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Report of the Working Group on the Universal Periodic Review*

Kenya

Addendum

Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review

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I. Introduction

1. The Republic of Kenya accepted 261 of the 319 recommendations adopted by the Working Group during the 3rd cycle Universal periodic review in January 2020. Kenya has examined all the remaining recommendations and hereby presents its position on the same.
2. Kenya upholds a constitutional democracy that places the primary well-being and interests of the people at the very center of all development planning. It is on this basis that the Government of Kenya (GOK) accepted a majority of the recommendations made by the UPR Working Group, secure in the knowledge that their full implementation will contribute to the meaningful realization of human rights and fundamental freedoms for all.
3. Indeed, many of the recommendations that enjoyed Kenya's support, relate to ongoing measures that the Government is already effecting to improve the human rights situation in the country. The recommendations are in line with our obligations under Kenya's Vision 2030, the Sustainable Development Goals (SDGs) and the African Union Agenda 2060. The Government continues to integrate the recommendations into national policies, legislation, national action plans and budgets. The recommendations accepted relate to poverty alleviation, judicial, police and prison reforms, promotion of gender equality and nondiscrimination, protection of children, better implementation of economic and social rights, enhancing the capacity of the national human rights institutions, fighting corruption, ensuring right to life, holding law enforcement officers accountable for extrajudicial killings, addressing enforced disappearances, anti-torture interventions, provision of affordable legal aid and awareness services, and extending an open invitation to all human rights mandate holders.
4. After the upcoming adoption of Kenya's outcome document by the UN Human Rights Council in June–July 2020, the Office of the Attorney General and Department of Justice (OAG/DOJ) will distribute the document to all relevant government ministries, departments and agencies to commence implementation of the follow-up activities. The OAG and DOJ will continue to collaborate with all stakeholders, including Civil Society Organizations, (CSOs), National Human Rights Commissions, Parliament, Judiciary and other stakeholders, to draw up a consolidated plan of action to monitor progress in the implementation of all supported recommendations.
5. The Action Plan will outline the tasks to be undertaken to implement the recommendations, human indicators to monitor the progress made; responsible actors for each task, including CSOs and development partners; and timelines within which the tasks should be undertaken and or completed.

II. Position on recommendations that did not enjoy Kenya's support and those not addressed at the session due to lack of sufficient clarity

A. Accepted recommendations post – review

6. Subsequent to the review, in-depth consultations were held with key stakeholders and the State now indicates its acceptance of the following recommendations:

Recommendation 143.3: Review the 2018 Associations Bill and ensure that NGO laws are in line with the right to freedom of expression (Germany);

Recommendation 143.4: Ensure that a human rights approach is reflected in the Government's 2020 submission of the reviewed nationally determined contributions (Fiji).

B. Noted recommendations

7. The following recommendations did not enjoy the support of Kenya during the review due to the country's national implementation processes and circumstances.

Recommendation 143.2

Respond to the request of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

8. Kenya is currently grappling with the COVID 19 pandemic. Given the specific measures put in place by the Government to stem the virus, it is not practical at this point in time to set a specific date for the Expert's official visit to Kenya or to organize meetings with various relevant organizations or groups. Consequently the request of the Independent Expert will be revisited after the COVID 19 situation is brought under control with a view to setting a mutually agreeable date for the visit.

Recommendations 143.1, 143.5, 144.1, 144.2, 144.3, 144.4, 144.5, 144.6, 144.7, 144.8, 144.9, 144.10, 144.11, 144.12, 144.13, 144.14, 144.15, 144.16, 144.17, 144.18, 144.19, 144.20, 144.21, 144.22

Ratification of treaties and Protocols

9. Due to the elaborate nature of the processes and procedures necessary for the ratification or accession of treaties/protocols, the Government of Kenya is concerned that the implementation of some of the recommendations, particularly, those stated in mandatory phraseology may not be finalized within the given time frame of 5 years.

10. Kenya is a party to a majority of regional and international human rights instruments. The Constitution provides for the process of the development and adoption of any policy or legal framework, including the ratification/accession to treaties. Public participation and sensitization, extensive stakeholders' consultations and parliamentary lobbying are mandatory before any legislation or policy can be approved. These processes are quite elaborate, attract substantial budgetary outlays and take time, thus considerably slowing down the implementation of some recommendations. However, these processes are constitutional and are important to ensure that all needs are adequately considered and taken into account, hence promoting transparency and ownership of national policies and laws.

11. With regard to Treaties/protocols, the ratification process must conform to the criteria and procedures laid down in the Constitution and the Treaty Making and Ratification Act, 2012. In addition, since ratified treaties form part of Kenyan laws, the Government must ensure that all mechanisms for implementation are in place to meaningfully give effect to the ratified human rights instruments. It would be highly unrealistic to formally undertake to implement the recommendations within the set 5 years, given the aforesaid procedures and processes that must be followed in the ratification process. However, the Government of Kenya (GOK) is conducting an examination of all human rights treaties/protocols that Kenya is not a state party to and will commence the ratification/accession process based on the available resources and the will of the people.

Recommendations 144.23, 144.24 and 144.50

Sexual and reproductive health

12. Article 26 (1) of the Constitution regulates the provision of abortion in Kenya by providing that abortion is not permitted unless in a situation where: there is danger to the life of the mother; there is need for emergency treatment, and if allowed by any other written law. Section 6(1) of the Health Act allows access to treatment by a trained health professional for specific conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and the molar pregnancy, or any medical condition exacerbated by the pregnancy to such extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.

Recommendations 144.25, 144.26, 144.27, 144.28, 144.29, 144.30, 144.31, 144.32, 144.33, 144.34, 144.35, 144.36, 144.37, 144.38, 144.39, 144.40

Decriminalize same sex unions

13. The recommendations to decriminalize same sex unions were noted on the basis that such unions are expressly prohibited by the Constitution, national laws and unacceptable to our culture and values. The Government of Kenya actively promotes the fair provision of all public services to all persons without discrimination, notwithstanding their sexual orientation and gender identity or expression. To this end, several pieces of legislation and policies have been developed that attest to the realization of the principles of equality and non-discriminations.

14. These include, *inter alia*; the Health Act 2017, whose objective is to protect, respect, promote and fulfil the health rights of all persons in Kenya to the progressive realization of their right to the highest attainable standard of health; The Education Act 2012 enacted to ensure the promotion of education of all the people of Kenya and the progressive development of institutions devoted to the promotion of education; and the Diversity Policy for the Public Service, 2016, which provides strategies for ensuring that the recruitment process for the public service reflects diverse Kenyans. One is not required to indicate his/her sexual orientation when applying for jobs or accessing any government service.

15. The Government has, however, identified stigma and discrimination as the greatest barriers to accessing services for lesbians, gays, bisexuals and transgender (LGBT). This state of affairs is noted with regard to the low HIV/AIDS prevention and uptake of care and treatment services for this segment of society. Men having sex with men (MSM) who are living with HIV are unlikely to take up services, with a consequent negative impact. Some of the measures taken by the State to address the situation include: sensitization of health care workers to reduce stigmatizing attitudes in healthcare settings; the development and dissemination of population specific and user friendly information; and the promotion of the acceptance of all persons as part of the community for increased service uptake. Sensitization forums for judges, prosecutors, the police, prison officers, and law and policy makers on how to handle matters concerning LGBT individuals are conducted.

16. With regard to intersex people, it is worth noting that the Courts have recognized and protected their rights. Following the judgment in *Petition No.266 of 2013, Baby A Vs Attorney General and others, eKLR* – a Taskforce was established to review legislation and policies to address the plight of intersex people in Kenya, which led to the official recognition of the Intersex (I) marker in addition to male and female in the 2019 National Population census.

Recommendations 144.41, 144.42, 144.43, 144.44, 144.45, 144.46, 144.47

Abolish the death penalty completely, in law and in practice

17. The recommendation to abolish the Death Penalty also did not enjoy Kenya's support, mainly on the basis of the circumstances already stated in the above paragraph 1. The process of abolishing the penalty in the statute books will take considerable time, considering the importance of: first, changing the public perception on the penalty, through intense sensitization on the value of abolishing the death penalty in law; and second, the need to lobby and sensitize Parliament on the need to enact or review the relevant laws. However, Kenya is happy to state that while the death penalty remains in the statute books, the country has had a non-execution policy since 1987. Death penalty sentences are routinely commuted to life imprisonment.

18. Notably, on 14th December, 2017 the Supreme Court of Kenya, in *Francis Karioko Muruatetu and Wilson Thirimbi Mwangi vs Republic and 6 others, eKLR* declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional. A Task force set up to develop the necessary framework for the implementation of the Court's decision has recommended the following:

(a) A legal framework to deal with sentence re-hearing cases similar to that of the Petitioners;

- (b) A guide to death sentencing;
- (c) Parameters of what ought to constitute life imprisonment; and
- (d) Review and enactment of laws to give effect to the judgment.

19. While the Court did not abolish the death sentence, the Task force has taken the bold step to recommend the abolition of the death penalty by proposing to categorize murder as Aggravated Murder; First Degree Murder; Second Degree Murder and Manslaughter. Aggravated Murder involves the 'rarest of rare' offences, with a recommendation that the offender is liable to life imprisonment with no parole and in the event that this recommendation is rejected by stakeholders, then, this is the only offence that could fetch the death penalty, at the discretion of the judge.

20. The judiciary is in the process of establishing an Implementation Committee under the auspices of the National Council on the Administration of Justice (NCAJ) that will be responsible for overseeing the re-sentencing process.

Recommendation 144.48

Financial assistance to CSOs that are trying to change attitudes towards positive masculinity for men and boys

21. The Non-Governmental Organizations Co-ordination Board is a State Corporation in Kenya responsible for regulating and enabling the Non-Governmental Organizations (NGOs) sector in Kenya. The Board receives part of its budget from Government and the rest from development partners. Specifically, the NGOs Co-ordination Board is responsible for *inter alia* registering, facilitating and coordinating all national and international NGOs operating in Kenya; advising the government on their contribution to national development; providing policy guidelines for NGOs to align their activities with national priorities and receiving and analyzing NGOs annual reports.

22. However, with regard to funding of individual civil society organizations, the State noted the recommendations because it was concerned that such assistance would compromise the capacity of the organizations to independently monitor, investigate and report on the observance of human rights by the State.

Recommendation 144.49

Abolish polygamy

23. This recommendation did not enjoy the Government's support based on the fact that polygamy is a deeply entrenched practice under customary law, which is both historical and philosophical. The Marriage Act 2014 recognizes and codifies polygamy as part of customary marriages. All registered marriages under the Act have the same legal status, whether polygamous or monogamous.

24. Prior to the enactment of the Marriage Act, customary marriages were not regulated by law, thus rendering them informal and uncertain as their legitimacy could only be confirmed and formally recognized through court judgments and rulings. Prior to the enactment of the Act, women in polygamous unions lost their property and other marital benefits due to evidentiary difficulties involved in proving the existence of a customary marriage. There are cases where women who are married under customary law have been denied the right to inherit the estate of their deceased spouses due to the difficulty of proving the existence of such unions.

25. Kenya avers that polygamous marriages do not violate a woman's right to equality and non-discrimination on basis that adult couples have the discretion to freely choose, from the very onset, the kind of union they prefer. Those adults who choose voluntarily to contract a monogamous marriage cannot later contract another marriage, unless in the event of divorce or death. Similarly, no person in a polygamous marriage can contract a monogamous marriage. A polygamous marriage can later be converted into a monogamous one, as long as at that time there is only one wife.

Recommendation 144.51

Reinstate the Standards and Guidelines on Reducing Maternal Mortality and Morbidity related to unsafe abortion and the Training Curriculum for medical professionals in public hospitals

26. The problem of unsafe abortion is multifaceted – it has legal, religious, gender rights and public health dimensions among others. To this end, the guidelines have been resubmitted to stakeholders to further multi -sectorial discussions to capture the contributions of all.

Recommendations 144.52 and 144.53

Access to reproductive health services and comprehensive sexual education for all women and girls

27. These recommendations failed to enjoy Kenya’s support because it was deemed necessary to conduct further comprehensive consultations with all stakeholders prior to making any decision on the provision of comprehensive sex education in schools.
