disappearance by the Criminal Investigations Department to be carried out contemporaneously with an inquiry/inquest by the Chief Magistrates court.

43. Despite the Commission’s efforts and correspondence to engage the Criminal Investigations Directorate (CID) as directed by the court in the Hemed case above, no joint investigations have been launched nor a report filed back in court. The family or the representatives of the disappeared have not been informed of the steps taken by the State.

Proposed recommendations
44. The State ratifies the International Convention for the Protection of All Persons from Enforced Disappearance.

45. The State defines Enforced Disappearance as a distinct criminal offence within the statute books that will take into account the elements of enforced disappearance as espoused in the International Convention for the Protection of All Persons from Enforced Disappearance.

46. The State grants access to military detention facilities to the Kenya National Commission on Human Rights while carrying out investigations into torture and ill-treatment as well as enforced disappearances.

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Section 387(1) of the Criminal Procedure Code states that, “When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386 (1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence”.

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Paragraph 5 List of Issues- Persons deprived of liberty.

The Committee requested for up to date information on the measures taken during the reporting period to ensure that all persons deprived of liberty can enjoy, in practice, fundamental legal safeguards from the moment of arrest, particularly the right to have access to a lawyer, to notify a relative, to be examined by an independent doctor and to be presented to a judicial authority promptly, as provided for in article 49 of the Constitution and particularly, information on:

A. Measures taken to ensure that the Persons Deprived of Liberty Bill is enacted into law, considering the State party’s follow up report to the Committee stating this was expected to occur in August 2014.

47. The Person Deprived of Liberty Act\(^\text{47}\) was enacted into law on 24th December 2014 and commenced operation on 14th January 2015.

48. The Act provides for a framework for the protection of the rights of persons deprived of liberty, and mandates authorities in charge of persons deprived of liberty to ensure that persons deprived of liberty enjoy protection of fundamental rights and freedoms subject to limitations as may be prescribed in the Constitution of Kenya.\(^\text{48}\) This includes the right to be promptly informed of the reasons of arrest, fair hearing and trial, right to present their defence either personally or through a defence counsel of the person’s choice, right to communicate with family or person of choice, the right not to be compelled to make a confession, the right to not to be compelled to plead guilty to any charges and the right to communicate with an advocate privately.

49. The Act makes it a criminal offence to subject a person deprived of liberty to cruel, inhuman or degrading treatment attracting a penalty of 2 years imprisonment or a fine of Kshs. 500,000 (USD 5,000).\(^\text{49}\) The Act does not make provision for torture as a criminal offence.

50. The Commission notes with concern that these safeguards afforded are not upheld in practice. In its report on human rights violations in the matter of Miguna Miguna, the Commission has documented failure by police to uphold fundamental legal safeguards of an arrested person from the moment of arrest.\(^\text{50}\) In this case, upon the arrest of

\(^{47}\) Act No 23 of 2014 available at \url{http://www.kenyalaw.org/lex/actview.xql?actid=No.%2023%20of%202014} (accessed on the 19\textsuperscript{th} February 2017).

\(^{48}\) Part II Persons Deprived of Liberty Act, 2014

\(^{49}\) Section 5 Persons Deprived of Liberty Act, 2014

Miguna Miguna he was held incommunicado and not informed of reasons of arrest. During his ordeal before his subsequent deportation, Miguna was held in custody without production in court for 14 days without access to lawyers and his family. This is despite three court orders that ordered his release from custody.\textsuperscript{51}

B. Measures taken to monitor compliance of police and other security officials with these legal safeguards, including data on any disciplinary or other action against police officers for refusing to provide prompt access to a lawyer, independent doctor or notification to a relative.

51. The legal framework to monitor compliance with legal safeguards for persons in custody is now in place. The Independent Policing Oversight Authority established pursuant to the Independent Policing Oversight Authority Act 2011 exercises a number of functions geared towards ensuring that the police in the execution of the duties strive for professionalism, discipline and comply with human rights and fundamental freedoms. Amongst these functions includes the inspection of police premises including detention facilities under the control of the police,\textsuperscript{52} and the investigation of complaints related to disciplinary or criminal offences carried out by the members of the Police Service.\textsuperscript{53}

52. In respect to these functions, IPOA has investigated and recommended the prosecution of one police officer for refusal to provide medical assistance and access to independent doctor of an arrested person who was ailing in custody. The officer has been charged with cruel, inhuman and degrading treatment and punishment under section 95 of the National Police Service Act.\textsuperscript{54} IPOA has further investigated and secured conviction of one police officer (Republic versus Nahashon Mutua) for death of an arrested person in police custody.\textsuperscript{55} The accused person was found guilty of murder under section 203 as read with section 204 of the Penal Code and sentenced to death.

53. In addition, the Persons Deprived of Liberty Act enables persons deprived of liberty to lodge complaints where one considers that their rights have been violated. The complaints can be lodged by the complainant in person or on his/her behalf either orally or in writing to the officer in charge of the facility, the Cabinet secretary in Charge of matters relating to persons deprived of liberty, the Commission on Administrative

\textsuperscript{51}Miscellaneous Criminal Application No 57 of 2018.
\textsuperscript{52} Section 6 (e) Independent Policing Oversight Authority Act Cap 88 Laws of Kenya available at http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%2088 (accessed on 19\textsuperscript{th} February 2017).
\textsuperscript{53} Section 6 (a) ibid
\textsuperscript{54} Republic versus Police Inspector Zuhura Khan (Criminal Case No 1834/2015 Milimani Law Courts).
\textsuperscript{55} Republic versus Nahashon Mutua (Criminal Case No 84 of 2015) 2019 e KLR available at http://kenyalaw.org/caselaw/cases/view/169489/.
Justice or the Kenya National Commission on Human Rights.\textsuperscript{56} The Act makes it an offence for a law enforcement officer to obstruct, conceal or fail to act on a complaint lodged by a person deprived of liberty with imprisonment for term of two years or a fine of Kshs 500,000 (USD 5,000). The Act further establishes a Consultative Committee on the Rights of Persons Deprived of Liberty with a mandate to deliberate and resolve matters to do with persons deprived of liberty.\textsuperscript{57} The Kenya National Commission on Human Rights is a member of this committee.

54. Between January 2015 and February 2020, the Commission has received and processed a total of 206 cases relating to the rights of an arrested person. Of the complaints received, right to be brought to court within constitutional time limit of 24 hours upon arrest constituted the largest fraction of complaints in this category followed by the right to be charged and informed of reasons for arrest.

\textbf{Figure 5:} Categorization of Complaints received on alleged violations on the Rights of Arrested Persons from January 2015 to February 2020. Source: KNCHR Complaints Management System.

55. Of 220 complaints received on violations of the rights of arrested persons, 136 affected the youth particularly male aged between 18 and 35 years in urban areas. 75.9\% of complaints received on violations of arrested persons affected men whereas 23.6\% affected women. The trends as extracted from complaints management system point to the fact that this category of violations affects male aged between 18 and 35 years.

\textsuperscript{56} Section 27, Persons Deprived of Liberty Act, 2014.
\textsuperscript{57} Section 29 Persons Deprived of Liberty Act.
Figure 6: Categorization of Complaints Received of alleged violations of the Rights of Arrested Persons by age Jan 2015 to Feb 2020. Source: KNCHR Complaints Management System.

Figure 7: Categorization of Complaints Received on Alleged Violations of the Rights of Arrested Persons by County (Jan 2015 to Feb 2020) Source: KNCHR Complaints Management System.
56. In the year 2016, the State through the National Council on the Administration of Justice carried out an Audit of the Criminal Justice System\(^58\) with a view to analyse and make recommendations towards strengthening service delivery and policy reforms in the criminal justice in Kenya. The audit examined conditions of detention within police stations in 18 counties and established the following in relation to the rights of an arrested persons:

(i) That one in five adults (between 2013 and 2014) are held in custody beyond the 24-hour limit. Data and analysis suggest that a large number of people are arrested and detained in police cells with 5000 people per police station annually;

(ii) Record keeping- Police keep records of persons within their custody, however inconsistencies have been noted in relation to failure to note date and reasons of release of person in their custody;

(iii) There is inconsistency in the information provided to detainees on their rights upon admission into custody; and,

(iv) Detainees are not able to make phone calls at the State’s expense to notify family/relative of their arrest. The detainees are either allowed to use their own phone if they have one or rely on an officer’s phone. In addition, police stations do not have visiting areas to enable visit be conducted in a dignified manner.

57. In response to the above audit, the Chief Justice, on 23rd June 2017 established the National Committee on Criminal Justice Reforms (NCCJR) under the auspices of the National Council on the Administration of Justice. \(^59\) This committee draws membership from the critical actors in the criminal justice sector and the objective is to oversee the implementation of the audit recommendations. The Kenya National Commission on Human Rights is a member.

58. The State in its reply to the list of issues has not provided data on the number of disciplinary cases lodged against the police who refuse to grant access to lawyers, independent doctor or relatives. Disaggregated data including on compliance of police and other security officials, disciplinary action, prosecution to secure adherence to the legal standards in respect to persons deprived of liberty is difficult to find.


\(^59\) Gazette Notice 5857 of 2017.
Proposed recommendations

59. The State should collect and maintain an updated database of disaggregated data on the number of persons deprived of liberty in all detention facilities including police stations, the conditions of detention, the register of complaints received from persons deprived of liberty in line with section 27 of the Persons Deprived of Liberty Act, 2014 as well as the number of disciplinary cases and charges preferred against police and other security officials who refuse to grant access to lawyer, independent doctor or relative.

60. The State should prioritize the implementation the recommendations arising out of the Audit of the Criminal Justice Systems Audit including the need for proper record keeping, the need to ensure that persons deprived of liberty are able to notify relatives and lawyers of arrest at State expenses as enunciated in the Persons Deprived of Liberty Act.

C. Information on the progress of any investigations undertaken into reports of denial by authorities of fundamental legal safeguards of persons deprived of their liberty including in the context of the April 2014 Usalama Watch operation in Nairobi in which an estimated 5,000 people were detained.

61. Various State agencies have carried out investigations into the denial of fundamental legal safeguards for persons deprived of liberty in the context of operation Usalama Watch. The Kenya National Commission on Human Rights carried out monitoring exercise and documented multiple breaches of law and denial of fundamental safeguards of persons deprived of liberty. The violations documented include:

(i) Incarceration of persons beyond the 24-hour limit provided for in the constitution without being presented to a competent judicial authority;
(ii) Incommunicado detention without means of communicating with next of kin or legal counsel;
(iii) Detention in congested and unhygienic cells with little access to food, water and sanitation;
(iv) Extortion by police officer where detainees were compelled to give bribes in order to be released;
(v) Assault, sexual harassment, and intimidation during arrest, while on transit and in detention at police stations;
(vi) Illegal deportation or expulsion in unclear circumstances; and,
(vii) Ethnic profiling through disproportionately targeting ethnic Somali’s in arrest.

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62. The Independent Policing Oversight Authority established human rights violations that occurred during the operation including the rights of an arrested person through failure to bring arrested persons during operation before a court of law within the constitutional time frame; holding persons in congested and unhygienic cells and holding children together with adults. Additionally, it was noted that there was very poor and unsatisfactory record keeping. The authority was however unable to verify allegations concerning extortion, assault, harassment and forced deportation/expulsion of detainees. In its report, it indicated that it was conducting investigations into 29 complaints/allegations of harassment, extortion, and assault arising from the operation.\textsuperscript{61} There has been no update on the same since the release of the report.

**Proposed recommendation**

63. The National Police Service should implement the recommendations made by the Kenya National Commission on Human Rights and the Independent Policing Oversight Authority including carrying out a post-mortem of the operation to ensure strict implementation of the law and forestall future breaches of the law.

**Paragraph 6 List of Issues- Legal aid.**

| The Committee requested for up to date information on the progress achieved in passing the Legal Aid Bill as well as the implementation of the National Legal Aid Program including data on funding and the extent of legal aid service provided during the reporting period so that lack of resources is not an obstacle to citizens' access to justice. |

64. The Legal Aid Act, 2016 (No. 6 of 2016) was enacted into law on 22nd April 2016 and commenced operation on 10th May 2016. The Act aims to facilitate access to justice and social justice as well as to establish the National Legal Aid Service whose main function is to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable. The National Legal Aid Service replaces the National Legal Aid and Awareness Programme.

65. The Board of the National Legal Aid Service has been established and members have been appointed.\textsuperscript{62} The Board comprises of a chairperson and 11 persons representing the Judiciary, Office of Attorney General and Department Of Justice, Ministry of Finance, Ministry of Interior And National Co-Ordination, the Director of Public


\textsuperscript{62} Gazette Notice 6512 (Vol. CXVIII) of 19th August 2016.

66. A National Action Plan on Legal Aid (2017-2022) is now in place to facilitate the full implementation of the National Legal Aid and Awareness Policy 2015 as well as the Legal Aid Act, 2016. The priority areas of the Action Plan include the promotion of legal literacy, increase in access points and service delivery options responsive to needs of people, capacity building for legal aid providers, develop accreditation and certification for paralegals and increase human financial, technical and material resource allocation on legal aid.

**Proposed recommendations**

67. The Commission strongly recommends for the provision of funds to ensure full and swift operationalization of the Legal Aid Act, 2016 and monitoring of its impact on access to justice especially for the indigent.

68. The Commission also urges that the State rolls out awareness programmes on the provisions of the Act.

**Paragraph 7 List of Issues- Optional Protocol on the Convention against Torture.**

The Committee requested for up to date information on the status for consideration of the Optional Protocol on the Convention against Torture.

69. Despite the enactment of the Treaty Making and Ratification Act\(^\text{\[no 45\]}\) which provides for the process of treaty ratification, no progress has been made towards ratification of the Optional Protocol on the Convention against Torture. The State in its reply to the List of Issues has not given any reason why it is yet to enact the Optional Protocol to the Convention against Torture. During the 2\(^{nd}\) cycle of the Universal Periodic Review, Kenya did not support and noted a recommendation to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment.\(^\text{\[no 44\]}\) Worryingly, the State continues to note the same recommendation in the third cycle UPR review that took place on 23\(^{rd}\) January, 2020.

\(^{\text{\[no 45\]}}\) No 45 of 2012 available at [http://www.kenyalaw.org/lex//actview.xql?actid=No. 45 of 2012 (accessed on 7\(^{th}\) March 2017)].

70. The State has put in place the legal infrastructure which contributes to prevention of torture in places of detention locally. The State has enacted the Prevention of Torture Act, 2017 which attributes responsibility to the Commission in:

(i) Monitoring compliance by the State with international treaty obligations relating to torture and cruel, inhuman and degrading treatment or punishment;
(ii) Advising government on strategies towards prevention of torture which includes inspection visits to places of detention;
(iii) Calling for information from public entities and private bodies to facilitate monitoring compliance with the provisions of the Act; and
(iv) Reporting on an annual basis on compliance with the provisions of the Prevention of Torture Act.

71. In addition, the Independent Policing Oversight Authority has the specific mandate to ‘conduct inspections of police premises including detention facilities under the control of the service’ adding to the layer of institutions that play a role in preventing torture in places of detention.

72. In order to complement the positive developments, Kenya should ratify the Optional protocol and establish a national preventive mechanism to effectively reduce the risk of torture in places of detention.

Proposed recommendation

73. The Committee should recommend that the State takes concrete steps to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Paragraph 8 List of Issues - Trafficking in Persons

The Committee requested for up to date information on the measures taken to prevent human trafficking for purposes of sexual and labour exploitation, including women and girls and people living with albinism. The Committee further requested for detailed information including disaggregated data on the number of complaints, investigations, prosecutions and sentences for acts of trafficking and information on measures to increase the protection of victims of trafficking and to provide redress and rehabilitation including adequate shelters and assistance in reporting incidents to the police.

Positive developments in prevention efforts

74. Following the enactment of the Counter-Trafficking in Persons Act, 2010, the government constituted and launched the Counter-Trafficking in Persons Advisory Committee on 8th July 2014. The Advisory Committee has spearheaded the development of the National Plan of Action for Combating Human Trafficking 2013-
2017 which provides a roadmap to address Trafficking in Persons in Kenya. The activities and objectives of the National Plan of Action are articulated around Prevention, Protection and Prosecution. Activities around prevention include capacity building of criminal justice actors i.e. the police, judges, prosecutor, labour inspectors and immigration. Raising public awareness on human trafficking by conducting public information awareness campaigns and reducing fraudulent employment opportunities by monitoring and assessing employment agencies, their processes and practices to detect misconduct or potential gaps that may be used for trafficking. Prevention activities have culminated in the development of standard operating procedures for prosecutors and training of approximately 60 law enforcement officers.

75. The Advisory Committee has also put in place a data collection mechanism to improve tracking of anti-trafficking initiatives across all 47 counties. The reporting period has also seen to the development of new policies by the Ministry of Labour and Social Protection for persons seeking employment opportunities abroad to ensure that their work contracts meet minimum standards set out by the ministry. In 2014, the government revoked the licenses of over 900 agencies recruiting workers for employment in the Middle East and gulf region. Moreover, the National Employment Authority created under the National Employment Authority Act has published a list of 79 recruitment agencies that it has vetted as part of efforts towards assessing agencies that could be used as points of trafficking in persons. The impact of these measures are yet to be seen, however, this marks an important step towards preventing trafficking of persons in Kenya overseas.

76. The Advisory Committee has also put in place a data collection mechanism to improve tracking of anti-trafficking initiatives across all 47 counties. The reporting period has also seen to the development of new policies by the Ministry of Labour for persons seeking employment opportunities abroad to ensure that their work contracts meet minimum standards set out by the ministry. The impact of this policy is yet to be seen, however, this too marks an important step towards preventing trafficking of persons in Kenya overseas.

77. Through the activities of the Advisory Committee on Counter trafficking in persons in Kenya and the adherence to the National Plan of Action on Countering Human Trafficking, Kenya has improved from Tier 2 Watch List to Tier 2. Nonetheless, reports of human trafficking cases are still rife.

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78. **Areas of concern**: There are no specific measures put in place to protect persons with albinism from abduction, human trafficking and other discriminatory practices that jeopardise their life. Persons with albinism are protected like other members of the public by security agencies and the provisions of the Sexual Offences Act, Criminal Procedure Code (the framework for arrests and prosecutions) and Counter-Trafficking in Persons Act. The Committee on the Rights of Persons with Disability in considering the initial report of Kenya has expressed concern on the different forms of violence against persons with albinism in particular girls and the absence of measures to protect, prosecute and convict perpetrators. The Committee has recommended that Kenya promptly investigates all cases of violence against persons with albinism, creates shelters and redress for victims of attacks and intensifies efforts to raise awareness about the rights and dignity of persons with albinism.

79. A study on Human Trafficking by the National Crime Research Centre indicates that Trafficking of persons to other Nations from Kenya is at 60.2%. Victims of human trafficking are mostly destined for Middle East Countries. The most prevalent form of trafficking is trafficking for labour followed by child trafficking and trafficking for prostitution. The study further identified poverty and unemployment as the main contributing factors to human trafficking. Poverty, corruption, unemployment are the major reasons as to why the business of human trafficking continues to persist in the country.

**Proposed recommendations.**

80. The State should promptly investigate all cases of human trafficking against persons with albinism.

81. The State should create shelters and provide redress for victims of trafficking.

82. The State needs to document and make available data on the number of persons with albinism to facilitate effective response by the State.

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83. The State should step up its efforts to combat trafficking in persons through investigation and prosecution of government officials who aid and abet the trafficking of persons.

Positive developments in protection

84. The government has developed national referral mechanism guidelines to assist stakeholders in referring victims of trafficking to assistance.

85. In addition, the government allocated Kshs 60 million in the financial year 2018/19 financial year directed towards implementation of the National Referral Mechanism and the Victims Assistance Fund. Given the magnitude of the problem in Kenya, more resources need to be allocated towards protection and assistance of victims of trafficking. 71

86. The State further sent labour attachés to Kenyan Missions in three Gulf States i.e. United Arab Emirates, Qatar, and Saudi Arabia with the task of assisting Kenyan workers in the Gulf States and handling cases of those who report abuse by their employers. 72 In addition to the above, it has been reported that the government concluded bilateral labour agreements with Saudi Arabia, Qatar and UAE in an effort to reduce exploitative labour and abuse against Kenyans abroad. 73 In 2018, the government reported that it had assisted 71 Kenyans who had unresolved workplace grievances in the Gulf States with their return. 74

87. During the reporting period, the Commission has continued to support government efforts to combat trafficking in persons by providing leadership in human rights mainstreaming as a key member of the national advisory committee on counter-trafficking in persons. The Commission has been implementing a project dubbed migration and human rights through public awareness and capacity building to over 600 people with a view to mainstream adherence to human rights and respect of migrant rights by all. Internally, the Commission has developed policy documents for training of its staff and duty bearers. 75 The Commission is also a member of Kenya’s

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73 2019 Trafficking in Persons Report-Kenya (n) 71 page 273
74 Ibid page 273
National Coordination Mechanism on Migration housed under the Ministry of Interior and National Coordination Pursuant to its constitutional role to advise the government on matters related to human rights, the Commission has mainstreamed human rights principles in Kenya’s draft Migration Policy and the Kenya Institute of Migration Studies post-graduate course curriculum. As at the time of reporting, 27 persons had benefited from the training programme.

Issues of concern

88. Authorities continue to misidentify victims of trafficking as criminals. In some instances, victims of trafficking are penalised for crimes that the traffickers compel them to do due to inadequate screening or knowledge of trafficking indicators.\textsuperscript{76} Foreign trafficking victims are often charged with contravention of immigration laws (unlawful entry into Kenya) and are held for deportation due to lack of valid identification documents. Additionally, officials conflate smuggling with trafficking in persons pointing to the need to train law enforcement officials.\textsuperscript{77}

89. The government is yet to establish the Board of Trustees to oversee the administration of the National Assistance Trust Fund for Victims of Trafficking.

Proposed recommendations

90. The State should put in place mechanisms to enable the identification of victims of trafficking to address the misidentification of victims of trafficking as criminals.

91. The State should establish the Board of Trustees to administer the National Assistance Trust Fund for Victims of Trafficking.

Paragraph 9 (a) list of issues- Sexual and gender-based violence

The Committee requested for up to date information on the measures taken during the reporting period to prevent and eliminate violence against women and girls including information on measures taken during the reporting period to prevent and punish sexual violence by members of the police and security forces including data on complaints received, investigations, prosecutions and any punishments.


\textsuperscript{77} Trafficking in Persons Kenya (n 66) page 273
92. The reporting period saw to the enactment of the Prevention of Torture Act which classifies rape and sexual abuse as a form of physical torture. The State has also developed the National Guidelines on Management of Sexual Violence in Kenya which addresses the clinical management of survivors of sexual violence and forensic management of evidence needed for legal action.

93. The National Gender and Equality Commission has formulated a model policy framework on sexual and gender based violence. The policy is aimed at providing guidance to the County Governments on critical elements and considerations for policy on SGBV. County Governments should customize the policy according to their county needs and sufficient resources (financial and human) should be allocated to ensure the fight against domestic violence is a long term program. The reporting period has also seen to attempts by County Governments to enact legislation to address sexual and gender violence. For example, the Nairobi City County has introduced to the County Assembly the Nairobi City County Sexual and Gender Based Violence Bill. The Bill seeks to address sexual and gender based violence in Nairobi City County and details the obligation of the County Government in addressing sexual and gender based violence including establishment of safe houses/shelters. The Commission in its advisory to the Nairobi City County Assembly advised for among other things the enactment of legislation and policies that waive the initial medical check-up and examination fees for all victims of SGBV.

94. The Sexual Offences Act which criminalizes sexual violence against women and girls remains poorly implemented. For instance, the Sexual Offences Register under section 39 of the Act is yet to be fully established. The reporting period has seen to challenges in implementation of the Sexual Offences Act particularly in addressing consensual teenage sexual relations. The prosecution of consensual sex between adolescents has had a disproportionate effect on young men. The Sexual Offences Act places the age of consent at 18 years.

95. Sexual violence against women and children remains pervasive in Kenya. Data from Kenya Demographic and Health Survey 2014 shows that 14% of women between 15-49 years have experienced sexual violence.

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96. Sexual violence by members of security forces in the context of election have been documented by the Commission in its special report on sexual violence during and after the 2017 general election. The Commission has documented a total of 201 cases of sexual violence in 11 counties and mostly committed against women from lower economic bracket earning less than a dollar a day. Sexual violence against women and girls during and after the electioneering period was perpetrated by the Police at 54.5% compared to civilians at 45.5%. Most common form of sexual violence documented during the period was gang rape at 52.6% and rape at 19.3%.

97. In terms of access to medical care, 80% of the victims and survivors were unable to get timely medical care. As per the Commission’s findings, victims were unable to seek timely medical assistance due to insecurity especially in areas that were experiencing violence. Unavailability of medical assistance was further compounded by the five months long strike which has crippled medical services in all public hospitals. The nurse’s strike forced some of the patients to seek medical services in private hospitals where costs of health care are prohibitive and high. In addition, survivors were severely traumatized and did not share their experiences due to feelings of shame and self-guilt.

98. Of the cases recorded by the Commission, only 21.6% of the victims reported their ordeal to the police. A key reason attributed to low reporting was that the police were key perpetrators of the sexual violence and victims feared reprisals. In instances where victims reported the matter to police, the police have been reported to act indifferent especially where the victim identified the police as the perpetrator. The victims would either be turned away and denied the opportunity to record a statement or arrested and placed under custody. Cases have been recorded where police frustrate victims by demanding some form of evidence or witness or identity of perpetrators failure of which the case will be dismissed.

99. Accountability and redress for these violations is yet to be secured as no member of the Police Service reported has been investigated, charged or prosecuted for sexual

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84 Ibid page 32.
85 Ibid page 32.
86 Ibid page 59.
87 Ibid page 59.
88 Ibid page 59.
89 Ibid page 55.
90 Ibid page 55.
violations arising out of 2007 post-election violence and the 2017 post-election violence.

**Proposed recommendations.**

100. Commence investigations and prosecution of members of the police service responsible for committing acts of sexual violence.

101. Ensure adequate provision of medical and psychosocial support to survivors of sexual violence.

102. Ensure a human rights-based approach to law-enforcement during elections and put in place the requisite prevention and protective mechanisms towards conflict-related sexual violence.

103. The State to establish one stop gender recovery centres in every county and safe houses for the victims and survivors.

**Paragraph 9 (b) List of Issues- Violence against women and girls.**

| Statistical data on the number of all other complaints received relating to violence against women and girls and on the number of convictions and penalties imposed on the perpetrators |

104. The State in its reply to the list of issues has given data on the number of prosecutions and convictions secured for violence against women and girls. However, the data does not reflect the number of complaints received, number of investigations conducted, the number of cases that have been completed and those pending before courts, and penalties imposed and means of redress including compensation and rehabilitation.91

105. The data provided by the State in its reply to the list of issues on the prosecution and conviction paints a worrying picture on the high number of defilement cases prosecuted between the period of 2014 to 2016, at a total of 5,479. In addition, the

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91 Third Periodic Report Submitted by Kenya under Article 19 of the Convention Pursuant to Optional Reporting Procedure (CAT/C/KEN/3) available at docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPPRiCAqhKb7yhsgf%2fc%2fin4VmTu8nKht5Mhjbo7bqTps7ogxOusqNGmAjANsd%2fjqjimpp198LiMzXphRR9yfYDdP7ROYhoqjO3qWf6P2u%2fXXZqjBvDlp7 page 9.
rate of convictions secured as compared to the number of cases being prosecuted is even more concerning (Page 12 of the Periodic Report).

106. Treaty body mechanisms including the Committee on the Rights of the Child and the Committee on Elimination of Discrimination against Women in their concluding observations to Kenya have highlighted their concern on the prevalence of domestic and sexual violence against children and women and the lack of access to justice for survivors of sexual violence. This is attributable to social stigma, pressure from family members and communities to settle cases out of court through alternative justice systems\textsuperscript{92}, low rates of investigation and prosecution\textsuperscript{93}, frequent delays in court proceedings,\textsuperscript{94} the risk of victimization in the justice system\textsuperscript{95} and the lack of legal aid and other support mechanism.\textsuperscript{96} Other factors include the use of alternative justice systems to settle GBV cases which does not necessarily protect victims, intimidation of victims and witnesses and the lack of safe accommodation to shelter victims of sexual offences.\textsuperscript{97}

107. The KNCHR set out Sexual and Gender Based Violence as a parameter in its monitoring of human rights compliance during the 2017 General election.\textsuperscript{98} The Commission received 201 cases of sexual violence between May 2017 and March 2018 that occurred within a highly contested political environment that saw increased acts of civil unrest and political protests. The perpetrators from the cases documented were civilians at 45.5 % and police officers 54.5% of cases reported.\textsuperscript{99}

108. The KNCHR notes with concern that majority of the victims were unable to report the violations due to fear of victimisation by alleged perpetrators a majority of whom were identified as police officers\textsuperscript{100}, fear of stigmatisation as such violations are considered taboo\textsuperscript{101}, difficulty in accessing medical facilities due to the barricading of

\textsuperscript{94}Committee on the Rights of the Child Concluding Observations para 33(d).
\textsuperscript{95}Ibid para 33 (d).
\textsuperscript{96}Ibid para 33 (d).
\textsuperscript{97}Ibid para 33 (d).
\textsuperscript{99}Ibid page 43.
\textsuperscript{100}Ibid page 55
\textsuperscript{101}Ibid page 56
roads during the electoral cycle that affected most public hospitals and health centres. There were low levels of awareness on the importance of seeking immediate medical attention and the perceived lack of confidence with key duty bearers that the perpetrators would be held accountable.

**Proposed recommendations**

109. The State party should provide statistical data relevant to monitoring of the implementation of convention on the national level, including data on complaints, investigations, prosecutions and convictions, domestic and sexual violence as well as on means of redress, including compensation and rehabilitation provided to victims.

110. Investigate and prosecute security officers responsible for sexual violence

111. The State should provide information on the measures it has taken to prevent, and respond to sexual violence against children and women including the obligation to carry out prompt, effective, professional and effective investigations.

112.

113. Promptly investigate, prosecute and punish violence against women and children and discourage the use of alternative justice systems in cases of sexual violence.

114. Implement the provisions of the Victim Protection Act including the operationalization of the victim protection trust fund to cater for legal aid and medical and psychosocial support for victims of sexual and gender-based violence.

115. Establishment of safe houses for Sexual and Gender Based Violence survivors in every county.

116. The State should raise awareness on the emergency medical services and care for victims of sexual and gender-based violence.

**Paragraph 9 (d) List of Issues- Access to remedy for victims of sexual and domestic violence.**

| Measures to ensure protection for victims of domestic and sexual violence including access to medical and legal services, psychosocial counselling and effective access to redress. |

117. The State has enacted the Victim Protection Act to provide for protection of victims of crime and abuse of power, psychosocial interventions, medical treatment, legal aid

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102Ibid page 59
103Ibid page 60
104Victim Protection Act, No. 17 of 2014
and social services designed to assist victims recover from loss, injury or damage suffered as a consequence of the offence. Under the Act, the Victim Protection Trust Fund is established to provide for reparation and compensation of victims.

Area of Concern

118. The State is yet to set up the Board of Trustees that is to oversee the administration of the Victim Protection Trust Fund that would cater for expenses arising out of psychosocial intervention, medical treatment, legal aid and social services. In addition, there is limited support offered/available for victims of sexual and domestic violence such as provision of safe accommodation.

Proposed recommendation.

119. The State should set up the board of trustees to ensure the full operationalization of the Victim Protection Trust Fund.

Paragraph 9 (e) List of Issues- Marital Rape.

| Any legislation the State party is considering adopting that would establish marital rape as a distinct criminal offence. |

120. There is no express provision outlawing marital rape in the statute books. The Sexual Offences Act\(^\text{105}\) which is the principal statute that provides for sexual offences does not recognise marital rape as an offence in Kenya. Section 43 (5) of the Sexual Offences Act provides that an act committed under the Sexual Offences Act is not considered intentional or unlawful if it was committed in the context of a lawful marriage. However, section 3 of the Protection against Domestic Violence Act\(^\text{106}\) provides for sexual violence within the marriage as a form of Domestic violence.

Proposed recommendation.

121. Repeal section 43 (5) of the Sexual Offences Act that condones marital rape.

\(^{105}\) Act No 2 of 2006 available at http://www.kenyalaw.org/lex/actview.xql?actid=No.%203%20of%202006

\(^{106}\) Act No 2 of 2015 available at http://www.kenyalaw.org/lex//actview.xql?actid=NO.%202%20OF%202015
**Paragraph 10 List of Issues- Female Genital Mutilation.**

The Committee requested for data concerning the implementation and enforcement of the Prohibition of Female Genital Mutilation Act (2011), including the number of complaints, investigations, prosecution, and convictions, and on the sentences imposed on perpetrators of criminal acts related to such practices. The Committee has further requested for information on the medical and psychosocial support and redress given to victims and any awareness raising campaigns conducted.

**Positive developments**

122. The State has established the Anti-Female Genital Mutilation Board pursuant to the Prohibition of Female Genital Mutilation Act. The Anti-FGM board has the mandate to formulate policies, mobilize resources, design and co-ordinate public awareness programs against FGM and advice the government on matters concerning FGM. The Director of Public Prosecutions in April 2014 established the Anti-FGM Unit in order to streamline the prosecution of FGM. The Anti-FGM unit was rolled out nationwide and begun investigating and prosecuting cases on FGM.

123. The State has also enacted the Protection against Domestic Violence Act\(^{107}\) and the Victim Protection Act.\(^{108}\) The Protection against Domestic Violence Act defines and criminalises domestic violence and includes FGM within its definition. The Victim Protection Act provides for the framework for the provision of better information, services, reparation and compensation of victims of crime.\(^{109}\)

124. The reporting period has also seen to the adoption of the revised National Policy on the Eradication of Female Genital Mutilation (Sessional Paper No 3 of 2019). The Policy has five core objectives namely:

(i) To accelerate the eradication of FGM in Kenya

(ii) To strengthen multi-sectoral coordination and networking, partnership and community participation towards eradication of FGM

(iii) To address emerging trends and practices aimed at circumventing the legal framework

(iv) To address gender inequality associated with FGM by promoting the empowerment of girls and women

(v) To strengthen data collection, information and knowledge management

\(^{107}\) No 2 of 2015 available at  

\(^{108}\) No 17 of 2014 available at  

\(^{109}\) Section 3, Victim Protection Act
**Areas of concern**

125. Despite the legal prohibition and intensified efforts to investigate and prosecute, Female Genital Mutilation continues to be practised in the Country. The Kenya Demographic Health Survey 2014\(^{110}\) indicates that the prevalence of FGM stands at 21% compared to 27% as documented in 2008. The prevalence rate of FGM in the North Eastern area stands at 97.5% compared to 8% in Nairobi. The percentage of women aged 15-49 circumcised by ethnic group stands at 94% in Somali community, 86% in Samburu, 84% in Kisii, and 78% amongst the Maasai community.

126. The Survey indicates that 14.8% of women and girls aged between 15 and 49 years have been circumcised by medical professionals. The prevalence rates of FGM especially in the North Eastern Part of Kenya and the increase in medicalization of FGM have been discussed as areas of concern and recommendations made by the Committee on the Rights of the Child\(^{111}\) and the Committee on Economic Social and Cultural Rights in 2016.\(^{112}\)

127. Cross border cutting has also been identified as a challenge with communities practicing FGM crossing to neighbouring countries to avoid law enforcers.\(^{113}\) In addition, Kenyans living abroad return to Kenya to undergo FGM.\(^{114}\)

128. In terms of religious and community attitudes towards FGM, the survey indicates that 89% of women and 87% men in North Eastern believe that FGM is required by their religion. 36% of women and 37% of men with no education are likely to believe that circumcision is required by religion. Furthermore, survey indicates 82.7% of men and women from Somali community and 72% of men and women from the Samburu community believe that FGM is required by their communities. The data goes to show that deep seated cultural beliefs remains a real challenge in the anti-FGM campaign. The findings of the survey demonstrate the need for intensified public awareness campaigns in areas where FGM is prevalent. The anti-FGM board requires additional funding and resources to effectively carry out its mandate.


\(^{114}\) Ibid page 12.
129. Section 24 of the FGM Act provides for the offence of failure to report commission of an offence under the Act. The Section could potentially lead to double victimization of the victims who fail to report that they have undergone FGM. The Act also needs to be amended to ensure that evidence brought by a minor does not need to be corroborated so as to ensure that minors are able to access to justice.

130. The State is yet to appoint the Board of Trustees to oversee the management of the Victim Protection Trust Fund. The fund is supposed to cater for the medical, psychosocial and redress support required by victims of FGM.

131. While the perpetrators of FGM are prosecuted in Kenya, the victims hardly seek redress in form of compensation. There has been no suit filed by a victim of FGM.

**Proposed recommendations.**

132. The State should effectively enforce the provision of the Prohibition of Female Genital Mutilation Act including prosecution and punishment of health professionals who carry out FGM.

133. The State should also intensify public education and awareness campaign especially in areas where FGM is prevalent to encourage change of attitude.

134. The State should ensure that the Anti-FGM Board is properly resourced to effectively carry out its mandate.

135. The State should appoint the Board of Trustees to oversee the management of the Victim Protection Trust Fund.

136. Amend section 24 of the Female Genital Mutilation Act which provides for the offence of failure to report the offence of Female Genital Mutilation. The section is likely to affect victims of female genital mutilation for failure to report the offence.
Paragraph 11 List of Issues- Detention and ill-treatment of women seeking maternity services.

The Committee requested for information on the measures taken to ensure that women seeking maternity services are not detained or subjected to ill-treatment at public or private hospitals including for non-payment of fees and to ensure the implementation of the presidential directive on free maternity services.

137. During the reporting period, the government rolled out free maternity service program in all public health facilities following the Presidential Directive on free maternity services. Free maternity service program is administered through the *Linda Mama* Program by the National Health Insurance Fund (NHIF).\textsuperscript{115} Maternity services provided under the program include free ante-natal care, delivery through caesarean section and post-natal care. In addition, the government through the Beyond Zero Initiative has supported counties through the distribution of fully kitted mobile clinics across the country to compliment county efforts in the provision of maternal health services especially amongst marginalized and under-served populations in the counties.\textsuperscript{116}

138. In 2015, the High Court of Kenya in the case of *M A & Another versus Attorney General & 4 Others*\textsuperscript{117} found that the practice of detaining women post-delivery violated the women’s right to dignity, the right not to be deprived of freedom arbitrarily, the right to the highest attainable standards of health. The Court further found that the practice amounted to torture, cruel, inhuman or degrading treatment or punishment. The Court ordered the Ministry of Health to develop clear guidelines and procedures for implementing waiver system in all public hospitals.

Areas of concern

139. The order of the High Court is yet to be implemented. The reporting period saw to reports of 184 women being detained at the Kenyatta National Referral Hospital due to non-payment of bills amounting to Kshs 6.7 Billion.\textsuperscript{118} The Ministry of Health while appearing before the National Assembly Committee on Health acknowledged that the detention of women is an ongoing challenge. The Ministry further reported the

\textsuperscript{116}Ibid page 30.
\textsuperscript{118}Standard Digital Newspaper ‘Hospital Holding 300 patients, 391 bodies over KShs 6.7 billions Bills (29 March 2019) available at https://www.standardmedia.co.ke/article/2001318596/hospitals-holding-300-patients-391-bodies-over-bills.
establishment of a special technical team to investigate the matter and committed to publish a report within one month.\(^{119}\) The report is not publicly available.

140. In the Commission’s assessment report of the implementation of recommendations arising from the Public Inquiry on Sexual and Reproductive Health Rights, the Commission has noted that whereas there has been an increase in the availability and accessibility of maternity services, the quality of service delivery has been seriously compromised by shortage in human resources, perennial industrial action by doctors and nurses, lack of infrastructure and equipment to handle the increase in numbers seeking maternity services.\(^{120}\)

141. The Commission has further noted that across health facilities in six counties visited, mothers shared beds during ante-natal period due to shortage of beds. The delivery coaches in the delivery rooms were not enough to handle all mothers in second stage of labour.\(^{121}\) Furthermore, sexual and reproductive health services are inaccessible to women with disabilities. The assessment report notes that the delivery beds available cannot accommodate women with disabilities. In addition, service providers do not provide supports and information in accessible or augmented formats for the blind, deaf and those with intellectual disabilities.\(^{122}\)

142. Delays in reimbursement of funds to county health facilities\(^{123}\) and procurement of supplies has contributed to stock out of drugs and equipment such as gloves and antisepsics across the 6 counties visited during the assessment.\(^{124}\) The burden is therefore transferred to patients to obtain goods such as jik, cotton wool, pairs of gloves to be used during labour and delivery.\(^{125}\)

143. Treaty body mechanisms including the Committee on Economic Social and Cultural rights and the Committee on the Elimination of Discrimination against Women in their concluding observation to Kenya have expressed their concern on post-delivery detention of women who are unable to pay for their medical bills.\(^{126}\) The Committee have recommended that the State takes concrete measures to ensure free maternal

\(^{119}\) Ibid
\(^{121}\) Ibid page 27.
\(^{122}\) Ibid page 51.
\(^{124}\) Ibid page 31
\(^{125}\) Ibid page 31
health services and to prevent incidents of post-delivery detention in health care facilities.\textsuperscript{127} The observation is made in view of the decision of the High Court of Kenya in which it awarded damages worth Kshs 2,500,000 (USD25, 000) for ill-treatment meted out to a woman while delivering in a county public health facility.\textsuperscript{128} The Court held that failure to avail drugs and other basic commodities in health facility i.e. cotton wool and making patients buy these necessities is a violation of their rights.\textsuperscript{129} In addition, making a women give birth in an open place where third parties watch, shouting and use of abusive words against patients amounts to cruel, inhuman and degrading treatment.\textsuperscript{130}

144. While it is commendable that the government waived maternity fees in all public health facilities, the quality of services that child-bearing women receive in health facilities has been of poor quality as the women experience abuse and disrespect during childbirth.\textsuperscript{121} This is aggravated by poor working conditions of health practitioners in the public health facilities.\textsuperscript{132}

\textbf{Proposed recommendations}

145. National Government should ensure timely disbursement of funds to county governments to enable the delivery of quality health care services including free maternity services as per the Presidential Directive.

146. Implement court order in the case of \textit{MA and Another Versus Attorney General} by halting detention of women due to non-payment of medical bills and the development of guidelines on waiver for fees.

147. Enforce code of ethics of health professionals including nurses to ensure that complaints on ill-treatment of women during delivery are redressed.

148. Ensure that sexual and reproductive health services are accessible to persons with disabilities.

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\textsuperscript{127} Committee on Economic Social and Cultural Rights ‘Concluding Observation on the Combined Second to Fifth Periodic Reports of Kenya’ (E/C.12/KEN/CO/2-5 6\textsuperscript{th} April 2016) para 53.
\textsuperscript{129} Ibid para 58.
\textsuperscript{130} Ibid para 60-64.
\textsuperscript{132} As above.
\end{flushright}
149. Fast-track the enactment of a comprehensive Reproductive Health Bill to enhance the promotion, protection and fulfilment of the reproductive health rights by national and county governments.

**Paragraph 11 (b) List of Issues- Harmful practices in connection with reproductive health.**

The Committee requested for up to date information on the measures taken to ensure that investigations are undertaken into allegations of involuntary sterilization or other harmful practices in connection with reproductive health.

150. Forced and involuntary sterilization on women living with HIV and women with disabilities continues to be an area of concern highlighted by treaty body mechanism in their concluding observations to Kenya. The Committee on the Rights of Persons with Disabilities and the Committee against Torture in their concluding observations to Kenya highlighted their concerns on the ongoing practice of forced/involuntary sterilization of women with disabilities and women living with HIV.¹³³

151. There are no specific measures or legislation in place to prohibit forced or coercive sterilization. A group of five women living with HIV, who have undergone forced or coerced sterilization, have gone to court seeking compensation for physical and psychological suffering occasioned by forced sterilization.¹³⁴

**Proposed recommendations.**

152. The State party should issue a circular to all medical and health facilities prohibiting forceful or coercive sterilization.

153. The State party should create a monitoring and evaluation system to ensure full implementation of policies regarding tubal ligation such as the National Family Planning Guidelines.

154. The State party should establish clear procedural guidelines for follow up on complaints of rights violations and strengthen administrative accountability at hospitals.


155. The State party should carry out public awareness campaigns to educate patients and citizens about their rights and ensure that information on patient’s rights is immediately accessible within health care facilities.

**Paragraph 11 (c) List of Issues- Complaints and accountability mechanisms for women who allege ill-treatment in health facilities.**

The Committee as requested for information on measures taken by the State party to ensure effective monitoring of health facilities, including to establish effective complaints mechanisms accessible to women who allege ill-treatment.

156. The Health Act, 2017 obligates national government, county governments and all organs that have a responsibility in the national health system to disseminate information on their health functions which must include information on procedures for lodging complaints.\(^{135}\) Section 14 of the Health Act mandates national and county governments to establish and publish the procedure for the laying of complaints within public and private health care facilities.\(^{136}\) The complaints procedure must be displayed by all health facilities in a visible place\(^{137}\) and must be handled by the head of the relevant facility or any person designated in the facility to handle the complaint.\(^{138}\) If a complaint is not resolved to the satisfaction of the complainant, the Kenya Health Professional Oversight Authority has the power to take necessary action on the matter.\(^{139}\)

157. In an assessment of status of implementation of the KNCHR Public Inquiry on Sexual and Reproductive Health and Rights in Kenya, the Commission has established that there is insufficient investment in handling complaints and monitoring of complaints processes within the health facilities in Kenya.\(^{140}\) Moreover, most of the county and sub-county hospitals visited have suggestion boxes located near administrative buildings.\(^{141}\) However, there is no clear indication as to whether the boxes are opened and complaints and suggestions made handled or whether there is a designated officer to handle complaints at facility level.\(^{142}\)

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135 Section 10 (e) Health Act No 21 of 2017.
136 Section 14 (2) Health Act No 21 of 2017.
137 Section 14 (3) (a) Health Act No 21 of 2017.
138 Section 14 (3) (b) Health Act No 21 of 2017.
139 Section 13 (5) Health Act No 21 of 2017.
141 Ibid page 32.
142 Ibid page 32.
Proposed recommendations.

158. The national government and county governments should compel all health facilities to post information on patients’ rights in visible settings in healthcare facilities along with information about how patients can file a complaint.

159. The national and county government should enforce the provisions of the Health Act on establishing complaints mechanisms that are well resourced to handle complaints on service delivery at facility level.

Paragraph 11 (d) List of Issues- Access to safe and post-abortion care services.

| Measures taken to affirm that women who have been subjected to rape or incest are able to have access to abortions, and to ensure that post-abortion care services are accessible, affordable and of adequate quality. |

160. A study conducted by the Ministry of Health and the African Population and Health Research Centre estimated that 464,000 induced abortions occurred in Kenya.\(^{143}\) This translates into an abortion rate of 48 per 1,000 women aged 15–49, and an abortion ratio of 30 per 100 live births. The report further highlighted that about 120,000 women received care for complications of induced abortion in health facilities.\(^{144}\) About half (49%) of all pregnancies in Kenya were unintended and 41% of unintended pregnancies ended in an abortion. The report highlights that unintended pregnancies is a leading cause of unsafe abortions in Kenya. Furthermore, there are 266 deaths per 100,000 unsafe abortions.\(^{145}\)

161. The Constitution of Kenya 2010 under article 26 (4) allows for abortion where a woman’s health or life is at risk or for emergency treatment. The Penal Code on the other hand has not been revised to reflect the constitutional provisions. The Penal Code sections 158-160, 228 and 240 make it illegal to procure abortion and to supply instruments to be used to procure abortion. The police use this section to harass and extort money from medical providers willing to give abortion services.

162. The situation was further compounded by the withdrawal by the Director of Medical Services the government’s guidelines for reducing morbidity and mortality from unsafe abortion which provided guidelines to medical professionals on instances they


\(^{144}\)Ibid.

\(^{145}\)Ibid page 25
could perform abortion in line with the Constitution of Kenya, 2010. The withdrawal of the guidelines was accompanied by a memo to all health professional banning abortion on demand. The memo further prohibited health workers from participating in training on safe abortion practices.

163. The actions of the Director of Medical Services has been the subject of a court action before the High Court of Kenya. In the case of FIDA-Kenya and 3 Others versus Attorney General & 2 Others,146 the High Court clarified that whereas abortion was illegal under the Constitution, it was permitted in circumstances where emergency treatment was required or where or the life or health of the mother was in danger or if permitted by any other written law. The High Court held that the actions by the director of medical services violated the right to the highest attainable standards of health, the right to non-discrimination, right to information, and consumer rights.

164. Whereas the ruling signifies significant progress in the legal landscape, State agencies continue to take action frustrating the dissemination of information and services on safe abortion. In 2018, the Kenya Films and Classification Board issued a press statement banning the creation, distribution & exhibition of film and broadcast by Marie Stopes of abortion on demand.147 Marie Stopes was undertaking an awareness campaign highlighting amongst other things the statistics and dangers of unsafe abortion; provision of information to members of the public in need of pregnancy counselling. The ban on broadcast of information was based on article 26 (4) of the Constitution of Kenya. Subsequently, the Kenya Medical Practitioners and Dentists Board issued a cease and desist order to Marie Stopes on offering any form of abortion services.148

165. The Commission is also concerned that following her third cycle review under the UPR in January 2020, the State did not support the recommendation to reinstate the Ministry’s Guidelines pursuant to the High Court order.149

147 Standard Digital Media ‘Why Marie Stopes has been asked to Stop Abortion Services’ (17th March 2018) available at https://www.standardmedia.co.ke/article/2001303049/why-marie-stopes-has-been-asked-to-stop-abortion-services?fbclid=IwAR3nE4ITuD5c6eNiDfmez3EuzHEWEKDoFazIpgS1Tv1kgX8Z1FCODmeTOQ8.
148 Ibid.
Proposed recommendations.

166. Ministry of Health reinstates the Standards and Guidelines for Reducing Maternal Morbidity and Mortality in Kenya in line with the order of the High Court in Petition 266 of 2015.

167. Secondly Parliament enacts laws and review other prohibitive laws and policies around abortion in order to provide the framework for the delivery of safe abortion services.

168. Thirdly Government of Kenya lifts its reservations on Article 14(2) (C) of the Maputo Protocol that require State Parties to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Paragraph 14 List of Issues- Non-refoulement.

The Committee has requested for up to date information on legislative reform undertaken to ensure that the State does not expel, return or extradite, foreigners to countries where there are substantial grounds for believing they would be in danger of torture. The Committee has also requested for up to date information on measures taken to ensure that the State party complies with its non-refoulement obligations under article 3 of convention, particularly concerning populations in Kakuma and Dadaab.

Positive developments

169. Section 21 (2) of the Prevention of Torture Act prohibits the expulsion, return, or extradition of a person to a country where there is reason to believe that the person is in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Areas of concern

170. The State is yet to amend the Kenya Citizenship and Immigration to ensure that it conforms to Article 3 of the Convention against Torture prohibiting the expulsion, return or extradition of an asylum seeker and refugees to countries where there is substantial grounds for believing that the person would be in danger of being subjected to torture in the country of destination.

Non-Refoulement

171. The State during the reporting period has ordered for the closure of the refugee camps and an end to hosting of refugees owing to national security concerns. The directive given on 6th May 2016 disbanded the department of refugee affairs,
established a Taskforce to implement repatriation of refugees to Somalia and declared the closure of the Dadaab Refugee camp by November 2016.

172. Of further concern is that the State through the Cabinet Secretary in charge of Ministry of Interior and Coordination of National Government, on 29th April 2016, revoked refugee status of Persons of Somali Origin. The actions were taken in total disregard to Kenya’s obligations under the United Nations Convention Relating to the Status of Refugees and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problem in Africa.

173. The Kenya National Commission on Human Rights challenged the decision of the State to disband the Department of Refugee Affairs, to revoke refugee status of Persons of Somali Origin without due process and to close the Dadaab Camp.\footnote{Kenya National Commission on Human Rights and another versus Attorney General and 3 others (2017) e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/131173}.} The High Court issued orders halting the above. As at the time of reporting, the State has declared its intention to appeal the decision.

174. The Commission in pursuance of its mandate to monitor or investigate the situation of human rights in the Republic of Kenya has received complaints concerning the situation and of asylum seekers. The Commission in its report on fact finding mission concerning the human rights status of refugees in Kakuma and Dadaab Refugee Camps. Key findings of the report include that the suspension of the refugee determination status in 2015 has left an estimated 15,000 asylum seekers in the refugee camps without documentation. The net effect is that undocumented asylum seekers are excluded from accessing crucial services such as resettlement programs, services beyond the boundaries of the camps and employment.\footnote{Kenya National Commission on Human Rights 'Report of the Fact Finding Mission on the Human Rights Status of Refugees at Kakuma and Dadaab Refugee Camps-Kenya (September 2019)' page 12}

**Proposed recommendations**

175. The State should amend the Kenya Citizenship and Immigration Act to ensure that it conforms to Article 3 of the Convention against Torture.

176. The State should reverse its decision to disband the Department of Refugee Affairs, to revoke refugee status of all Persons of Somali Origin without due process and to close the Dadaab Refugee Camp in line with the decision of the High Court of Kenya in Petition Number 266 of 2016.

177. The State should re-instate the refugee determination status and allow for documentation of undocumented asylum seekers.
Paragraph 18 (a) List of Issues- Monitoring places of detention by the Kenya National Commission on Human Rights.

Committee requested for up to date information on monitoring visits to places of detention by the Kenya National Commission on Human Rights during the reporting period, reports of the commission during such visits including conclusions and recommendations made, and whether the reports are made public.

178. In line with its mandate, the Kenya National Commission on Human Rights carries out monitoring of places of detention. During the reporting period, the Commission undertook prison visits to a number of facilities and made the following observations:

**Observations**

179. There have been sustained efforts by the Kenya Prisons Service towards improving conditions of detention. The Commission however notes that lack of adequate funding has hampered its ability to improve conditions in line with the requirements of the Convention against Torture as well the as the United National Minimum Standards for the Treatment of Prisoners. The Kenya Prison Services has been open to the Commission carrying out inspections and meeting with Commission to relay and discuss our observations, conclusions and recommendations.

180. Despite efforts made towards improving conditions of detention there a number of issues the National Commission has observed which do not adhere to State obligations under the Convention against Torture and international standards on the treatment of prisoners:

(i) **Overcrowding:** The Kenyan detention facilities were constructed just before independence with little investment made in expansion. Minimal expansion, increasing levels of crime and large intake of inmates has had an effect on space available to accommodate the inmates. Some detention facilities hold double or triple the recommended numbers. Overcrowding in detention facilities, notably in pre-trial detention facilities has had serious implication such as poor sanitation, poor diets and inadequate beddings violating UN Minimum Standards on Treatment of Prisoners. The Chief Justice has established the National Committee on Criminal Justice Reform with a mandate to spearhead a comprehensive review and reforms of Kenya’s entire criminal justice system including reclassification and decriminalization of petty offences which contribute to bulk of detainees.
(ii) **Poor ventilation**: A majority of detention facilities visited do not have proper ventilation. This largely attributed to the fact that a majority of these detention facilities were built during colonial days and no efforts have been made in carrying out renovations.

(iii) **Provision of beddings and uniforms/clothing**: Efforts have been made towards the provision of uniforms, with each inmate allocated two pairs of uniform on admission to detention facilities. However, this is not applicable to all facilities with some facilities providing only one pair of uniform on admission. Prisoners on remand are the worst affected as they not give priority in uniform allocation making them rely on the clothes they were remanded with. For those who have been in remand for long periods of time and are not visited by their families the situation is dire. Furthermore, allocation of uniforms does not take into consideration the weather requirements. The inability to take care of these weather conditions means that inmates suffer as a result of weather conditions.

The prison department has made effort to provide bedding i.e. mattresses and blankets to prisoner. However, the Commission has noted that in some detention facilities the beddings given are inadequate, torn, or ragged. In other instances, prisoners share mattresses, whereas in extreme cases an inmate would only have a blanket which he would use to cover himself as well as sleep on the same. The worst affected category with respect to provision of bedding are pre-trial detainees held in remand detention facilities. With respect to police premises and detention facilities, the Independent Policing Oversight Authority in its inspection reports has noted the most stations do not provide beddings to detainees. Follow-up inspections to check compliance has noted no changes in all police detention facilities inspected.152

(iv) **Access to medical care**: The Kenya Prisons Services have taken initiative to ensure accessibility to health care services for prison populations, however a number of challenges have been noted ensuring access to medical care for prisoners. 57 of the 73 prisons visited by the Commission have medical service stations (level 2) which serve inmates as well as member of public.153 For prisons that do not have in house medical centres, services are sought from outside.

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However, inadequate funding in all detention facilities inspected has resulted in inadequate and inconsistent supply of drugs and medical equipment. The commission further noted with concern that the management of terminally ill inmates is dire as prisons do not have the capacity to manage terminally ill inmates. Prison staff and fellow inmates take care of terminally ill often with no training on the medical and psychosocial needs. The Commission also noted the need to have proper medical staff attending to inmates as opposed to having prison warders doubling up as medical staff. It also emerged that in some Counties, since the taking over of health care function by the County Governments, prisoners are expected to pay for services when they go to public health facilities. Prisoners cannot afford to pay due to their state of incarceration.

(v) **Plight of Inmates serving the Presidential Pleasure Sentencing:** Presidential pleasure sentencing is a form of sentence served under the pleasure of the President prescribed under the Criminal Procedure Code and the Penal Code. It is issued by a court of law where a person’s successfully pleads the defence of insanity; where a person is found incapable of understanding criminal trial proceedings or is found to be insane; or children found guilty of capital offence attracting death penalty. In the case of children, a presidential pleasure sentence is entered in lieu of death penalty as penal code exempts children from being sentenced to death. The sentence applies to children and persons with intellectual or psychosocial disabilities.

The High Court in the case of *AOO & 6 Others v Attorney General & another* have declared the provisions of section 25 of the Penal Code on presidential pleasure sentencing for children unconstitutional because of the indeterminate nature of the sentence. The court in this matter ordered the Hon Attorney General and Parliament to move with speed and enact necessary amendments to the law to ensure it conforms to the constitution of Kenya. Additionally, the High Court has found that section 162-167 of the Criminal Procedure Code that prescribes presidential pleasure sentence for persons with psychosocial and intellectual disabilities unconstitutional because the indeterminate nature of the sentence is cruel inhuman and degrading.

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154 Ibid page 20.
156 Section 162 (4) and (5) Criminal Procedure Code.
Regardless of the court decision, the KNCHR is concerned with condition of stay and treatment of these category of detainees which amounts to cruel, inhuman or degrading treatment. In view of various decisions of the high court and the inadequate and incomplete information on these categories of the detainees, the KNCHR carried out a survey\textsuperscript{160} in seventeen prisons across the country to determine the impact of the sentence on these category of detainees. The findings of the survey points to the following issues which amount to cruel inhuman and degrading treatment or punishment:

a. The KNCHR noted with concern a trend of indefinite and excessively long sentences for the two categories of detainees in violation of the provisions of the Convention. The long sentences have been occasioned as a result of lack of guidelines to determine review procedures for these sentences as well as duration of sentence following court decisions.

b. The KNCHR further noted that detainees with psychosocial or intellectual disabilities did not have access to mental health care because most are detained within prisons facilities that do not have psychiatric experts/care. Detainees with intellectual or psychosocial disabilities have to be transferred to Mathari Mental hospital. Transfer procedures are bureaucratic and involve many delays.

c. Detainees serving under Presidential Pleasure are not allowed to take part in program offered within Prisons. The KNCHR observed that detainees are placed under special watch as they deemed to pose a threat to those who are in prison facilities. Denying inmates under presidential pleasure the opportunity to undertake these rehabilitative programs therefore defeats the purpose of their incarceration.

d. There were reported cases of detainees who did not receive any form of representation when sentenced to detention under President’s Pleasure. Given the fact that the sentence is reserved for special category of persons i.e. persons with intellectual or psychosocial disabilities and children. Allowing such persons to self-represent can lead to grave injustice since they lack the ability to follow court proceedings without the provision of procedural and age-appropriate accommodations.

e. The Commission is concerned with the slow pace at which the State is implementing the decisions of the high court because there still persons in custody that are serving under this sentence. There have been no reported concrete steps taken to review or to look into the plight of these category of detainees in light of the decision of the courts.

(vi) **Death Penalty**

The Supreme Court of Kenya in Francis Muruatetu & another v Republic declared the mandatory death sentence unconstitutional as relates to the offence of murder as prescribed in Section 204 of the Penal Code. This means that the death penalty is still legalised in Kenya but the trial court has discretion with regard to sentencing of the offence. The judgment further ordered for the establishment of a Taskforce on the Implementation of the Supreme Court Ruling on the Death Penalty. On 3rd October 2018, the Taskforce submitted to the Attorney General a summary of the Taskforce on the review of the mandatory death penalty. The Taskforce proposes a resentencing hearing model in which the judiciary will designate a specified number of judges who will be responsible for presiding over the resentencing hearings, which will take place in or as close as possible to each prison where eligible offenders are held over the course of a number of consecutive days, with a view to conducting as many hearings as possible in the timeframe. The Power of Mercy advisory committee in conjunction with KNCHR conducted a survey on Kenya’s perception on the abolition of the death penalty. However, the committee is yet to publish its finding.

**Proposed recommendations.**

**On presidential pleasure sentencing, the Commission proposed the following recommendations:**

181. With respect to Children, the Hon Attorney General should with urgency and with compliance with the judgement of the High Court constitute a team that shall develop the necessary framework to operationalize the court judgement.

182. With respect to persons with intellectual and psychosocial disabilities, the State in consultation with persons with disabilities or their representative organizations should develop a comprehensive approach to the right to legal capacity for persons with disabilities including inclusive design of criminal responsibility and review to reform presidential pleasure sentencing in accordance with the United Nations Convention on the Rights of Persons with Disabilities.

183. The State should with urgency put in place mechanisms to review the sentences of persons who are already serving under presidential pleasure.

184. The State should provide reasonable accommodation and avail mental health services for detainees with intellectual or psychosocial disabilities.
On conditions of detention, the Commission proposes the following:

185. The State provides the Kenya Prison Services with adequate funding to implement recommendations towards improving conditions of detention.

186. The State to fast track the process of review of legislation to de-criminalize and re-classify petty offences which contribute to bulk of persons under detention.

187. Abolish the death penalty within the statute books.

Paragraph 18 (b) List of Issues - Information on the resource outlook of the Kenya National Commission on Human Rights.

| Measures taken to increase resources of the Commission to enable it to carry out all its mandated activities, including monitoring places of detention. |

188. The Commission continues to receive low funding from the State which would enable it carry out its mandate including monitoring places of detention contrary to State obligation to provide adequate funding to the Commission to carry out its functions.  

189. The Commission gets funding from both the Government of Kenya and development partners. The Operational costs of the Commission such as salaries and remuneration, Utilities, Rent, and Communication systems are met by the allocation given by the Government of Kenya. The Commission often experiences shortfalls in its programmatic budget of which a portion of it is funded by development partners. The increase in the Commission’s mandate under the Prevention of Torture Act, 2017 has not been accompanied by corresponding additional funding. The table below shows the financial trends of the Commission from the financial year 2013/14 to 2018/19.

190. In terms of staffing, the Commission is currently transitioning into a new organizational structure. The new approved staff establishment as per the re-organization requires the Commission to have 461 staff to operate optimally. The Commission currently has 115 staff in post. The Commission is operating at 24.5% of its full establishment.

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161 Article 249 (3) Constitution of Kenya, 2010
<table>
<thead>
<tr>
<th>Financial Year</th>
<th>GOK Receipts</th>
<th>GOK %</th>
<th>Partners</th>
<th>Partners %</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
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<td>263,770,000</td>
<td>80%</td>
<td>64,602,000</td>
<td>20%</td>
<td>328,372,000</td>
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<td>82%</td>
<td>74,579,444</td>
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<td>2015/2016</td>
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<td>124,904,601</td>
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<td>566,604,601</td>
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<tr>
<td>2016/2017</td>
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<td>116,485,764</td>
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<tr>
<td>2017/2018</td>
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<td>68%</td>
<td>190,659,198</td>
<td>32%</td>
<td>589,425,432</td>
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<tr>
<td>2018/2019</td>
<td>384,789,280</td>
<td>89%</td>
<td>49,746,108</td>
<td>11%</td>
<td>443,535,388</td>
</tr>
</tbody>
</table>

Table 1: Funding outlook of the Kenya National Commission on Human Rights

**Proposed recommendation.**

191. That the State allocates adequate funding to the Kenya National Commission on Human Rights to enable it carry out its mandate effectively.

**Paragraph 19 List of Issues- Monitoring places of detention by IPOA.**

The Committee requested for data on monitoring visits made to places of detention by the Independent Policing Oversight Authority during the reporting period and information about its conclusions and recommendations, which have been implemented and with what results.

192. As of July 2016, IPOA reported that it had carried out 508 inspections of detention facilities across the country. In its end of term board report of 2012-2018, IPOA has noted that whereas the inspections have yielded positive results with Station commanders willing to take immediate action, improvement of conditions of detention facilities need significant resources to systematically address the challenges.\(^{162}\)

Therefore, implementation of recommendation by the Authority heavily depends on resources availability.

**Paragraph 20 List of Issues- Overcrowding in places of detention.**

The Committee requested for up to date information on measures taken to reduce length of pre-trial detention and the high number of detainees awaiting trial and the measures taken to reduce overcrowding in places of detention including data on frequency of use of non-custodial measures and community service orders, particularly of minor offences.

193. The Judiciary through the National Council on the Administration of Justice developed and gazetted the Bail and Bond policy guidelines which are to guide police and judicial officers in the application of bail. Cash bail amounts are still significantly high compared to the earnings of ordinary Kenyans. Cash bail amounts range from KES 1000 to KES

1,000,000/= with a median of KES 15,000/=.\textsuperscript{163} The Judiciary is yet to implement the payment of cash bail in instalments as provided for in the Bail and Bond Policy Guidelines.

194. The Judiciary has also developed the Sentencing Guidelines Policy to guide judges and judicial officers in sentencing process. The Sentencing Guidelines reiterates the provisions of Community Service Order Act which applies to offence punishable with imprisonment that does not exceed three years and the court determines that a sentence of three years or less would be imposed. There is minimal use of non-custodial sentences to reduce prison population. According to the Economic Survey 2018, the 2017 population of petty offenders in custody serving sentences of less than two years stands at 49,014.

195. In response to the high number of detainees on petty offences, the Judiciary through the National Council on the Administration of Justice has established the Committee on Criminal justice Reform to spearhead comprehensive review and reform of the entire criminal justice in Kenya. Its terms of reference include the identification and review of laws and policies that criminalize petty offences and make recommendations on their declassification and reclassification.

\textbf{Proposed recommendations.}

196. The State should enforce the use of non-custodial measures for minor offences in line with the Sentencing Policy Guidelines.

197. The State should enforce the provision of the bail and bond policy with a view to reducing the number of people in pre-trial detention.

\textbf{Paragraph 20 (c) List of Issues- Non-custodial measures}

Measures taken to reduce overcrowding in prison and detention centre including data on frequency and use of non-custodial measures and community service orders, particularly minor offences

198. Overcrowding in prison and detention centres remains a challenge in the management, control and rehabilitation of prisoners in Kenya. During the reporting period, actors within the Criminal Justice Sector coordinated under the National Council on the Administration of Justice have come up with measures towards addressing overcrowding. Measures include:

\textsuperscript{163}Criminal Justice System in Kenya: An Audit page 199
(i) **Construction of new prisons and detention facilities**: The State of Judiciary and Administration of Justice notes that Kenya Prison Services has constructed new prisons in Makueni, Kwale, Mwingi, Rachunyo, Kaloleni, Bomet, Vihiga, Yatta, Marimanti, Kehancha, Chuka, Kilgoris, Sotik, Loitoktok, Maara, Nyamira and Mutomo. Despite the efforts to expand prison facilities, the daily average prison population as of 2017 stands at 51,021 against an accommodation capacity of 26,000.

(ii) **Implementation of the Bail and Bond Policy**: In a bid to address disparities in the administration of bail and address use of pre-trial detention, the National Council on Administration of Justice developed the bail and bond policy guidelines. However, this has not been adequate in addressing the high numbers of pre-trial detainees committed to pre-trial detention. Data extracted from the Kenya National Bureau of Statistics shows that whereas there has been a steady decline in the number of pre-trial detainees, pre-trial detainees constitute almost 60% of total number of persons committed in prison facilities.


<table>
<thead>
<tr>
<th>Year</th>
<th>2013</th>
<th>2014</th>
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<th>2016</th>
<th>2017</th>
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<td>F</td>
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<tr>
<td></td>
<td>137,974</td>
<td>12,539</td>
<td>124,795</td>
<td>13,966</td>
<td>121,097</td>
</tr>
<tr>
<td>Total</td>
<td>151,182</td>
<td>139,905</td>
<td>133,859</td>
<td>127,794</td>
<td>129,466</td>
</tr>
</tbody>
</table>

(iii) **Formation of the National Committee on Criminal Justice Reforms**: The Chief Justice formed the National Committee on Criminal Justice Reforms with a mandate to among other things ‘identify and review laws and policies that criminalize petty offences and make recommendations for their de-criminalization and reclassification.’ The work is expected to contribute towards the reduction of petty offenders being incarcerated.

(iv) **Implementation of the sentencing policy through the use of non-custodial measures such as community service orders**: In the State of Judiciary and Administration of Justice Report (2016-2017), it was reported that there were a total of 48,031 cases inquired into for probation and community service order countrywide. With respect to probation, a total of 11,011 probation investigations were made and 6910

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offenders were placed on probation orders. On community service orders a total of 34,665 cases were referred for community service pre-sentence reports out of which 33,486 offenders were found suitable to serve their sentence under Community Service Orders.

However, the probation and aftercare service department reported that most offenders were placed on one day community service orders thus not putting enough time to work. Additionally, the department recorded cases where offenders absconded in totality and noted that executing warrants of arrest for absconders especially in urban slums remains a challenge. 167

The Economic Survey, 2018 shows that in the period between 2017 and 2018 shows a decline of 11.3% of the number of offenders handled by probation and after care services.

The State of Judiciary and Administration of Justice Report notes that there is gross underutilization of alternative sanctions by judicial officers and prison facilities remain overcrowded. 168 The daily average of prison population is 50,000 as compared to an accommodation capacity of 26,000. Major contributing factor to gross underutilization is lack of effective supervision of the orders which makes courts reluctant to impose the orders. 169 The Probation and Aftercare Services continue to face challenges in executing their work in relation to court inquiries and supervision of court orders due to lack of adequate funding. As at June 2017, 847 probation officers serving in various court stations and probation institutions.

**Proposed recommendation.**

199. Increase funding to the Probation and Aftercare Services Department to enable it carry out effective supervision.

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168 Ibid page 215

Paragraph 20 (d) List of Issues- Conditions of places of detention

Measures taken to improve conditions in all places of detention and ensure that adequate health services are made available.

200. The Commission has carried out a survey on the provision of health care services in detention facilities across the country\textsuperscript{170}. In the Survey, the Commission has noted good practices on provision of health services such as the management of inmates with HIV/AIDS, pregnant women and lactating mothers. These categories of inmates were provided with double ration or special diets prescribed by medic and are given supplements. The Commission further established that prisoners who are expectant are put in ante-natal care and are provided with medical assistance to ensure safe delivery.

201. The Commission however noted that in some detention facilities i.e. Nairobi Remand and Allocation, inmates with HIV were kept in a separate block from the rest of prison population.

202. The Commission further observed that most facilities visited had level 2 health facilities within the prison premises that serves both members of the public as well as prisoners. However, the Commission noted a number of challenges in the delivery of health care services for prisoners and conditions of detention:

(i) \textit{Medical Infrastructure:} The commission noted discrepancies in the delivery of services and quality of medial infrastructure in the facilities visited. Most prison facilities visited have level 2 facilities (dispensaries) which operate between 8:00 am and 5:00 pm. This limits the nature of service and conditions that can be addressed by the facilities. The Commission noted that level 2 facilities do not operate at night and cannot provide 24-hour observation of patients. Inmates who require intense medical attention are therefore referred to county referral hospitals for further treatment. For prison facilities visited that do not have in-house medical facilities, the prisoners have to be taken to nearby health facilities. This has been a challenge for some of the facilities as logistical challenges of ferrying Prisoners to and from facilities which are far and response to emergency situations. For example, during the Commission’s visit to Kwale Prison, the Commission noted that the medical needs are catered for a hospital that is about 33 kilo meters away from the prison facility. Logistical challenges of ferrying prisoners to and from the facility seriously hamper access of prisoner to medical attention especially during

medical emergencies. Additionally, the prison facility did not have trained medical personnel amongst its staff.

(ii) **Medical examinations and management of communicable diseases:** The Commission noted that medical examinations are done upon entry. However, the examination is not comprehensive to identify physical or mental illness and take appropriate measures to provide appropriate health services and management of health of prisoners. During its visit to Lodwar Prison, the Commission observed a case of an inmate who had been admitted to prison with Hepatitis B who went on to infect 90 other inmates and 5 prison staff. The case was detected when the inmate was participating in a blood donation exercise and not through internal mechanisms that would enable the Prison department detect, treat and take appropriate measures to curb the spread of the disease within the facility. Additionally, regular medical examination are not consistently done in terms of prevention and timely diagnostics. This puts prisoners and prison staff at great risk of disease outbreak that may turn into an epidemic due to lack of early detection and mitigation. The high number of inmates as compared to medical personnel available as well as availability of funds has hampered the ability to carry out comprehensive medical examination for prisoners.

(iii) **Mental health care:** the Commission noted that prisons do not have the capacity to provide mental health care for those who need it. The facilities visited did not have appropriate medical personnel to offer mental health care to inmates. In the KNCHR Survey on Presidential Pleasure Sentencing, the Commission noted that inmates who require mental health care are transferred to Mathari Mental Hospital which often takes long due to bureaucracies of transfers. For those transferred to Mathari Hospital, there is no allocation of funds to cater for their stay since the Hospital and Prisons do not want to take responsibility for them.

(iv) Additionally, the Commission observed that prisoners with psychosocial disabilities were constantly kept under medication to manage their condition and were not engaged in any activities because of their condition.

(v) **Rehabilitation of drug addicts:** there are no targeted drug treatment and harm reduction programs in most prisons facilities in Kenya with the exception of Malindi Prison and Shimo la Tewa where drug treatment and harm reduction programs are availed to prisoners though collaboration with non-governmental organizations.

(vi) **Availability of drugs, equipment and trained personnel:** Availability of drugs, equipment and medical personnel remains a challenge in health facilities in detention centres. The Commission noted challenges in delivery of drugs. Kenya
Prisons Services do not have the capacity to provide appropriate medical and psychiatric care. In most detention centres, physician assistants and nurses are relied upon to provide primary care to patients who are either not supervised or trained. As result prisoners are at risk of receiving poor care. Additionally, referral medical centres suffer from shortage of medical personnel which shows no sign of improvement. There is need for the Prison Service to carry out a health needs assessment to enable it determine and plan for health care needs of prisoners. As at the time of carrying out the Survey in 2017, the Prisons Department had not carried out a health needs assessment.

**Conditions of detention**- Efforts have been made towards the provision of water and maintenance of hygiene in prison facilities. In prisons monitored by the Commission, public health officers form County Governments with carry out regular inspections on conditions of detention. In prions visits, the commission has noted general standards of cleanliness and hygiene. Despite the progress made, congestion still poses a major challenge in management of conditions of detention. Cell blocks remain very stuffy due to high prison population which affects air circulation. There are also shortages of mattresses and beddings for inmates.

**Proposed recommendations**

203. Ministry of Health in collaboration with the Prisons Department should carry out a health needs assessment of prison facilities for purposes of determining the health needs, medical services and resources needed to ensure access to the highest attainable standards of health for prisoners.

204. State should invest adequate resources both human and financial towards providing quality medical services for prisoners.

205. Prison department should provide reasonable accommodation and avail mental health services for prisoners with disabilities including those with psychosocial disabilities.
Paragraph 22 (a) and (b) List of Issues- Redress for victims of 2007-2008 post-election violence

The Committee requested for up to date information on measures that the State has taken to ensure prompt, impartial, full and effective investigations of all allegations of torture particularly sexual violence, excessive use of force and extra-judicial killings perpetrated by the police and military during the 2007-2008 post-election violence and to prosecute the perpetrators of such acts. The Committee has also requested for up to date information of any redress that has been provided to victims of torture and sexual violence perpetrated during the post-election violence and whether the fund for restorative justice established by the President in 2015 has been used to provided redress for victims.

206. There has been no progress in investigation and prosecution of allegations of torture particularly sexual violence, excessive force and extra-judicial killings perpetrated during the 2007-2008 post-election violence. The Collapse of the last cases before the International Criminal Court has further devastated hopes of victims for justice.

207. The restorative justice fund is yet to be operationalized despite draft regulations and a policy developed by a multi-sectoral technical working group chaired by the Kenya National Commission on Human Rights. These regulations and policy were handed over to the Attorney General in 2017 but to date are yet to be enacted. This remains a major setback towards restorative justice and reparations for the victims and survivors of the 2007/8 post-election violence.

Proposed recommendation
208. The State should hasten the approval and full operationalization of the regulations governing the restorative fund.


Information on whether the National Assembly has considered the report by the Truth, Justice and Reconciliation Commission and the measures taken in response to that report.

209. The President in March 2015 declared the establishment of a Restorative Justice fund during the State of the Nation speech in Parliament. Kshs 10 billion was to be set aside to repair victims of historical injustices as captured from the Truth Justices and Reconciliation Commission.

210. The National Assembly has yet to table and discuss the report by the Truth Justice and Reconciliation Commission. This impedes the implementation process and the realisation of justice for victims of historical injustices.
211. In 2016, the Attorney General set up a technical committee to come up with a framework for Reparations for the purposes of setting up of the Restorative Justice fund, map out victims of historical injustices in Kenya and to disburse the funds. The reparations guidelines and policy are yet to be adopted and gazetted. The draft regulations only provides for the first category (Priority A) of victims for reparations that comprise of most vulnerable victims including orphans, child victims, elderly victims and single heads of households that suffered personal harm leaving out other categories (Priority B and C ) that include group victims of historical injustices.

212. In the 2019 State of nation address, the President announced that the Ksh 10 Billion restorative fund will be used to provide community reparations living individual reparations in limbo. The TJRC report recommends for the provision of individual and community reparations.

**Proposed recommendation.**

213. The State should adopt and gazette regulations and framework for Restorative Justice Fund to enable compensation of victims of the historical injustices.


**Paragraph 22 (e) List of Issue-International Criminal Court.**

<table>
<thead>
<tr>
<th>Measures taken by the State party to cooperate with the investigations by the prosecutor of the International Criminal Court into the post-election violence.</th>
</tr>
</thead>
</table>

215. On 19th September 2016, the Trial Chamber V(B) of the International Criminal Court(ICC) issued a decision finding that Kenya had failed to comply with its obligations under the Rome Statute. Kenya was found to have failed to comply with its statutory obligations to consult with the ICC and to take all reasonable steps to execute a request for co-operation from the Court.

216. The State has not established an International Criminal Division (ICD) within the Judiciary. The initial heated campaigns for a national mechanism appear to have been dampened following the termination by the ICC of the Kenyan cases.
Paragraph 23 List of Issues- Regulations under section 39 of the IPOA Act.

The Committee requested for up to date information on whether the draft regulations being prepared by IPOA to provide for disciplinary and criminal punishment for police officer who fail to report death or serious injury resulting from police action or occurring in police custody or who fail to properly secure evidence in such cases in which these regulations have been applied and the disciplinary and criminal punishment that has resulted.

217. The Authority has developed regulations pursuant to section 39 of the IPOA Act. As of the time of reporting, the regulations were yet to be gazetted. The regulations will enable IPOA fully implement its mandate including investigations, inspections, audit, review and monitoring the Internal Affairs Unit of the National Police Service.

Proposed recommendation
218. The State should fast track the gazettement of the regulations under section 39 of the IPOA Act.

In addition, the committee requested for up to date information:

Paragraph 23 (a) List of Issues- Information on Implementation of recommendations issued by IPOA.

On whether any recommendations concerning the necessary changes to police processes or procedures have been made by the authority during the reporting period and whether they have been implemented.

219. The Independent Policing Oversight Authority in exercise of its mandate has made recommendations to the National Police Service towards professionalising the service. Some of the recommendations made include need for harmonized command and coordination structure from the lowest levels, need to aggressively embrace technology, need to ensure reasonable working hours for the police and the need to operationalize community policing initiatives. However, in its Board End of Term Report, IPOA has noted that it has faced non-cooperation by members of the National Police Service as many of the recommendations made to the police towards professionalising the service remain unacknowledged.

173 Ibid page 93-94.
Paragraph 23 (b) List of Issues- Information on complaints and prosecutions on excessive use of force.

On the number of cases of use of force leading to serious injury or other grave consequences that have been reported to the IPOA and the number that have been referred to the Director of Public Prosecutions and the number of prosecutions and convictions that have resulted.

220. As at 30th April 2018, IPOA had received a total of 9,878 complaints and referred 103 cases to the office of Director of Public Prosecutions for further action.\(^{174}\) The nature of complaints received and investigated relate to arbitrary arrests, unlawful detention, deaths in custody, police assault, police shooting, sexual offences and sexual related offences, harassment, intimidation and coercion amongst others. As a result of its work, the authority has so far achieved 4 convictions. The cases are:

(i)  \textit{Republic versus IP Veronica Gitahi and PC Issa Mzee}\(^{175}\) - Involved the shooting of 14 year old girl in Kwale who died after being shot by Police. The accused were found guilty of the offence of manslaughter contrary to section 202 of the Penal Code and sentenced to 7 years imprisonment.

(ii) \textit{Republic versus PC Titus Ngamua Musila}\(^{176}\) - Involved the shooting of a 26 year old male at Githurai 45 bus station, Kiambu by Police. The accused person was found guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and was sentenced to death.

(iii) \textit{Republic versus PC Benjamin Kahindi and PC Stanely Okoti}\(^{177}\) - Involved the shooting of Geoffrey Mogoi, Amos Makori and Joseph Onchuru in Kangemi, Nairobi by Police. The accused persons were charged and convicted with three counts of murder under section 203 as read with section 204 Penal Code. The three officers were sentenced to death.

(iv) \textit{Republic versus CIP Nahashon Mutua}\(^{178}\) - Involved the killing of one Martin Koome while he was detained in custody at Ruaraka Police Station, Nairobi. The accused was charged and convicted for the offence of murder contrary to section 203 as read with 204 of the Penal Code. The officer was sentenced to death.

\textit{Areas of concern}

221. The Authority is facing non-cooperation from the National Police Service resulting in delays in investigations. In its end of term board report, IPOA has noted that the National Police Service has not complied with the Sixth Schedule of the National Police

\(^{174}\)Independent Policing Oversight Authority \textit{Board End-Term Report May 2012-May 2018} (May 2018).

\(^{175}\)2016 e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/118626}.

\(^{176}\)2018 e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/149253}.

\(^{177}\)2018 e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/168360}.

\(^{178}\)2019 e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/169489}.
Service Act which requires police to report use of firearms that leads to death or serious injuries and provisions requiring the police to secure scene of crime arising from use of firearm that occasions death or serious injury.\textsuperscript{179} Non-compliance has also been noted with the requirement of police to IPOA and the commanding officer where use of firearm occasion death or serious injury.\textsuperscript{180} IPOA has noted numerous instances of mishandling and mismanagement of crime scenes.

222. Non-cooperation by the Police has been noted through cover-up of crimes, through tampering with exhibits and crime scenes, manipulation of arms and ammunition movement register and other official documents, witness intimidation all with the aim of defeating justice.\textsuperscript{181} Furthermore Police proceed to undertake investigations in cases of use of force/firearms resulting to death/serious injury and death in custody and recommend inquests before informing the Authority and thus legally barring IPOA’s investigations.

**Proposed recommendation.**

223. The National Police Service should cooperate with IPOA to enable the Authority achieve its mandate.

224. The State should fully operationalize the National Coroners Service Act\textsuperscript{182} and establish the National Coroners Service pursuant to section 6 of the National Coroners Service Act. This is critical towards ensuring that crime scene management is enhanced to ensure impartial investigations in cases of use of force and firearms resulting in serious injury or death by the Police or death in custody.\textsuperscript{183}

**Paragraph 23 (b) List of Issues- Confidential complaints mechanism for persons deprived of liberty.**

| On the measures taken to ensure that persons in detention alleging torture or ill-treatment can make confidential complaints to impartial and independent institutions and mechanisms to ensure follow up |

225. The Independent Policing Oversight mechanism has established mechanisms to ensure that complainants of torture or ill-treatment while in police custody can make confidential complaints. Section 27(8) of the Persons Deprived of Liberty Act empowers persons including persons deprived of liberty to lodge formal complaints concerning

\textsuperscript{179} Ibid page 93-94.
\textsuperscript{180} Ibid page 93-94.
\textsuperscript{181} Ibid page 93.
\textsuperscript{182} No 18 of 2017 available at \url{http://www.kenyalaw.org/lex//actview.xgql?actid=No.%2018%20of%202017#part_II}
\textsuperscript{183} Independent Policing Oversight Authority Board End-Term Report May 2012-May 2018 (May 2018) page 93.
their treatment to the Commission on Administrative Justice or the Kenya National Commission on Human Rights.

226. In the reporting period, the Kenya National Commission on Human Rights together with partners have been working with the Kenya Prison Services to establish early warning and response mechanism in prison facilities. The objective is to strengthen human rights defender and national security organs on promoting structural reforms against torture and other cruel, inhuman or degrading treatment within detention and custodial facilities. To this end, KNCHR facilitated workshops for Kenya Prison Service on early warning and reporting mechanism (EWRM); as an essential service delivery practice of ensuring human rights monitoring based on: data collection, situational analysis, collective action and compliance monitoring to local law and international instruments. The trainings were conducted across 13 prisons targeting 25 officers per prison. The trainings were conducted together with Kenya prison service human rights officers who provided a practical aspect on Human rights within places of detention. The purpose of the trainings was to institutionalize EWRM in 40 correctional facilities and to domesticate a human rights-based approach to enhance the operational environment for the officers and prisoners. EWRM mechanism in the correctional facility operates on the principles of collective responsibility by all officers, participation, proactive involvement of the sectional heads and ownership by the command of the correctional facility.

227. During the training, a total of 325, 136 women and 189 male officers were trained on United Nations minimum rules for the treatment of prisoners and EWRM. One of the features of EWRM is the establishment of Human Rights Committees at local prisons. The Human Rights Committees have a mandate to:

(i) Advise the Officer in charge of the facility on human rights matters
(ii) Monitor compliance to the United Nations minimum rules for the treatment of prisoners
(iii) Coordinate human rights activities in prisons;
(iv) Identify Early Warning Signals through analysis of compliance report of minimum rules for treatment of prisoners
(v) Carry out quarterly audits on the level of compliance to UNSMRTTP and other human rights standards through the human rights offices;
(vi) Collaborate with the criminal justice agencies, court user committees and other stakeholders in realization of its objectives
(vii) Prepare and disseminate periodical publications and annual reports on the activities of the Committee;
(viii) Develop a criteria for recognizing and celebrating success on the implementation of UNSMRTTP and other applicable standards;
(ix) Any other human rights related function to be agreed upon by the committee
Proposed recommendations.

228. The State through the Consultative Committee on Persons Deprived of Liberty should put in place policy and administrative structures to ensure that persons in custody deprived of liberty are provided facilities to be able to access the independent institutions while in custody.

229. Strengthen human rights committees and desks within facilities to receive and handle confidential complaints on torture and ill-treatment.

Paragraph 24 List of Issues

The Committee has requested for up to date information on whether the draft IPOA regulations creating a more simplified process for recording complaints against the police have been implemented. The Committee further requested for information on the number of complaints filed with IPOA disaggregated by year. How many cases has the authority forwarded to ODPP for action? How many prosecutions have been initiated and did any result in convictions and if so on what charges?

230. A simplified procedure of recording complaints has been established. A complainant can make a complaint to the Authority online, in writing, by email or telephone. A complainant can also download a complaints form to fill out and send in. Other ways to raise complaints on policing include calling the Complaints Management Team to make an oral complaint or email to complaints@ipoa.go.ke

231. According to the IPOA Board End of Term, Report 2012-2018 the IPOA has received a total of 9,878 complaints since its establishment. The breakdown of complaints per year is captured in the table herein below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of complaints</th>
</tr>
</thead>
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<tr>
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<td>594</td>
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<tr>
<td>2013/2014</td>
<td>860</td>
</tr>
<tr>
<td>2014/2015</td>
<td>1792</td>
</tr>
<tr>
<td>2015/2016</td>
<td>2529</td>
</tr>
<tr>
<td>2016/2017</td>
<td>2267</td>
</tr>
<tr>
<td>2017 to April 2018</td>
<td>1836</td>
</tr>
</tbody>
</table>

Table 3: Table captured from figures given by IPOA in the Board End of Term Report

232. As at 30th April 2018, IPOA had forwarded 103 cases to the Office of the Director of Public Prosecutions for further action. As at 30th April 2018, IPOA had secured 4

successful convictions of police officers for murder as a result of unlawful shootings and a death in custody as reported above.

**Areas of concern**

233. The IPOA continues to experience back log of cases awaiting investigations. As at December 2016, the number of cases awaiting investigations stands at 677 with the lowest rate of growth of case backlog being realised between July 2016 and December 2016. The Authority needs more financial and human resources to enable it devolve its services and complete pending investigations.\(^{185}\)

**Proposed recommendation.**

234. The State should ensure that IPOA has sufficient financial and human resources to enable it effectively carry out its mandate.\(^{186}\)

**Paragraph 25 List of Issues- Information on resource allocation to IPOA.**

| Committee has requested for up to date information on measures taken to ensure that the Independent Policing Oversight Authority is independent and has sufficient financial and human resource to carry out its mandate. |

235. Since its establishment, the Authority has seen its annual budget grow from Kshs 246 million in 2012/13 to Kshs 807 million in the 2018/19 financial year.\(^{187}\) Cumulatively the board has received a total of Kshs 2.4 billion from national treasury to finance its operations.\(^{188}\) The boost in financing has enabled IPOA establish 8 regional offices in Mombasa, Kisumu, Garissa, Nakuru, Eldoret, Kakamega, Nyeri and Meru. Decentralization of services is critical in ensuring effective policing oversight in rural and peripheral areas of the country.

\(^{185}\) Ibid.
\(^{186}\) Ibid
\(^{187}\) Ibid page 80.
\(^{188}\) Ibid page 80.
Paragraph 26 List of Issues-Administration of P3 Forms

Committee has requested for information on measures that have been taken to ensure that police and medical professionals do not demand for payment from victims of violence, including sexual violence, for providing, completing, processing, or testifying in court in relation to these forms, and to ensure that any individual who demands payment for such action is investigated and subjected to disciplinary or other punishment. Has the State party established an independent medical examiners service to address these issues?

236. The National guidelines on management of sexual violence\(^{189}\) state that p3 form for victims of sexual violence should be free but the trends in most counties in their respective Finance Acts is that they are imposing a fee on the processing and filing of p3 form. Justification given by national and county governments is that the constitution under article 209 (4) allow national and county governments to levy fees for services including services rendered for medical examinations and filing of p3 form.\(^{190}\) It is critical to note that fees levied for filling of p3 forms is not uniform across counties and is not charged in some government health facilities. There is currently no policy/regulation in place to govern charge of levies for filing p3 form at medical facilities.\(^{191}\)

237. In addition, it is reported that whereas the p3 forms is free and can be accessed on the internet, victims of crime are made to print/photocopy at their own cost as it is often not available at the Police Station.\(^{192}\) This poses a challenge for victims who have no access to the internet and have to puruse hard copies at their own cost.

238. The reporting period has seen to court petition challenging the practice of demanding payment from victims of violence including sexual violence for completing and processing of P3 forms. In the case of Legal Resources Foundation Trust versus Attorney General and 2 Others\(^{193}\), the petitioners sought orders from court to declare that actions of the police and government medical facilities to levy fees for either issuance of filling of P3 forms to be unlawful and unconstitutional. In addition, the Petitioners ought orders to prohibit national and county government health facilities from receiving, asking, soliciting demanding any payment or levy for filing by a duly authorised medical practitioner of any P3 forms.

\(^{191}\)Ibid para 75. 
\(^{192}\)Ibid para 70. 
The court found that the practice of charging fees for filing P3 form is the norm rather than the exception in most national and county government health facilities. In view of this finding, the court held that the levy charged on issuance or filling of the P3 form is illegal and ‘that victims of assault, sexual offences and related crimes are entitled to the benefits of legitimate expectation.’ In addition, the court in noting that p3 document is part of critical information needed in proof of criminal offences, held that the government had a duty to comply with the provisions of the constitution in relation to access to justice. Therefore the act of charging fees/levies for the issuance or filing of the p3 form violates the right to access to justice for victims contrary to article 48 of the Constitution of Kenya.

The Court subsequently issued an order of prohibition to government including their agents or any medical officers in charge of public health facilities at both levels of government from levying fees for issue or for filing the p3 forms.

Proposed recommendation

The government should implement court order by prohibiting charging of levies/fees for issuance or filling of p3 forms.

Ensure that the cost of accessing p3 form is borne by the government not victim of crime.

Paragraph 30 (c) List of Issues- Victim Protection Law.

The committee as requested for information on: The status of the Victims of Offence Bill and efforts to establish a comprehensive legislative framework to give effect to the right to redress, including compensation and medical rehabilitation to victims of torture and ill-treatment.

During the reporting period, Parliament enacted the Victim Protection Act which is a comprehensive legislative framework that provides for the protection, rights and welfare of victims of crime. The Act provides for the rights and protection of victims of crime, it obligates the State to provide victims of crime support and welfare services, and it establishes a victim protection trust fund through which expenses related to support services to victim may be charged. The act mandates the victim protection board to assist victims in dealing with physical injury and emotional trauma; access and participate in the criminal justice process; participate in restorative justice to obtain

\[\text{\footnotesize 194ibid para 68.}\]
\[\text{\footnotesize 195ibid para 78.}\]
\[\text{\footnotesize 196ibid para 92.}\]
\[\text{\footnotesize 197ibid para 97.}\]
\[\text{\footnotesize 198ibid para 101 (iii).}\]
reparation and cope with problems associated with victimization. Section 26 (1) of the Act provides courts with the power to order a person to make restitution or compensate the victim.

244. In addition to the Victim Protection Act, the State further enacted the Prevention of Torture Act which makes torture and ill-treatment a criminal offence in Kenya. Section 17 of the Act affirms the right of a victim of torture and other cruel, inhuman and degrading treatment or punishment to obtain redress and the enforceable right to adequate reparation including restitution, adequate compensation, and rehabilitation. Section 19 (2) states that the expenses for medical treatment, rehabilitation and professional counselling for victims shall be obtained for the Victim Protection Trust Fund established under the Victim Protection Act.

245. Whereas the State has enacted the Victim Protection Act and appointed the Victim Protection Board in 2017, the State has not put in place regulations which has hampered the full implementation of the Act including provision of support services to victims of crime. Additionally, there is no information provided by the State as to whether it has appointed board of trustees under section 30 of the Act who are mandated with the role of administering the victim protection trust fund.

Proposed recommendation
246. Enact regulations to fully operationalize the Victim Protection Act including regulations on administration of the Victim Protection Trust Fund, the conduct and regulation of the business and affairs of the Victim Protection Board.


The Committee has requested for up to date information on measures taken to prevent and punish harassment, intimidation, and violence directed against human rights defenders and journalists, including the cases of the deaths of Hassan Ali Guyo in August 2013 and newspaper editor and publisher John Kituyi in April 2015 and allegations that human rights organizations including Muslim for Human Rights and HAKI Africa have been subjected to retaliation by the authorities for their documentation of abuses in the context of counter-terrorism.

247. The reporting period saw to intensified assault on civic and democratic space in Kenya targeting human rights and governance organization outspoken on human rights violations and accountability in the governance sphere. The Kenya National Commission documented the following violations by authorities geared towards human rights defenders and organizations during the reporting period:

(i) Failure to operationalize the Public Benefits Organizations Act
The Commission is concerned by the persistent failure by the State to operationalize the Public Benefits Organizations Act that was enacted into law in 2013. The legal framework is intended to ensure more efficient, transparent and accountable civil society sector with effective leadership. The High Court has on two occasions pronounced itself on the persistent failure to operationalize the Act as being a violation to the Constitution and has directed the State to operationalize the Public Benefits Organizations Act. Despite the court directive and orders, the Act is yet to be operationalized.

In the case of _Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning_199 (KNCHR appearing as Amicus Curiae) High Court Petition Number 351 of 2015, the petitioners challenged the failure of the Ministry of Devolution to appoint a date for the coming into operation of the Public Benefit Organization Act and further sought order of mandamus to compel the Cabinet Secretary in charge of Devolution and Planning to appoint and gazette a date for the coming into operation of the Act. The Court found that the failure by the Cabinet Secretary to appoint a commencement date for the Public Benefits Organizations Act is inconsistent with the Constitution. The Court issued an order of mandamus compelling the Cabinet Secretary in charge of Devolution and Planning, within the fourteen days of issuance of the order, to appoint a date of coming into operation of the Act. The order was not complied with and instead the function of regulation of Non-Governmental Organization was transferred from the Ministry of Devolution and Planning to the Ministry of Interior and Coordination of National Government. The transfer is irregular as section 2 (1) of the Public Benefits Organizations Act places regulation of Public Benefits Organizations under the Ministry of Devolution and Planning. The Commission views the transfer of the function as scheme to frustrate and circumvent judicial orders through exercise of administrative powers.

The Commission together with Civil Society Organizations subsequently moved to court seeking orders that the Cabinet Secretary in charge of Ministry of Devolution and Planning and the Cabinet Secretary in Charge of Ministry of Interior and Coordination of National Government be cited and held in contempt of court orders. The Court found that the Cabinet Secretaries had wilfully disobeyed a valid court order and ordered the National Government to comply with the judgment within 30 days of the date of service, failure of which the Cabinet Secretary in charge of Ministry of Interior and Coordination of National Government would be committed for contempt. Despite the court order, the National Government has not operationalized the Act.

(ii) Threats and intimidation of non-governmental organizations focusing on human rights and governance.

The reporting period has seen attempts to either suspend operations or de-register non-governmental organizations viewed as being critical of the State for human rights violations on grounds of alleged non-compliance with law, financial impropriety, money laundering and financing of terrorist activities. The State through the NGO Coordination Board has attempted to de-register the Kenya Human Rights Commission (KHRC), African Centre for Open Governance (AFRICOG) on allegations of financial and regulatory impropriety without being accorded an opportunity to be heard and defend themselves from the allegations. Notably, the State has on two occasions attempted to de-register the Kenya Human Rights Commission (for the same reasons) even with the existence of a court order declaring the adverse actions by the NGO Coordination Board as being unlawful, null and void.200

Similar action has been taken against the International Foundation for Electoral Systems (IFES) in December 2016 by the NGO Co-ordination Board on account that it has not be registered and is therefore carrying out activities in the country illegally without being afforded an opportunity to be heard. IFES has since proved that it is lawfully registered by the Registrar of Companies and has been in operation since 2002.201 Following the Garissa University attacks in 2016, the Inspector General of Police issued a gazette notice notifying the public of its intention to classify Muslim for Human Rights (MUHURI) and HAKI Africa as specified entities associated with terrorism. The government then proceeded to freeze their bank accounts thus halting their operation without affording them an opportunity to be heard. The two organizations are outspoken on violations of human rights violations occasioned by security agencies. The two organizations have challenged the decision of the Inspector General in the High Court which has held that the publication of the Gazette Notice as unconstitutional for failure of the Inspector General of Police to afford the two organizations and opportunity to be heard.202

In a Survey carried out by the Commission on situation of women and other vulnerable human rights defenders in Kenya, the Commission established that human rights defenders especially women remain at ‘high risk of a plethora of threats including arbitrary arrest and detention, physical violence, threats, intimidation and harassment.’\textsuperscript{203} The audit established that women human rights defenders were often and unjustly charged with incitement to violence and disobedience to law in their line of duty. This was occasioned by the fact that human rights defenders use protest and picket while seeking audience of duty bearers. The audit further established that 52% of women human rights defenders interviewed felt that there was insufficient State protection on the activities of human rights defenders. Furthermore, the study established that police officers and chiefs were common perpetrators of human rights at 56% with community members and politicians cited as notable perpetrators standing at 24% and 13% of responses received. This points to a lack of appreciation of the work of human rights defenders by both the community and political leadership and mistrust between human rights defenders and police and chiefs.

\textbf{Proposed recommendations.}


249. The State should allow the operation of lawful and legitimate civic action without hindrance, interference and intimidation.

250. Investigate and punish perpetrators of violence and violations against human rights defenders.


Paragraph 33 List of Issues - Discrimination and ill-treatment of sexual and gender minorities.

The committee has requested for up to date information on measures taken to address reported discrimination and ill-treatment including acts of sexual violence of lesbians, gay, bisexual, and transgender persons. Please indicate whether the State party has repealed any legal provision that foresee penalties against such persons.

251. Consensual adult private sexual conduct between persons of the same sex is a crime in Kenya as provided in section 162 (a) and (c), section 163 and section 165 of the Penal Code.\textsuperscript{205} As at the time of reporting, a petition filed in the high court challenging the constitutionality of sections 162 (a) and (c), 163 and 165 of the Penal Code was unsuccessful.\textsuperscript{206}

252. Though rarely enforced, the provisions criminalizing same sex conduct underpin violence, discrimination and stigmatization of lesbian, gay, bisexual and transgender persons in Kenya. Persons of diverse sexual orientation and gender identity face challenges including killings, physical violence, stigma and exclusion from family, expulsion for workplaces, learning institutions, blackmail, extortion, denial of work, housing and poor access to health care.\textsuperscript{207} Furthermore, there exists legal and policy gaps providing recognition for persons whose gender identity does not conform to the sex assigned during birth and for those who wish to change their gender markers in government issued documentation contributing to discrimination and ill treatment of sexual and gender minorities.\textsuperscript{208}

253. The reporting period has seen to the courts making progressive pronouncements protecting the rights of persons of diverse sexual orientation and gender identity in Kenya. The cases include:

(i) \textit{COI & another versus Chief Magistrate Ukunda Laws Courts and 4 Others}\textsuperscript{209}: The Court of Appeal in Mombasa declared forced anal examination as unconstitutional on account that its amounts to torture and violates the rule against self-incrimination. The case involved two male persons in Kwale who were charged

\textsuperscript{205} Cap 63 Laws of Kenya available at \url{http://www.kenyalaw.org/lex//actview.xql?actid=CAP.%2063}.
\textsuperscript{206}EG & 7 Others versus Attorney General Petition 150 and 234 of 2016 (Consolidated) available at \url{http://kenyalaw.org/caselaw/cases/view/173946/}.
\textsuperscript{209}(2018) e KLR available at \url{http://kenyalaw.org/caselaw/view/150781/}. 
under section 162 (a) and (c) of the Penal Code for same sex conduct. During investigations, the defendants underwent forced anal testing for purposes of proving the commission of offence under section 162 (a) and (c) following a court order by trial court.

(ii) *Eric Gitari versus the Non-Governmental Organizations Co-ordination Board & 4 Others* 210: The High Court quashed a decision by NGO Coordination Board which rejected an application for registration of an NGO named Gay and Lesbian Human Rights Commission on account that the Penal Code criminalizes same sex conduct. The Court in upholding the right of petitioner to associate held that the equality and non-discrimination provisions in the constitution apply to all persons including persons of diverse sexual orientation. Hence permitting discrimination on grounds of sexual orientation is contrary to the constitution. The decision of the high court was upheld by the Court of Appeal upon appeal. 211

(iii) *Republic versus Kenya National Examinations Council and another exparte Audrey Mbugua Ithibu* 212: The applicant sought orders of mandamus to compel the Kenya National Examination Council to change the name and gender marker in his secondary school certificate. The court upheld the right of transgender persons to government issued documentation that bore their desired name with the gender marker removed.

254. Additionally, in 2015 the State during the 2nd cycle of the Universal Periodic Review accepted a recommendation to enact a comprehensive equality and anti-discrimination legislation that offers protection to all person regardless of their sexual orientation and gender identity. This is a critical step towards addressing discrimination faced by persons of diverse sexual orientation and gender identity. However, the commission notes with concern that the State is yet to enact this legislation as committed in the Universal Periodic Review. In the 3rd Cycle review of Kenya under the Universal Periodic Review, the State in the draft outcome document has however indicated its intention to note the same recommendation on enactment of a comprehensive equality and anti-discrimination legislation affording protection to all persons regardless of their sexual orientation and gender identity. 213 It is critical to note that the government delegation in its response to advance questions on decriminalising provisions on same sex conduct in the 3rd Cycle of the UPR stated that the government does not ask individuals to state their sexual orientation when accessing services and that it is committed to addressing violations of human rights including those occasioned

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on the basis of sexual orientation.\textsuperscript{214} The Commission notes that the responses by the Government to the recommendations on enacting comprehensive equality and anti-discrimination legislation that afford protection to all regardless of sexual orientation or gender identity gives mixed signals as to its commitment in addressing violence and discrimination against persons of diverse sexual orientation and gender identity.

255. The Commission pursuant to its constitutional mandate and the Resolution 275/2014 of the African Commission on Human and Peoples Rights has been working towards addressing stigma and violence against persons of diverse sexual orientation and gender identity in partnership with sexual and minority gender groups. The Commission has developed an action plan detailing actions it will take towards institutionalizing responses to violence and discrimination against persons of diverse sexual orientation and gender identity.\textsuperscript{215}

\textit{Developments in protecting rights of intersex persons in Kenya}

256. The reporting period has seen to positive development is the protection of rights of intersex persons in Kenya. The high court of Kenya in the case of Baby ‘A’ (Suing through the Mother E A) & another versus Attorney General\textsuperscript{216} made positive pronouncements towards the protection of inter-sex persons in Kenya including orders to the Attorney General to come up with guidelines on corrective surgeries for intersex persons and file a report identifying status of statutes addressing intersex persons in Kenya.

257. Following the judgment, the Attorney General established a Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya in an effort to implement the orders of the Court.\textsuperscript{217} The Taskforce had a mandate to analyzing policy, legal, institutional and administrative frameworks on intersex persons and recommending appropriate reforms towards safeguarding intersex persons.\textsuperscript{218} The Taskforce produced a Report which established, among others that majority of intersex persons had undergone unnecessary corrective surgery at birth at times without the consent of parents and which have lifelong consequences on the health of the person.\textsuperscript{219} In addition a majority of intersex persons lack birth certificates, a factor

\textsuperscript{214}Ibid para 71.
\textsuperscript{216}(2014) e KLR available at \url{http://kenyalaw.org/caselaw/cases/view/104234/}.
\textsuperscript{217}Gazette Notice No. 4904 available at \url{http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXIX-No_.67_.pdf}.
\textsuperscript{218}Gazette Notice No. 4904 of 2017.
which negatively impacts their access to opportunities such as voting and employment.220

258. The law in Kenya recognizes only two sex dichotomies—that is male and female.221 This poses a challenge to intersex persons whose biological sex characteristics (whether genitals, gonads and chromosomal patterns) do not conform to the conventional binary notions of male or female recognized by the law in Kenya. The result of failure of the law to recognize them has led not only to discrimination of such individuals but also has locked them out of acquiring and accessing certain basic needs and rights that are important.222 As at the time of reporting, the Registration of Persons (Amendment) Bill, 2019223 had been tabled before Parliament which proposed amendments to the Registration of Persons Act224 and Births and Deaths Registration Act for registration of intersex persons.225

259. The Hon Attorney General vide Gazette Notice 7264 of 2019226 set up the Intersex Persons Implementation Coordination Committee (IPICC), a multisectoral team drawn from various government departments and non-state actors to oversee implementation of the Taskforce recommendations. IPICC is chaired by the Commission which is also the secretariat to the Committee. Part of the terms of reference for the Committee is to coordinate strategies and plans for the full implementation of the recommendations of the Task Force on Policy, Legal, Institutional and Administrative Reforms regarding intersex persons in Kenya and build the capacity of stakeholders in both public and private institutions to advocate, promote and protect the rights of intersex persons.

Proposed recommendations
260. The State should repeal section 162 (a) and (c) and section 165 of the Penal Code.

261. The State should enact and implement a comprehensive equality and anti-discrimination law outlawing discrimination on grounds of sexual orientation, gender

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221 See The Births and Deaths Registration Act, CAP 149,S.7.


identity and expression as per the commitment made during the 2nd and 3rd cycle of the Universal Periodic Review in 2015.

262. Enact law and policy that affirm the rights of intersex persons and transgender persons to change names and gender markers in government issued documentation.

263. Implement the recommendations of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya which includes recommendations towards developing protocols/guidelines on surgical and hormonal interventions on intersex persons and protection against involuntary medical interventions.

**Paragraph 35 List of Issues- Anti-terrorism measures and human rights**

Describe how any anti-terrorism measures by the State party have affected human rights safeguards in law and practice and how the State party has ensured that such measures comply with its obligations under the Convention.

264. Kenya has been grappling with complex challenge of terrorism and has been a frontline State in the war against terrorism. The Country has in the recent past faced the brunt of terrorism with notable attacks in Lamu Mpeketoni in June 2014 which led to 68 deaths, bus attack in Mandera November 2014 killing 24 people and April 2015 attacks on Garissa University College in which 148 students died. Terrorism has gravely affected education and health provision in Northern Kenya due to flight of teachers and health personnel.

265. The responses by the security agencies to these challenges have often been heavy handed and have led to multiple violations of human rights of citizens and terror suspects. The Kenya National Commission on Human Rights has documented government response to terrorism and its impact on human rights. The impact of the anti-terrorism measures on enjoyment of rights and fundamental freedoms have been manifested through:

(i) *Extra-judicial killings, enforced disappearances, torture and ill-treatment in security operations.*

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228 Ibid page 43
In a security operation dubbed Operation Usalama Watch in April 2014 aimed at flushing out foreigners linked to terrorism in Nairobi and Mombasa, the Commission documented multiple human rights violations and breaches of the law targeting members of the Somali Community. The human rights violations and breaches of the law documented include arbitrary arrest, extortion, theft, looting of business and homesteads, sexual harassments, arbitrary detention, illegal deportations and torture, cruel, inhuman and degrading treatment. The Independent Policing Oversight Authority established that the various aspects of the operation were carried out without adherence to the laid down statutory requirements, rules, and procedural regulations... discipline and professional standards. The Authority further established that rights of individuals were violated during the operation. It is important to note that The Authority had indicated in its report that it had initiated investigations into allegations of extortion, harassment and assault arising out of operation with a view to recommending prosecution or disciplinary action where allegations were established. However, as at the time of reporting, there has been no update on the status of the same.

In its report on the Error of Fighting Terror with Terror, the Commission has established a pattern of conduct by security agencies that amounts to gross violation of law and human rights of individuals associated with terror attacks in Nairobi, Mombasa, Kwale, Kilifi, Tana River, Garissa, Madera, and Wajir. The Commission has documented 120 cases of egregious human rights violations including 25 cases of extra-judicial killings and 81 cases of enforced disappearances. The Commission noted that the violations were ‘widespread, systematic and co-ordinated and include but are not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances.’ Moreover, the Commission has documented cases of torture in

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234Include the Kenya Defence Forces, the National Intelligence Service, the Kenya Wildlife Service, the National Police Service including the Anti-Terrorism Police Unit, the Kenya Police Reservist, Rapid Deployment Unit of the Administration Police, Border Patrol Unit and the General Service Unit.
235Ibid page 7.
236Ibid page 7.
detention with victims sustaining serious physical injuries and psychological harm. Reactive policing as opposed to intelligence led policing have been noted as a major contributing factor to rights violations witnesses during security operations in the context of the war against terror.  

(ii) Enactment of laws limiting enjoyment of rights and fundamental freedoms. During the reporting period, Parliament enacted the Security Laws (Amendment) Act238, in 2014 which amended 22 security related legislation giving security agencies more powers to combat terrorism. Human rights groups including the Commission and opposition groups moved to the high court to challenge select provisions of the law as they violated the constitution, bill of rights and international law. The High Court declared clauses touching on freedom of media, rights of refugees, right to fair trial and arbitrary detention. Provisions that still remain in law which have an impact on the enjoyment of rights for terror suspects include provisions in the Criminal Procedure Code239 which allow detention of suspects pending investigations and without charge for up to 90 days and those in the Prevention of Terrorism Act240 which allow for detention of terror suspects pending investigations for up to 360 days with court approval.

(iii) In addition, the State has amended the Prevention of Terrorism Act, 2012 by making it obligatory for civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization through counter-messaging or public outreach and disengagement and reintegration of radicalised individuals to seek approval and to report to the National Counter-Terrorism Centre.241 The Commission in its advisory to Parliament has cautioned against the above amendment due to the ambiguity of the provision. It is not clear what parameters and what considerations are to be made in approvals or reporting or what consequences there are for failure to abide by the requirements. In addition, there is no system of accountability in the form of appeal should such approval be denied. The Commission further noted that the amendment would have a chilling effect on civic space and is antithetical to

240 Section 33 (10) Prevention of Terrorism Act No 30 of 2012 available at http://www.kenyalaw.org/lex/actview.xql?actid=No.%2030%20of%202012
241 Section 40 C (1) Prevention of Terrorism Act No 30 of 2012 available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202012
freedom of expression and association guaranteed in the Constitution of Kenya. There are already in existence laws including the Prevention of Terrorism Act which govern the detection and investigation of terrorism related offences that would nab errant individuals including civil society organizations. Targeting of Non-Governmental Organizations seeking accountability for human rights violations by security agencies.

Following the Garissa University attack in April 2015, the Inspector General of Police issued a Gazette Notice on 4th April 2015 notifying the public of his intention to classify Muslims for Human Rights (MUHURI) and HAKI Africa as specified entities for association with terrorist activities. The two organizations are notably active for seeking accountability for human rights violations by security agencies in the war against terror. The Government proceeded to freeze their accounts, halting operations, without affording them an opportunity to defend themselves against the allegations. The two organizations have challenged the decision of the Inspector General in the High Court which has held that the publication of the Gazette Notice as unconstitutional for failure of the Inspector General of Police to afford the two organizations and opportunity to be heard.242

Proposed recommendations

266. The Independent Policing Oversight Authority, Internal Affairs Unit and Office of the Director of Public Prosecutions should investigate and prosecute or institute disciplinary measures for violations of human rights.

267. The State should implement recommendations arising out of the monitoring report of the Independent Oversight Authority on Operation Usalama Watch including:

(i) Police Officers should undergo intensive refresher course on human rights which should be wide enough to cover all aspects of human rights in policing;
(ii) Carry out a post-mortem of Operation Usalama Watch with a view to establishing the violations of law, procedure and human rights and carry an after-action review of all operations; and,
(iii) Foster broader relations with the community with an understanding that community engagement is the cornerstone of effective counter-terrorism policing.

268. The State should desist from harassment and intimidation of human rights organizations engaging in lawful and legitimate civic action.

269. The State should create a safe and enabling environment in which human rights defenders and civil society organizations can operate free from hindrance and insecurity including through full operationalization of the Public Benefits Organizations Act, 2013.

270. The State should re-consider and repeal provisions of section 33(10) of Prevention of Terrorism Act which allow for detention of terror suspects without charge for up to 360 days with court approval.

271. The State should re-consider and amend section 40 C(1) of the Prevention of Terrorism Act which obligates civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization through counter-messaging or public outreach and disengagement and reintegration of radicalised individuals to report and seek approval from the National Counter-Terrorism Centre.