



Violence against Women in Kenya

*Report prepared
for the Committee
on the Elimination
of Discrimination
against Women*



**The World Organisation Against Torture (OMCT)
operating the SOS-TORTURE NETWORK**


The World Organisation Against Torture (OMCT), based in Geneva, is today the largest international coalition of non-governmental organisations fighting against torture, summary executions, forced disappearances and all other forms of cruel, inhuman or degrading treatment or punishment.

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OMCT provides support to victims or potential victims of torture through urgent campaigns (notably in favour of children, women and human rights defenders), through the provision of urgent legal, social and/or medical assistance to victims and by way of the submission of alternative country reports to the various United Nations treaty monitoring bodies.

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**Committee
on the Elimination
of Discrimination
against Women**

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**Implementation of the Convention
on the Elimination of All Forms
of Discrimination against Women
by Kenya**

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The United Nations Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979. In 1981, the Convention entered into force and the Committee on the Elimination of Discrimination against Women was formally established. The major task of the Committee is to review the reports submitted by the States parties in order to oversee the implementation of the Convention.

The issue of gender-based violence is not specifically addressed in the Convention, but it is however essential to its most fundamental provisions. In the general recommendation No. 19 adopted at its eleventh session in 1992, the Committee on the Elimination of Discrimination against Women formally extended the general prohibition on gender-based discrimination to include gender-based violence. The Committee affirmed that violence against women constitutes a violation of their internationally recognised human rights, regardless of whether the perpetrator is a public official or a private person.

One becomes inevitably aware of the fact that the States present reports that show only a one-sided image of reality, which is frequently incomplete. The case being, the effectiveness of this supervision and control depends on the quality of information available to the members of the various committees. Recent information, verified by reliable sources, is consequently indispensable.

In submitting alternative reports to the Committee on the Elimination of Discrimination against Women (CEDAW), OMCT seeks to provide de facto information concerning violence against women, including torture, in a specific country as well as analyse national legislation that fosters violence against women.

OMCT's reports highlight the legal provisions, both penal and civil, of the States concerned, which discriminate against women or which, without being discriminatory as such, become so through their application. Unequal power relations between men and women have led to the domination of and discrimination against women, which in turn leads to violence against women.

Furthermore, the reports draw attention to the lack of ways for the victims of violence to obtain reparation and identify the mechanisms guaranteeing the impunity of torturers.

The reports include recommendations for reform of de facto practices and legislation aimed at reducing the incidence of violence against women in the country in question.

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Contents

I. Preliminary Observations	5
1.1 Kenya's International Obligations	6
1.2 Committee on the Elimination of Discrimination Against Women	7
II. General Observations on the Status of Women in Kenya	9
2.1 Equality between women and men	9
2.2 De jure discrimination against women	10
2.3 Educational and employment opportunities	12
2.4 Political representation	12
III. Violence Against Women in the Family	15
3.1 Domestic Violence	15
3.2 Marital rape	15
3.3 Female genital mutilation	15
IV. Violence Against Women in the Community	17
4.1 Rape	17
V. Violence Against Women Perpetrated By the State	19
5.1 Torture and Impunity	19
5.2 Police treatment	20
5.3 Prison conditions	20
VI. Cases of Violence against Women	23
6.1 Sophia Dolar, Pauline Wanjiru and Ester Wairimu	23
6.2 Kenyan Branch of the International Federation of Women Lawyers	23
6.3 Women refugees	24
VII. Conclusions and Recommendations	25
CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: KENYA	29

I

Preliminary Observations

This alternative report is written in the context of the OMCT programme on Violence against Women, and is structured as follows. The report will begin with a few preliminary observations, followed by a brief overview of the status of women in Kenya before going on to examine violence against women in the domestic and community spheres as well as violence perpetrated by the State from both a de jure and from a de facto point of view. The report ends with a series of conclusions and recommendations. The report was completed on 15 December 2002, therefore before the scheduled 27 December elections.

The Kenyan legal system is primarily based upon the English common law with customary law, Hindu Law and Islamic Law being applicable in certain disputes. There is no jury system. Kenya has a dualist legal system and therefore, national legislation is required in order for international and regional treaties to become part of national law.

Currently, corruption can be seen as the main problem of Kenya as it has spread through all spheres of society affecting the economy, the judiciary, the executive and ordinary lives. All the power lies with the President and the circle of civil servants around him. In theory, separation of powers exists, but in practice, it does not exist as the Executive influences the Legislative and Judicial powers.

The International Commission of Jurists (ICJ), an international non-governmental human rights organisation, stated in its 11th annual report on the independence of judges and lawyers that “the [Kenyan] legal system suffers greatly from inefficiency, corruption and lack of adequate funding.”¹ Respect for the Rule of Law is vital for every society as it guarantees the right to a fair trial and respect for the human rights of its citizens. Yet the administration of justice in Kenya is not at all free from political influence and the economic crisis of the country undermines the judiciary even further.

The Kenyan Constitution is not at all clear and contains many contradictions. A forum comprised of MPs and civil society members was appointed in 2000 to redraft the Kenyan Constitution. Severe problems

1 – Attacks on Justice 2002 – chapter on Kenya, www.icj.org.

surrounded the Commission regarding its composition and the administration of its finances. In addition, the President dissolved parliament before the draft could be voted on. Therefore, it is left for the new Government to decide how to proceed after the elections, scheduled for 27 December 2002.

Women in Kenya are specifically vulnerable; violence against women is widespread and persists in all layers of society. The Attorney-General of Kenya acknowledged in 1999 that “[v]iolence against women pervades all social and ethnic groups. It is a societal crisis that requires concerted action to stem its scourge... Culture does influence the relationship between the various groups in society and ... some cultural practices, beliefs and traditions have had the tendency to relegate women to second class status in society thereby not only violating their rights as human beings [but also] leading to discrimination against women. Some... customs and cultural practices have found their way not only into law but ... [are used] as justification for violence against women.”²

1.1 Kenya’s International Obligations

Kenya became a State Party to the UN Convention on the Elimination of All Forms of Discrimination against Women on 9 March 1984. When becoming a party to this Convention, Kenya made no reservations to the Convention.

The fifth periodic report to the Committee on the Elimination of Discrimination against Women (hereafter: the Committee) on the implementation of the Convention was due in 2001 and it was only in February 2000 that the combined third and fourth periodic report was issued to be considered by the Committee on the Elimination of Discrimination against Women in January 2003.

At the international level, Kenya is also a State Party to other international instruments relating to human rights which implicitly prohibit violence against women, inter alia: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of which article 2 prohibits discrimination on the basis of sex, article 3 guarantees “the equal right of men and women to the enjoyment of all rights set forth in the Covenant”, article 6(1) protects the right to life,

2 – Statement by the Hon. S Amos Wako, the Attorney General, during the 16 Days of Activism Against Violence Against Women, 10 December 1999.

article 7 prohibits torture and other cruel, inhuman or degrading treatment or punishment, article 9(1) protects the right to liberty and security of persons, and article 24 promises children protection by the state without any discrimination on the basis of, inter alia, sex.

The UN Convention against Torture provides protection against violence in a more detailed manner; and the UN Convention on the Rights of the Child, which constantly uses both feminine and masculine pronouns in its provisions, makes it explicit that the rights apply equally to female and male children.

At the regional level, Kenya is a State party to the African Charter on Human and Peoples' Rights, of which Article 3 provides that "each person is equal before the law and must be protected equally by the law." Article 5 guarantees to every individual "the right to the respect of the dignity inherent in a human being" and prohibits torture, cruel, inhuman or degrading punishment or treatment.

Despite these international commitments to protect women from violence, during the past years, OMCT has received many disturbing reports documenting violations of the human rights of women in Kenya.

1.2 Committee on the Elimination of Discrimination against Women

Although the Kenyan Government was praised for its thorough dialogue in January 1993 with the Committee on the Elimination of Discrimination against Women during the presentation of its combined first and second periodic report, much was left to be done afterwards.

With regard to the combined third and fourth periodic reports, OMCT would like to recall that in its General Recommendation No.19 (Eleventh session, 1992) the Committee stated, "the definition of discrimination includes gender-based violence, that is, violence that is directed at a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." Also, "gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence".

The Committee recommended that States parties should take all appropriate measures to overcome all forms of gender-based violence

whether by public or private act. Moreover, the Committee stated that laws against family violence and abuse, rape, sexual assault and other gender-based violence should give adequate protection to all women, while promoting respect for their dignity and integrity. The Committee requested States parties to report on the nature and extent of violence and on the measures that they have undertaken to overcome violence.³ Although the issue of gender-based violence is not explicitly addressed in the Convention, it is fundamental to its most basic provisions.

In light of the above, although OMCT welcomes the submission of the combined third and fourth periodic report of the government of Kenya to the Committee, OMCT is disappointed that the report leaves the issues of violence in the family, violence in the community and violence at the hands of State agents untouched.⁴

3 – UN Doc. HRI/GEN/1Rev.2.

4 – Kenya, Combined Third and Fourth Periodic Reports Submitted under the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/KEN/3-4.

III

General Observations Regarding the Status of Women in Kenya

2.1 Equality between women and men

It was only in 1997 that the Kenyan Constitution was amended to include a specific prohibition of discrimination on the grounds of gender.⁵ However, the Constitution still contains discriminatory provisions, such as the denial to women to pass on citizenship to their foreign husbands or children from these marriages.⁶

In 1999, the Ministry of Home Affairs together with representatives of the civil society drafted the Equality Bill. Its aim was to make provisions for equal treatment of all citizens irrespective of their gender and end all forms of discrimination. The draft never made it to legislation as then President Moi withdrew his support arguing that the Kenyan Constitution already provided for equality between men and women. The Muslim community in Kenya also voiced strong opposition against the draft bill saying that it violated religious values. This involved mainly the issues of equal rights to inheritance and traditions regarding marriage such as choosing a spouse.

International agreements, such as the Convention on the Elimination of All Forms of Discrimination against Women, are not directly applicable in Kenya. The obligations have to be transformed into domestic law. Some important obligations such as the prohibition of gender-based violence remain largely unregulated in Kenyan law. The Domestic Violence (Family Protection) Bill and the Criminal Amendments Bill, for example, were still pending before parliament when it was dissolved by then President Moi.

Even where de jure progress has been made in achieving equality, women continue to be discriminated against as a result of conflict between the laws in Kenya and customary practices and the economic situation. Women experience a wide range of discriminatory practices, limiting their political and economic rights. They are, de facto, second-class citizens. Most customary law disadvantages women, particularly in property rights

5 – Article 70 Kenyan Constitution.

6 – Article 87 (1) Kenyan Constitution.

and inheritance. Under the customary law of most ethnic groups, a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage.

The traditional inferior status of women is reinforced by the predominance of marriages under some form of customary law that limit women's rights. There are several laws, governing marriage and divorce based on the different religions in the country. The Marriage Bill has, to date, not yet gone into force.

The Kenyan society is a patriarchal society with widespread discrimination against women and a virtual absence of women in positions of power in the socio-economic and political spheres. Poverty and traditionalism remain two serious obstacles to women's equal rights in Kenya. The UN Economic and Social Council noted that poverty in general inhibited the full enjoyment of human rights and that the situation where women had unequal access to resources ensured continuing discrimination.⁷

Women's organisations have set their hopes on the Draft Constitution to be adopted by the new parliament after the December 27, 2002 elections. The Draft Constitution provides, inter alia, for the right to equal treatment with men including the right to equal opportunities in political, economic and social activities and the equal right to inherit, have access to land and control property. The draft prohibits any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women.

2.2 De jure discrimination against women

A Task Force was established in 1993, inter alia, to review the national laws to ensure non-discrimination against women and to initiate statutory reforms with regard to gender discrimination.⁸

The UN Committee on the Rights of the Child discussed, during its 28th session from September 24 to October 12, 2001, the initial report on the implementation of the Convention on the Rights of the Child by the Republic of Kenya.

7 – UN doc. E/CN.4/1998/22.

8 – UN Doc. CEDAW/C/KEN3-4, p. 3.

OMCT raised the issue of gender discrimination regarding citizenship in its alternative report to the Committee on the Rights of the Child.⁹ As the OMCT report pointed out, the Constitution of Kenya and the Kenya Citizenship Act¹⁰ discriminate against children born to Kenyan mothers abroad but do not discriminate against children born to Kenyan fathers born abroad. Children born to Kenyan mothers abroad have to apply for citizenship and are given entry permits for a limited duration upon entry into Kenya, while similar treatment is not accorded to children of Kenyan fathers born to non-Kenyan mothers.

The law on domicile, the Domicile Act¹¹, gives credence to and perpetuates the practice of discrimination against children born out of wedlock. In Kenya, residence is different from domicile and domicile or origin refers to the home of the parents at the time of birth. In Kenya, this is often equated to the ancestral home that every person born within lawful wedlock is presumed to have. Children born out of wedlock are accorded the domicile of their mothers whereas those born within lawful wedlock acquire that of their fathers. Domicile determines other rights such as voting rights. In many cultures, children born out of wedlock do not belong in the mother's home (domicile) and have no rights to inherit property. As a result, many are often rendered without domicile.

OMCT therefore recommended that the Government amend the Kenya Citizenship Act to ensure that every child born of either parent of Kenya citizenship is granted automatic citizenship. Also, OMCT urged the Government to amend the Domicile Act to ensure an end to discrimination against illegitimate children.

The UN Committee on the Rights of the Child stated, *inter alia*, in its Concluding Observations¹², after consideration of the Government's report: "the Committee notes that the State party established a Task Force in 1993 to undertake review of the law to ensure non-discrimination against women and initiate statutory reforms with regard to gender discrimination. The Committee is concerned, however, that the principle of non-discrimination is not adequately implemented with respect to certain vulnerable groups of children, especially girls... Finally, the Committee is concerned that the constitutional guarantee of equal treatment does not cover various tribal,

9 – Rights of the Child in Kenya, Report on the Implementation of the Convention on the Rights of the Child by the Republic of Kenya, OMCT report.

10 - Chapter 70, Laws of Kenya.

11 – Chapter 37, Laws of Kenya.

12 – UN Doc. CRC/C/15/Add.160.

traditional customs and practices associated with, for example, fostering, marriage and divorce that constitute major challenge for the full realization of children rights in the State party”.

In its alternative report, OMCT called upon the Government to adopt an official policy to end the practice of early marriages and include a minimum age which is the same for boys and girls. OMCT further urged the Kenyan government to enact specific legislation ensuring the rights of girls to inherit property, particularly in those cultures that have traditionally denied this right to girls.

2.3 Educational and employment opportunities

Levels of education and literacy for men and women differ widely. Although the number of boys and girls in school is roughly equal at the primary level, men substantially outnumber women in higher education. Especially in rural areas families are more reluctant to invest in educating girls than in educating boys. Hence, seventy percent of the illiterate persons in the country are female.

Women make up about seventy-five percent of the agricultural work force, and have become active in urban small businesses. Nonetheless, the average monthly income of women is about two-thirds that of men, and women hold only about 5 percent of land titles. Women have difficulty moving into non-traditional fields and are promoted more slowly than men.¹³

The bad economic situation in Kenya and the corresponding marginalisation of women in the workforce means that women are frequently financially dependent upon husbands and partners thereby making it extremely difficult for them to leave situations of domestic violence.

2.4 Political representation

Seven years after the Fourth World Conference on Women in Beijing, the fact remains that women world-wide are under-represented, if not

13 – Gender profile Kenya, www.afrol.com.

invisible, in decision-making at the highest levels of national and international positions mainly due to economic difficulties, the existing structures and frameworks within the environment and the gender-biased portrayal of women by the media. Based on the data from the Inter-Parliamentary Union, women's representation in legislative bodies globally increases annually by a mere 0.5%, the percentage of women in ministerial levels remains at 14%, 9.4% are in the judiciary, and a miniscule of less than 5% occupy economic, political and executive positions.

Women in Kenya also have achieved little progress since the Beijing Platform for Action was adopted. There were only eight women in Kenya's recently dissolved 224-seat parliament, and only one woman has been appointed an assistant minister in President Moi's cabinet. Yet women are said to account for 52 percent of the country's adult population and 60 percent of the voting population.

As a result of poor representation, women in Kenya feel they lack a sufficient voice to push the enactment of laws that could enhance respect for women's rights and fight against their economic marginalisation.

With elections on December 27, 2002, as of the date of publication, the number of women seeking to contest parliamentary seats increased from a mere 48 in 1997 to about 80 in 2002, according to Cecilia Kimemia, executive director of the Kenya League of Women Voters.¹⁴ The Draft Constitution provides some hope in this respect as it contains provisions regarding affirmative action that require political parties to ensure that at least one third of their candidates for direct elections are women.

A specific issue of concern with regard to the 2002 election is gender based election violence.

Anne Gathumbi, the coordinator of the Coalition on Violence against Women (COVAW) stated that gender specific violence, such as rape and threats of rape, were real issues of concern for women. She said women candidates faced violence from the communities, which are not accustomed to women's leadership, down to the family level.¹⁵

14 – UN Office for the Coordination of Humanitarian Affairs, www.irinnews.org, September 20, 2002.

15 – *Idem*.

According to the Kenya Human Rights Commission, a local non-governmental human rights organisation, Kenya has suffered recurring waves of politically sponsored violence since 1991 when the campaign for multiparty politics and democratisation peaked.¹⁶ The Kenyan government has often explained the violence as ethnic or land clashes and has failed to conduct useful investigations into the causes of the violence and prosecute the perpetrators in spite of overwhelming information gathered by various actors. Reports of various civil society groups, religious organisations and the media have all pointed fingers at the involvement of senior government officials in the violence.

16 – Campaign against Impunity, Kenya Human Rights Commission.



Violence against Women in the Family

3.1 Domestic violence

Domestic violence against women is a serious and widespread problem in Kenya. This is mainly due to traditional culture permitting a man to discipline his wife. The majority of the cases remain unreported or at least unpunished.

On a positive note, during the period from 1997 to 1999, the United Nations Development Fund for Women launched inter-agency regional campaigns to eliminate violence against women in Latin America and the Caribbean, Africa and Asia and the Pacific. In response to heavy media attention to the issue of violence against women, created as part of the UNIFEM-led regional campaign, the Kenyan Parliament adopted in 2000 the country's first legislation on domestic violence.¹⁷

3.2 Marital rape

Marital rape is not recognized by the penal code as a criminal offence because of the presumption that consent to sexual intercourse is given by the act of marriage. Therefore, the perpetrators often go unpunished or, if at all convicted, are punished for assault.

3.3 Female genital mutilation

Female genital mutilation (hereafter: FGM), which is condemned widely by international health experts as damaging to both physical and psychological health, is still practised in Kenya by certain ethnic groups and remains widespread, particularly in rural areas. Often, FGM is institutionalised through culture and tradition.

The UN Special Rapporteur on Violence against Women recognized FGM as a form of violence against women that requires concerted international

17 – UN Doc. E/CN.4/2001/126, UN Doc. E/CN. 6/2001/6.

and national action for its eradication. She warned that “[B]lind adherence to these practises and State inaction with regard to these customs and traditions have made possible large-scale violence against women.”¹⁸

FGM was banned by two presidential decrees and was not allowed in government-controlled hospitals and clinics before being prohibited by law for children under 18 in December 2001.

However, FGM continues to persist in Kenya and is carried out clandestinely in many parts of the country due to strong traditional customs. In some parts of the country FGM has been replaced by ‘circumcision with words’, celebrating a young girl’s entry into womanhood but with words rather than through genital cutting.¹⁹

18 – UN Doc. E/CN.2/1995/42.

19 – UN Doc. E/CN.4/2002/83.

IV

Violence against Women in the Community

4.1 Rape

Rape is defined under Kenyan law in Chapter XV ‘Offences against Morality’ of the Penal Code. Rape, defilement and incest are the three categories of rape classified according to the age of the victim and the relationship of the perpetrator to the victim.

Amnesty International published a report in March 2002 on rape in Kenya ‘Rape – the invisible crime’ which revealed, “[Violence] against women is widespread in Kenya. Every day women are physically and sexually abused. Rape occurs in all social and ethnic groups. It is a crime that shocks and traumatizes the victim, and undermines that status of women in society. Yet is largely suffered in silence.”²⁰

Besides the fact that rape occurs regularly in Kenya, there is no effective system to investigate allegations of sexual violence and rape and as result not many cases are dealt with in court. Police officers are not trained to deal properly with gender-based violence and many see domestic violence, including marital rape as a private matter. This has led to a lack of confidence in the law enforcement response to acts of violence against women and thus to the subsequent under-reporting of rape and other forms of violence against women in Kenya.

Amnesty International interviewed many women who stated that with regard to sexual violence and rape “they were reluctant to approach the police and had only reported their case when the violence had become so extreme that they needed intervention to protect their lives”.

The Kenyan law defines rape as a man having carnal knowledge (sexual intercourse) of a woman without her consent or agreement. Consent to have sex must be freely obtained. Any consent given because of threat, intimidation or undue influence is in law not acceptable. The maximum sentence for rape is life imprisonment with no minimum sentence. In reality this means that often offenders get away with a light punishment.

20 – ‘Rape – the invisible crime’, Report by Amnesty International, March 3, 2002.

In an interview with the media²¹, Ms Fatma Abeyd Anyanzwa, the chairperson of the Kenya Anti-Rape Organisation, who founded the organization after rape cases escalated in her Kibera neighbourhood said: “[N]ot a week would pass before hearing that a neighbour's daughter or a woman in the neighbourhood had been raped, maimed or killed.”

In the article, Anyanzwa condemns harassment by police whenever rape cases are reported. She says her organisation receives complaints on the mistreatment of rape victims by police from all parts of the country. She also blames the rising cases of rape on the judiciary, noting that courts hand down light sentences to rapists. “I think there should be a minimum sentence a rapist should receive since judges in Kenya have opted, in most cases, to hand down light sentences including probation.”²²

Ms Ann Gathumbi, coordinator of the Coalition on Violence Against Women (COVAW) Kenya, a local non-governmental human rights organisation, agrees with Anyanzwa: “[I]n most cases, there are no minimum sentences. The penal code for example only talks about a maximum life sentence for a rapist. It is therefore at the discretion of a judge or magistrate to hand down a minimum sentence. Consequently, some offenders get away with very light sentences.”²³

In addition, the judicial system in Kenya is perceived as discriminatory against women with a low percentage of female judges and little knowledge of gender issues and international standards on women's rights.

21 – Article by Zachary Ochieng, ‘Kenya - Relegated to second class citizens’, www.peacelink.it/afrinews.

22 – Idem.

23 – Idem.



Violence against Women Perpetrated by the State

5.1 Torture and impunity

The Kenyan Constitution prohibits torture, inhuman or degrading treatment but does not define torture.²⁴

The UN Special Rapporteur on Torture visited Kenya in September 1999. In his report to the 56th session of the UN Commission on Human Rights in 2000²⁵, the Special Rapporteur stated that “a number of his official interlocutors acknowledged that there was a tradition in Kenya of physical rough treatment of suspects of the police.” It was apparent to him that “such treatment routinely includes sustained beatings on all parts of the body with sticks, metal bars and lengths of rubber.” These beatings are administered generally to obtain confessions or other information.

The Special Rapporteur stated that “there is a general sense of impunity among those, notably members of the Criminal Intelligence Department, charged with investigating suspected criminal activities.”

The Kenyan Government announced that the Special Rapporteur’s recommendations would be implemented. In October 2000, the draft Criminal Law (Amendment) Bill on the treatment of detainees and police custody was published but has yet to be enacted. This Bill incorporated the above recommendations and included a provision to establish the Standing Committee on Human Rights as an independent Human Rights Committee. Therefore, the Kenyan Government has yet to implement the proposals made by the Special Rapporteur.

In his report to the 57th UN Commission on Human Rights in 2001, the Special Rapporteur on Torture also reminded the government of a number of cases transmitted between 1996-1998 regarding which no reply had been received. The report also notes that the Kenyan government had not provided information on the measures taken to implement the recommendations contained in the Special Rapporteur’s report of the 1999 mission.²⁶

24 – Article 74 (1) Kenyan Constitution.

25 – UN Doc. E/CN.4/2000/9/Add.4.

26 – *Idem*.

The Special Rapporteur documented several allegations of sexual assault by the security forces in his report. One case he documented was a group of nine women and children from Ngare Mara and Daaba, Isiolo district, ranging in age from 11 to 75 years who were allegedly assaulted on August 8, 1998 by security forces looking for stolen guns and livestock. The group was allegedly severely beaten and some raped in an attempt to make them produce the stolen weapons.

5.2 Police treatment

As mentioned before complaints on the mistreatment of rape victims by police are frequent. Women who dare to report that they are sexually abused are often not taken seriously.

Over the years the Kenyan media reported several cases of sexual violence by the police and it is believed to be a widespread phenomenon. These crimes by police officers often go unpunished as no independent enquiry will be carried out since it is the police itself that are in charge of the investigation, often even the local station to which the alleged offender(s) belong.

There are also allegations made by local human rights organisations that police obstruct the medical investigations into sexual violence and rape. In addition, doctors are apparently reluctant to fill in the necessary forms when police officers are the accused.

5.3 Prison conditions

Information about the conditions in Kenyan prisons is limited because local or international human rights organisations are denied access. Even the UN Special Rapporteur on Torture was denied access to Kamiti Maximum Security Prison in Nairobi during his 1999 visit, despite earlier approval of his request. Doctors, lawyers and family are often denied access or get only limited access.

In particular, the Kenya Human Rights Commission voiced its concern over the refusal by the Kenyan Government to bring down the iron curtain that prevents human rights groups and other observers from visiting prisons. The UN Special Rapporteur on Torture recommended after his visit: “[A] general opening up of the prison system is required, in a way that

would welcome rather than deter access by civil society. In particular, impediments to access by lawyers, doctors and family members should be removed. Civil society should be brought in as partners to help humanize an under-resourced and overpopulated system.”

It appears that torture and ill treatment are used indiscriminately in Kenyan prisons and the UN Rapporteur on Torture stated in his report on his mission to Kenya that the use of torture by law enforcement officials in Kenya was widespread and endemic. He reported at least 33 cases of torture committed against women by law enforcement officials, which included at least 23 women subjected to rape or sexual assault.

It is evident that prison conditions in Kenya are below every standard and amount to cruel, inhuman and degrading treatment. Prisons are overcrowded, food and water shortages are common and prisoners have limited access to medical care.

Prison officers have to work under very difficult circumstances and receive low salaries. As the UN Special Rapporteur on Torture stated after his visit “poverty contributed to the practice of torture...many law enforcement officials were underpaid, which eroded sympathy for their charges.”²⁷

The Standing Committee on Human Rights, created in 1996 by then President Moi and generally viewed upon as not being independent and with limited powers, voiced unprecedented criticism in 2001 by condemning the torture in prisons and recommending that police officers receive compulsory human rights training. However, a draft bill strengthening the independence of the Standing Committee was not yet considered by parliament before it was dissolved.

The UN Special Representative on human rights defenders, together with the UN Special Rapporteur on torture, sent an urgent appeal on behalf of a number of members and supporters of Release Political Prisoners (RPP), a human rights organization that mainly lobbies for the release of political prisoners. It was reported that they were arrested at the RPP premises in Nairobi during a peaceful celebration to mark Mau Mau Day (officially called Kenyatta Day), which commemorates the 1952 uprising of the Mau Mau against British rule.

According to the information received, the police used excessive force to break up the gathering; all the persons named were brought before the

27 – UN Press release, October 26, 2000.

Chief Magistrate at the High Court in October 2001 to answer charges of “unlawful assembly;” they all refused to enter a plea and were, therefore, recorded as pleading “not guilty;” only five of the detainees were able to gather the sum required to post bail.²⁸

28 – UN Doc. E/CN.4/2002/106, annex, paras. 227-228.

VI

Cases of Violence against Women

6.1 Sophia Dolar, Pauline Wanjiru and Ester Wairimu

The UN Special Rapporteur on Violence against Women sent a letter on 30 September 2001, jointly with the UN Special Rapporteur against Torture, and advised the Kenyan Government that she had received information concerning the following three women: Sophia Dolar, Pauline Wanjiru and Ester Wairimu.

They were reportedly arrested in March 2000 with eight other human rights activists, held for five days in Nakuru Prison, Rift Valley Province. Upon arrival the women were reportedly forced to strip naked in full view of other prisoners and jeering prison guards, and beaten with sticks during interrogation. They were allegedly held in a large overcrowded cell holding 39 women, many of whom were ill. When they refused to eat uncooked food, they were reportedly beaten with canes and forced to eat the food. No official investigation is said to have been carried out.²⁹ The Kenyan Government failed to respond to the letter of the two Special Rapporteurs.

6.2 The Kenyan branch of the International Federation of Women Lawyers (FIDA-K)

The UN Special Rapporteur on the Independence of Judges and Lawyers sent a communication to the Kenyan government concerning threats made against the International Federation of Women Lawyers. The information received indicated that in August 2000 five police officers had tried to force their way into the association's office. In addition three staff members received anonymous threats that they would be killed because of their work.

The harassment was particularly linked to the provision of legal assistance of the FIDA to an alleged rape victim in bringing a case against a minister in the Office of the President.³⁰

29 – UN Doc. E/CN.4/2002/83/Add.1 para. 54.

30 – UN Doc. E/CN.4/2001/65, paras. 124-127.

6.3 Women refugees

Refugees are a vulnerable group in Kenya and women refugees are particularly susceptible to violence. The non-governmental human rights organisation Human Rights Watch (hereafter: HRW) published a report in November 2002 'Hidden in Plain View: Refugees living without protection in Nairobi and Kenya' in which, inter alia, cases of sexual violence against women were documented. The cases include: Amina P., a Somali girl that was raped in Nairobi outside the United Nations High Commissioner for Refugees (hereafter: UNHCR) Westland offices; two Rwandan children who were murdered in April 2002 and their mother was injured; and a woman refugee from Burundi who was arrested by the police and raped in April 2002.

The HRW report concluded "The Kenyan government is failing to guarantee to refugees in Nairobi, regardless of their legal status, their most basic human rights. These include: the right to liberty and not to be arbitrarily detained, the right to security of person including protection from torture and mistreatment, and the right to freedom of movement. It is also failing to take adequate action to bring to justice the perpetrators of human rights abuses against refugees, even when these individuals are agents of another government. In addition, Kenya must allow refugees who have had their rights abused the same access as nationals to the police or seek redress in the courts."³¹

HRW blames also the UNHCR for "failing to identify refugees who are at risk when they first register at the office, in direct contravention of its own policies on refugee women and children, which require immediate identification and attention to such individuals needs."³²

31 – 'Hidden in Plain View: Refugees living without protection in Nairobi and Kenya', report by HRW, November 2002.

32 – *Idem*.

VII

Conclusions and Recommendations

OMCT welcomes the fact that Kenya has ratified most of the major international and regional instruments aimed at the promotion and protection of human rights and recommends that the Kenyan government incorporate these instruments into domestic law, more specifically the UN Convention on the Elimination of All Forms of Discrimination against Women.

OMCT regrets the fact that the Government report does not contain any detailed information concerning violence against women and girls in Kenya and would call upon the Government to provide such information, including statistics on rates of violence against women in its next periodic report to the Committee on the Elimination of All Forms of Discrimination Against Women. OMCT would urge the Government to submit the fifth periodic report rapidly, as the report was already due in April 2001.

As the majority of cases of domestic violence remain unreported or at least unpunished, OMCT urges the government to adopt legislation for the prevention, prohibition and punishment of domestic violence. In addition, a public awareness campaign concerning domestic violence is recommended to eradicate traditional beliefs regarding the subordinate status of women both in society and amongst law enforcement officials.

In this light, OMCT is very concerned that two important bills pending before parliament - The Domestic Violence (Family Protection) Bill, and the Criminal Amendments Bill – were not voted on following the dissolution of the House by the President and hopes that the bills will be adopted soon after the December 27 elections.

OMCT is very concerned that marital rape is not explicitly prohibited under the Kenyan Penal Code and would call upon the Government to amend the Code in order to ensure that rape in the context of marriage is criminalized.

OMCT welcomes that the Children's Bill came into force in December 2001 and contains provisions that ban forced marriages and female genital mutilation. However, FGM continues to persist in Kenya and is carried out clandestinely in many parts of the country due to strong traditional customs. Therefore, OMCT recommends that the government launch a

public awareness campaign to educate the population, especially in the rural areas, about the new laws and the consequences of FGM.

OMCT urges the Kenyan government to live up to the provision of article 5 of the UN Convention on the Elimination of All Forms of Discrimination Against Women and to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women. More specifically, with regard to the practice of female genital mutilation the Government should take action to eradicate this practice in the whole country, including rural areas.

Besides the fact that rape occurs regularly in Kenya, there is no effective system to investigate allegations of sexual violence and rape and as a result not many cases are dealt with in court. Police officers are not trained to deal properly with gender-based violence and many see domestic violence, including marital rape, as a private matter. OMCT therefore, recommends that all law enforcement personnel and members of the judiciary receive gender-sensitivity training in responding to cases of rape and other forms of violence against women.

OMCT calls upon the government of Kenya to consider including a minimum sentence for rape in the Penal Code.

OMCT is very concerned about the poor prison conditions in Kenya and the fact that local or international human rights organisations are denied access to prisons. Doctors, lawyers and family are similarly often denied access or get only limited access. For this reason, OMCT recommends that the government improve the prison conditions and work together with civil society in this respect.

It appears that torture and ill treatment are used indiscriminately in Kenyan prisons and the UN Rapporteur on Torture stated in his report on his mission to Kenya that the use of torture by law enforcement officials in Kenya was “widespread and endemic.” OMCT therefore calls upon the government to implement the recommendations of the Special Rapporteur immediately. Further, OMCT recommends that the Kenyan government consider ratifying the proposed Optional Protocol to the UN Convention Against Torture, which provides for a continuing mandatory access to prisons, police stations and other detention centres by UN observers as a means of preventing torture.

As is demonstrated earlier in this report, de jure discrimination of women exists, including in the Constitution of Kenya and OMCT therefore

recommends that the government take urgent action to amend this legislation so as to guarantee women equal rights with men in all areas.

OMCT remains concerned by the fact that women are under-represented in decision-making structures in Kenya as it affects the way in which gender is included in policy and law enforcement. For this reason, OMCT would like to welcome the development of affirmative action programmes designed to increase the numbers of women in the executive, legislative and judicial branch.

OMCT would welcome the ratification by Kenya of the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination Against Women, which would enable women in Kenya to lodge individual complaints concerning violations of the rights guaranteed under the Convention.

Finally, OMCT would insist upon the need for the Government to fully implement all of the provisions of the UN Convention on the Elimination of All Forms of Discrimination Against Women, the Beijing Rules and Platform of Action and the Declaration on the Elimination of Violence Against Women as these instruments provide detailed protection for women against violence in the family, in the community and at the hands of State officials.



*28th session
13-31 January 2003*

**Concluding Observations of the
Committee on the Elimination of
Discrimination Against Women:
Kenya**

(Advance Unedited Version)

1. Introduction by the State Party

1. The Committee considered the combined third and fourth periodic report of Kenya (CEDAW/C/KEN/3-4) at its 592nd and 593rd meetings, on 15 January 2003 (see CEDAW/C/SR.592 and 593).

2. In introducing the report, the representative of Kenya expressed the commitment of her Government to ensure that gender equality was promoted as a necessary precondition for national development. She noted that measures had been taken to remove social, cultural and legal obstacles for women through various efforts. As a first step, the National Machinery for the Advancement of Women had been elevated from a division within a department to a full department within the new Ministry of Gender, Sports, Culture and Social Services.

3. The representative also stated that the Standing Committee on Human Rights, established in 1996, had been transformed into the Kenya National Commission on Human Rights in 2002. The main function of the Commission was to investigate violations of human rights on its own initiative or upon a complaint by a person or group of persons. The Commission would ensure that the Government complied with its obligations under international treaties and conventions on human rights.

4. The representative informed the Committee that a draft constitution had been published on 27 September 2002. The draft was regarded as a milestone for the women of Kenya because it sought to eliminate existing discriminatory practices against women. The representative pointed out that section 34 of the draft constitution expanded the definition of discrimination to include race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth and required that injustices against women be addressed through legislative or other means. Measures had been taken to ensure that a new Constitution was in place by June 2003.

5. The representative also indicated that deliberate attempts had been made to improve, among other things, women's representation in the judiciary, the diplomatic service and the administration. In the civil service, the number of women appointed to decision-making positions had increased. In the recently concluded national elections, the number of women elected to Parliament had also increased. Out of those, three had been appointed to the Cabinet as Ministers in the Office of the Vice-President, Water Resources and the Ministry of Health, respectively. Out

of the 12 slots for nominated members of Parliament, the current Parliament had nominated 8 highly qualified professional women. There were currently 17 women parliamentarians, the highest number in the history of Kenya.

6. The Government had put in place a policy of free and Compulsory Primary Education, which would, among others, address gender disparities and ensure that more girls are enrolled and complete primary school.

7. The representative recognized that poverty needed to be reduced in order to achieve sustainable economic growth. In that context, a Poverty Reduction Strategy Paper had been prepared in 2001. She noted that the paper was a short -term strategy that sought to implement the National Poverty Eradication Plan in a series of three - year rolling plans. A gender thematic group had been formed specifically to make the document gender-sensitive.

8. HIV/AIDS had become a major threat to social and economic development, and the representative pledged her Government's commitment to intensifying the HIV/AIDS campaign. She indicated that major priority actions in combating the spread of the pandemic included publication and enactment of the HIV and AIDS Prevention and Control bill of 2002, developing a comprehensive HIV/AIDS research and control programme based on partnerships with stakeholders, and access to affordable anti-retroviral drugs.

9. In concluding, the representative informed the Committee that laws would be implemented and enacted to give effect to the empowerment of women. They included the Equality bill of 2001 and the National Commission on Gender and Development bill of 2002. The Government would ensure acceleration of the implementation of the Poverty Reduction Strategy Paper and mainstreaming of gender in all sectors of development. Ratification of the Optional Protocol to the Convention was under consideration and a decision to that effect would be communicated in due course.

2. Concluding comments of the Committee

Introduction

10. The Committee commends the State party for its large delegation, headed by the Permanent Secretary in the Ministry of Gender, Sports, Culture and Social Services, and expresses appreciation for the written replies to the questions of the Committee's pre-session working group and for the oral presentation, which provided additional information on the implementation of the Convention and the current situation of women in Kenya.

11. The Committee commends the State party for formulating a five-year Plan of Action based on all the twelve critical areas of concern of the Beijing Platform for Action.

12. The Committee commends the State party for its declared political will and efforts to improve the status of women in Kenya. The Committee appreciates the frankness and openness of the delegation's dialogue with members of the Committee.

Positive aspects

13. The Committee welcomes the draft constitution which will come into force by June 2003, as it addresses issues of the reform of existing discriminatory laws .

14. The Committee welcomes the transformation of the Standing Committee on Human Rights into the Kenya National Commission on Human Rights, and commends the State party for elevating the National Machinery for the Advancement of Women, giving it more autonomy within the new Ministry of Gender, Sports, Culture and Social Services.

15. The Committee is pleased to note that consultations were held with representatives of different ministries and civil society, including non-governmental organizations, in the preparation of the combined third and fourth periodic report.

Principal areas of concern and recommendations

16. Although the draft constitution, once enacted, should provide for the applicability of international conventions ratified by the State party in domestic courts of law, the Committee is concerned that the Convention on the Elimination of All Forms of Discrimination against Women has not yet been incorporated into domestic law and its provisions have not been invoked before the courts.

17. The Committee recommends that the State party incorporate the provisions of the Convention on the Elimination of All Forms of Discrimination against Women into domestic law without delay and requests the State party to ensure that the provisions of the Convention are fully reflected in the constitution and in all legislation.

18. The Committee is concerned that legislative provisions as well as customary laws and practices that discriminate against women in areas such as marriage, divorce, burial and devolution of property on death continue to exist. The Committee is further concerned at the continued existence of multiple laws governing marriage and divorce.

19. The Committee recommends that the State party take appropriate action to eliminate all discriminatory laws, practices and traditions and to ensure women's equality with men particularly in marriage and divorce, burial and devolution of property upon death in accordance with the provisions of the Convention. In this regard, the Committee recommends speedy enactment of the relevant bills, including the Domestic violence (family protection) bill of 2002; the Equality bill of 2001; the National Commission on Gender and Development bill of 2002; the Criminal law amendment bill of 2002; the HIV/AIDS Prevention and Control bill of 2002; and the Public Offices Code of Ethics bill of 2002. The Committee also recommends that the State party's relevant ministries continue working with civil society, including nongovernmental organizations, in order to create an enabling environment for legal reform, effective law enforcement and legal literacy.

20. The Committee expresses concern about the persistence of cultural practices and stereotypical attitudes with respect to the role and responsibilities of women that undermine their rights.

21. The Committee requests the State party to increase its efforts to create awareness in society about the need to change stereotypical attitudes and discriminatory behaviour towards women and girls through, inter alia,

specific programmes directed at men and boys, as well as to conduct educational campaigns directed at both women and men in this regard. The Committee further encourages the media to project a positive image of women and to promote the equal status of women and men in both the public and private spheres. It also calls upon the State party to periodically review the measures taken in order to identify shortcomings and to adjust and improve those measures accordingly.

22. The Committee expresses concern at the continued prevalence of violence against women. It is particularly concerned about domestic violence, sexual harassment in the workplace and in institutions of learning, and other forms of sexual abuse of women.

23. The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls, taking into account its general recommendation 19 on violence against women. The Committee calls on the State party to enact or review, as appropriate, legislation on all forms of violence against women including domestic violence as well as legislation concerning all forms of sexual harassment, in order to ensure that women and girls who are victims of violence and sexual harassment have access to protection and effective redress and that perpetrators of such acts are prosecuted and punished. The Committee also recommends gender-sensitive training for public officials, particularly law enforcement personnel, the judiciary and health services providers. It also recommends the establishment of shelters and counselling services for victims of violence and sexual harassment.

24. The Committee notes with concern that, despite the prohibition of female genital mutilation by the State party, the practice persists and is widely accepted in the country.

25. The Committee recommends that the State party develop a plan of action, including a public-awareness campaign, targeted at both women and men, with the support of civil society including NGOs, to eliminate the practice of female genital mutilation and encourages the State party to create an enabling environment for effective law enforcement and to devise programmes for alternate sources of income for those who perform female genital mutilation as a means of livelihood.

26. While recognizing an increase in the number of women recently appointed to decision-making positions, the Committee expresses concern that this number remains low in parliament, the judiciary and the diplomatic and civil service.

27. The Committee recommends that the State party take measures to increase the number of women in decision-making positions. It also recommends that the State party introduce temporary special measures, in accordance with article 4, paragraph 1, of the Convention, to strengthen its efforts to promote and elect women to positions of power, supported by special training programmes and awareness-raising campaigns, taking into account the Committee's general recommendation 23.

28. The Committee expresses concern at the discriminatory nature of Kenyan laws relating to citizenship and nationality.

29. The Committee urges the State party to reconcile Kenyan citizenship laws with the provisions of the Draft Constitution and article 9 of the Convention in order to eliminate all provisions that discriminate against women in the area of citizenship and nationality. It requests the State party to report on the implementation of these measures in its next periodic report.

30. The Committee expresses concern that, despite the laws and sanctions in place, prostitution continues to thrive, particularly in urban areas. The Committee is particularly concerned about the lack of information on the extent of the exploitation of prostitution and the lack of measures to combat this matter, including the lack of adequate penalties for those who exploit prostitutes.

31. The Committee requests the State party to study the phenomenon of prostitution and to take appropriate measures to combat the exploitation of prostitution in urban areas. It recommends that a holistic approach be pursued in order to facilitate the reintegration of prostitutes into Kenyan society and urges the State party to provide rehabilitation and other programmes to women exploited in prostitution. It also recommends prosecution and punishment for those who profit from the sexual exploitation of women and girls.

32. While noting the State party's commitment to combat the spread of HIV/AIDS and the reduction in infection rates from 14 per cent to 10.2 per cent in 2002, the Committee is concerned at the lack of sex-disaggregated data on HIV/AIDS and the absence of strategic measures for the care of women and girls infected with and affected by HIV/AIDS.

33. The Committee urges the State party to take comprehensive measures to combat the HIV/AIDS pandemic, to take strong preventive measures and to ensure that women and girls infected with HIV/AIDS are not

discriminated against and are given appropriate assistance. The Committee also emphasizes that the collection of reliable data on HIV/AIDS is critical in order to understand the impact of the pandemic on women and men.

34. Despite the State party's National Policy on Gender and Development to implement existing land and inheritance laws concerning women's rights in rural areas, the Committee is concerned that discriminatory customs and traditional practices remain prevalent in rural areas, thus preventing women from inheriting or acquiring ownership of land.

35. The Committee urges the State party to pay special attention to the needs of rural women, ensuring that they participate in decision-making and have full access to education, health services, credit and marketing facilities. The Committee also urges the State party to take appropriate measures to eliminate all forms of discrimination with respect to ownership, co-sharing and inheritance of land.

36. The Committee is concerned that the National Commission on Gender and Development is lacking the means to effectively coordinate among the different mechanisms related to gender; and that a lack of a clear division of responsibilities and insufficient budget allocations may have a negative bearing on the effective implementation of the Convention.

37. The Committee recommends that the State party clearly define the mandate and responsibilities of the different mechanisms related to the advancement of women and gender equality and allocate sufficient budgetary resources to them.

38. The Committee urges the State party to accelerate its efforts to ratify the Optional Protocol to the Convention and to accept the amendment to article 20, paragraph 1, of the Convention.

39. Taking account of the gender dimensions of declarations, programmes and platforms for action adopted by relevant United Nations conferences, summits and special sessions (such as the special session of the General Assembly to review and appraise the implementation of the Programme of Action of the International Conference on Population and Development (the twenty-first special session), the special session of the General Assembly on children (the twenty-seventh special session), the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Second World Assembly on Ageing), the Committee requests the State party to include information on the

implementation of aspects of these documents relating to relevant articles of the Convention in its next periodic report.

40. The Committee requests the State party to respond to the concerns and recommendations expressed in the present concluding comments in its next periodic report to be submitted under article 18 of the Convention; and to take into account the Committee's general recommendations in legislation, policies and programmes .

41. The Committee requests the wide dissemination in Kenya of the present concluding comments in order to make the people of Kenya, in particular government administrators and politicians, aware of the steps that have been taken or are intended to be taken to ensure the de jure and de facto equality of women. It also requests the State party to continue to disseminate widely, in particular to women's and human rights organizations, the Convention, its Optional Protocol, the Committee's general recommendations and the Beijing Declaration and Platform for Action, as well as the results of the twenty-third special session of the General Assembly, entitled "Women 2000: gender equality, development and peace for the twenty-first century" .

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