



KENYA UNDER REVIEW BY UNITED NATIONS UNIVERSAL PERIODIC REVIEW: RECOMMENDATIONS REGARDING ACCESS TO JUSTICE

Introduction to this document

The purpose of this document is to explain the United Nations Universal Periodic Review process, and set out the **recommendations** made to Kenya regarding **access to justice**. By “access to justice”, we mean recommendations regarding the judiciary, police, prison service, access to legal services and the criminal justice system as a whole. This includes accountability for acts such as torture, disappearances and extrajudicial executions and the International Criminal Court process. The document refers **only** to recommendations regarding these areas and does not refer to recommendations on other human rights areas.

CHRI hopes that this document will assist in advocacy regarding access to justice matters in Kenya. Organisations can lobby the government to implement the recommendations.

What is the Universal Periodic Review?

The United Nations Universal Periodic Review (“UPR”) is a process in which each member nation of the UN has its human rights record examined by other UN member states to assess compliance with human rights obligations and commitments. Each country is reviewed every four and a half years.

The UPR is a new mechanism that began in 2008. Kenya was reviewed for the first time in June 2010.

There are three stages in the UPR process: before, during, and after the review.

1. Before the review

Reports are provided to the UN Human Rights Council before the actual review, explaining the status of human rights in the country. Three reports are provided: one from the government; one prepared by the UN Office of the High Commissioner for Human Rights (OHCHR) summarising submissions from civil society organisations; and one which is a compilation of UN information, observations and recommendations on the country.¹

What role can civil society play in this stage of the process?

Governments are encouraged to hold broad consultations with all stakeholders including civil society when preparing their report. Civil society can lobby the government to hold consultations involving all stakeholders. Civil society can also hold its own consultation and choose to invite the government – for the entire consultation or parts of it. It’s often better to work in consultation with other civil society groups at this stage and involve the National Human Rights Institution.

¹ Reports are available at <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KEsession8.aspx>



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

2. The review

The government of the country appears at the United Nations to discuss its own human rights situation and its adherence with international human rights obligations. During this process, other UN member states can raise concerns about human rights matters within the country – and make recommendations for improvement.

With each recommendation made by another country, the government of the country can either:

- **Accept** the recommendation: this means that the government agrees to implement or address the recommendation.
- **Reject** the recommendation: this means that the government rejects the recommendation, and will not implement it.
- **Make general responses** on the recommendation: this is often used by states as a way to neither accept nor reject recommendations. In such cases a government may for example say that a recommendation is irrelevant or that it has already been implemented.

At the time of the review, the government can take some time to **consider** whether they will adopt or reject recommendations. The government is expected to report back on whether they have decided to adopt or reject the recommendation at or before the next sitting of the UN Human Rights Council after its UPR review, where it is adopted. This is recorded in an addendum.

What role can civil society play in this stage of the process?

Civil society does not have a formal role to play during the actual review. Civil society groups can observe the review but cannot take the floor or make statements at the Council. However it is important for civil society to engage with diplomatic missions of other countries either in Nairobi or in Geneva and encourage them to ask questions about key human rights matters. Civil society can make statements at the Human Right Council after the final recommendations are adopted.

3. After the Review

The government has an obligation to implement recommendations accepted before they appear before the UPR again. When the country does get reviewed again, the government is expected to report back on the progress made on implementing the recommendations. Countries are also encouraged to make voluntary midterm updates on the progress of implementation.



What role can civil society play in this stage of the process?

Civil society can:

- ✓ Lobby the government to implement the recommendations – this could include advocating for an Action Plan to outline how the recommendations will be implemented
- ✓ Work with other civil society organisations, journalists, parliamentarians, NHRIs and in some cases even the judiciary to advocate for implementation of recommendations
- ✓ Partner with the government to implement recommendations
- ✓ Monitor and report on the implementation of the recommendations – this can include reporting to donor governments who fund government projects related to UPR recommendations
- ✓ Lobby the government to hold consultations to report on the implementation of recommendations
- ✓ Give an update on the implementation of recommendations at Human Rights Council sessions in Geneva
- ✓ Prepare and submit a submission before the next review of Kenya at the UPR

Recommendations accepted by Kenya

The following recommendations regarding access to justice were accepted by Kenya and must be implemented by the government² (the government has an obligation to implement them):

Legislative reforms: police and judicial reforms

- Continue to carry out the identified constitutional, judicial and police reforms (Zimbabwe)
- Fully implement the proposals made by the National Task Force on Police Reforms (USA)
- Strengthen efforts to implement the key reforms, including the police reforms (Netherlands)
- Accelerate the judicial and police reform processes (France)

² See UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review; Kenya*, A/HRC/15/8, 17 June 2010, under “Outcome of the Review” at <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KESession8.aspx>



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

- Take measures to comprehensively address long-standing issues identified under agenda item 4 of the Kenya National Dialogue and Reconciliation, including with regard to judicial and police reform (Australia)
- Effectively implement the recent legislation on police reform (Austria)

Accountability and oversight of public officials – particularly police officers

- Establish an independent, credible and authoritative Police Oversight Authority, with sufficient powers and resources (United Kingdom)
- Take every useful measure to investigate human rights violations committed by the police, in particular extrajudicial killings, in order to bring to justice the perpetrators of such acts (France)
- Take effective measures against police violence, in particular by ensuring comprehensive investigations and the prosecution of alleged offenders within the police and security forces (Austria)
- Intensify its efforts to investigate and punish those responsible for punishable violence, especially that perpetrated by security forces and armed forces (Spain)
- Take all steps available to eradicate the use of torture and ill treatment by public officials, and prosecute and punish those responsible (Denmark)
- Strengthen the law on the use of firearms by police officers, by introducing a policy of “zero tolerance” for their abusive use (Belgium)
- Set out how it will act against the culture of impunity, including for perpetrators of extrajudicial killings (United Kingdom)
- Take effective steps to improve accountability with a view to eradicating impunity (Sweden)
- Strengthen and promote respect for civil and political rights through the judicial process regarding complaints initiated regarding the violation of such rights (Argentina)
- Undertake all measures, including by seeking technical assistance and capacity-building to address the concerns relating to the need to strengthen institutions responsible for the enforcement of human rights (Botswana)

Human rights training and awareness

- Provide human rights training to judges, police officers, prison guards and all law enforcement officers (Brazil)
- Better educate security and law enforcement authorities at all levels about the basic rights of the citizens, take each reported case seriously and impartially investigate and punish those found guilty of such actions (Finland)



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

- Establish a human rights education system for members of the police and detention and prison staff, together with systems for the full and independent investigation and regular punishment of human rights violations by such personnel (Czech Republic)
- Strengthen the capacity of Kenya's National Commission on Human Rights to enable it to play a greater role in promoting human rights awareness in the country (Indonesia)

Prisons

- Intensify its efforts to humanize its penitentiary system (Slovakia)
- Adopt and implement measures necessary to address the needs and challenges of juveniles in prison custody, including raising the minimum age of crime responsibility, in line with international standards (Slovakia)

Judiciary and criminal justice system

- Take legislative and practical measures to ensure the independence and effectiveness of the judiciary (Austria)
- Develop an administration of justice policy that would address principles of access to justice and public interest education, and take reform measures to address corruption, in particular within the judicial system (Germany)
- Undertake more effective measures to address the problems of impunity, violence and trafficking in women and girls, including through the strengthening of law enforcement and the judicial system and intensive media and education programmes aimed at increasing public awareness on the rights of women (Malaysia)
- Raise the age of criminal responsibility in order to bring it into line with international standards (Czech Republic)
- Give priority to combating corruption and incompetence in the judiciary, and provide sufficient human and material resources for the administration of justice (Hungary)

The ICC, justice, reconciliation and the post-election violence

- Resolve issues related to truth, justice and reconciliation within the national framework (Sudan)
- Devote attention to transitional justice and national reconciliation as an approach used to contain disputes and prevent their recurrence (Sudan)
- Take further measures to prevent impunity of the perpetrators of the post-election violence (Netherlands)
- Reinforce the inquiries regarding the electoral unrest as well as the national reconciliation mechanisms, in particular through an independent review of their effectiveness (France)



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

- Undertake credible and effective investigations as a matter of priority regarding the Mungiki killings, the Mount Elgon operation and the murders of two civil society activists in addition to the post-election violence (Norway)
- Move forward on reform similar to that of the police of the judicial system, which has to this point proved inadequate to handle the cases of those suspected of involvement in the violence (Japan)
- Cooperate fully with the International Criminal Court investigation (Norway, Finland, Austria), and ensure the protection of witnesses from intimidation and violence (Austria)
- Fully cooperate with the International Criminal Court to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, committed during the 2007 general elections in Kenya (Republic of Korea)
- Cooperate with the International Criminal Court's investigation and take measures to ensure that those responsible for post-election violence are held accountable (Australia)
- Continue its cooperation with the International Criminal Court in accordance with its responsibilities as a State party to the Rome Statute, namely regarding access for Court officials to investigate, the implementation of witness protection programmes and the implementation of warrants that might be issued by the Court (Portugal)
- Intensify cooperation with the Office of the United Nations High Commissioner for Human Rights with a view to implementing the recommendations of the mission deployed by the Office in February 2008 to investigate the post-electoral violence that occurred at the end of 2007 (Mexico)

Torture and the death penalty

- Continue to review its legislation concerning the death penalty (Holy See)
- Consider ratifying OP-CAT (Denmark)
- Consider ratifying the Convention on the Prevention and Punishment of the Crime of Genocide (Brazil)

Witness protection and human rights defenders

- Review its national legislation on freedom of expression so that it fully complies with the relevant provisions of the International Covenant on Civil and Political Rights, and ensure the effective protection of human rights defenders against harassment or persecution (Czech Republic)
- Promptly take effective measures to safeguard the work of human rights defenders, including by ensuring that witness protection and the protection of human rights defenders who assist witnesses are a priority for the Government (Sweden)



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

- Investigate harassment and attacks against journalists and human rights defenders in order to bring those liable to justice (Norway)
- Extend an invitation to the Special Rapporteur for human rights defenders (Norway)
- Ensure the effective protection of human rights defenders and witnesses (France)
- Effectively implement the recent legislation on witness protection (Austria)
- Establish an independent witness protection agency that is free of political influence (United States of America)
- Provide adequate protection for witnesses of human rights violations (Netherlands)
- Establish, through these efforts to address the issue of witness protection legislatively and administratively, a witness protection system (Japan)
- Better protect witnesses giving evidence and human rights defenders (United Kingdom)
- Ensure an independent and reliable witness protection programme (Finland)
- Ensure that human rights defenders and witnesses are protected and can freely talk to the International Criminal Court investigative team so that the Court can carry out its mission successfully (Ireland)

Recommendations being considered by Kenya

Kenya had to confirm if they will adopt or reject the following recommendations at the fifteenth session of the Human Rights Council in September 2010. However, to date, they still have not reported back on whether they will accept or reject the recommendations below³:

UN Conventions, torture and death penalty

- Extend an open and standing invitation to all special procedures (Spain)
- Accede to the human rights conventions and protocols to which Kenya is not yet a party (Niger)
- Sign and ratify the optional protocols to the ICCPR (Austria, Spain) (*Optional Protocol 1 is about setting up a procedure for individuals to complain to the UN about breaches of rights under the ICCPR. Optional Protocol 2 is about the abolition of the death penalty*)
- Ratify ICCPR-Optional Protocol 2 (Uruguay, Argentina) (*This is about the abolition of the death penalty*)
- Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Spain)

³ Ibid



Commonwealth Human Rights Initiative

working for the *practical* realisation of human rights in the countries of the Commonwealth

- Introduce in its national legislation the definition of torture, reflecting that set out in Article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Czech Republic)
- Ratify OP-CAT (Argentina, Czech Republic) (*If Kenya ratify OP-CAT they would need to implement a national system for inspecting places of detention*)
- Ratify the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC) (Spain, Argentina)

The ICC and post-election violence

- Establish a national mechanism independent of the public prosecutor and the attorney general for the investigation and prosecution of crimes committed during and following the 2007 election period (Denmark)
- Consider establishing an independent investigative authority that can effectively investigate the violence related to the 2007 elections and the alleged involvement of the police and public prosecutor (Austria)
- Cooperate fully with the ICC investigation, in accordance with Kenya's obligations under the Rome Statute, and establish a credible local tribunal in parallel (United Kingdom)

Recommendations rejected by Kenya

The following recommendations regarding access to justice were rejected by Kenya⁴:

- Amend national legislation to abolish the **death penalty** so it is completely prohibited, and sign and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (Spain); establish a de jure moratorium on capital punishment, with a view to abolishing the death penalty (Belgium; Australia); abolish the death penalty (Ireland, Austria, Germany, Uruguay, Argentina); suspend the application of the death penalty (Argentina)
- Strictly ensure that the death penalty is not imposed for children (Australia)
- Prevent **extrajudicial killings** and ensure compensation and justice for the families of victims, taking into account the recommendations of the United Nations Special Rapporteur on extrajudicial killings (Netherlands)
- Immediately implement all the recommendations put forward by the Waki Commission and the Special Rapporteur on extrajudicial killings (Denmark)

⁴ Ibid



In relation to the recommendations concerning the death penalty, the government of Kenya says:

“the Kenyan public had overwhelmingly rejected the abolition of the death penalty for the most serious crimes. The Government, in collaboration with the Kenya National Commission on Human Rights and other stakeholders, continued to raise public awareness regarding the abolition of the death penalty”.⁵

Regarding the recommendations on extrajudicial killings and the report of the Special Rapporteur, Kenya states:

“while it was committed to preventing extrajudicial killings and ensuring compensation and justice for the families of victims through due process, it did not agree with linking that issue to the Special Rapporteur’s report, whose shortcomings had already been pointed out by the Government”.⁶

In relation to the recommendation regarding implementation of the Waki Commission recommendations, Kenya states:

“the use of the term “all” was not acceptable, as it was not feasible; however, most of the recommendations of the Waki Commission Report were being implemented and aspects of the Special Rapporteur’s report had given rise to issues of concern”.⁷

Next steps

The government of Kenya has a duty to implement the recommendations it accepted before it is reviewed again, in **January/February 2015**.

Civil society should work to make sure the recommendations that were accepted by Kenya are implemented, and should consider the actions suggested in the text box on page 3.

Need more information?

If you would like more information please contact us:

Commonwealth Human Rights Initiative

+91 11 4318 0200

info@humanrightsinitiative.org; sarah@humanrightsinitiative.org

⁵ See UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review; Kenya*, A/HRC/15/8, 17 June 2010, under “Outcome of the Review” at <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KESession8.aspx>

⁶ Ibid

⁷ Ibid