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Alternative report to the UN Committee against Torture regarding the consideration of Kenya's second report

**Foundation for Human Rights Initiative (FHRI)
Penal Reform International (PRI)**

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FHRI and PRI welcome this opportunity to provide additional information regarding the implementation of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in Kenya on the occasion of the examination of Kenya's second report (CAT/C/KEN/2) under the Convention.

In the present report we aim to provide additional information on the recently drafted Prevention of Torture Bill, which defines and penalises torture as a distinct offence (Article 2 of the Convention); on overcrowding in prisons resulting in torture and other ill-treatment (Article 11 of the Convention); and on the implementation by Kenya of Article 16 of the Convention, with specific reference to the application of the death penalty, which amounts to torture and other ill treatment. The fact that we do not comment on other issues raised in the State report does not mean that we agree to the State report on all other points.

Information included in this alternative report was gathered within a project co-funded by the European Commission.

Torture as a criminal offence

In 2010, Kenya adopted a new Constitution which introduced a number of reforms including the absolute prohibition against torture and other cruel, inhuman or degrading treatment (Articles 25 and 29).

In 2011, the government of Kenya drafted the 'Prevention of Torture Bill', which aims to implement their obligations under the Convention, which was ratified in 1997. The Bill meets the definition of torture as laid out in Article 1 of the Convention, by defining torture to include any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a person who is a public officer, or is acting in an official capacity, or is acting with the consent or acquiescence of a public officer on a person for purposes of:

- (i) obtaining from the person or from a third person information or a confession;

- (ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- (iii) intimidating or coercing the person or a third person; or
- (iv) for any reason based on discrimination of any kind.

The Bill lays down a list of non-exhaustive acts constituting torture. The acts are divided into physical torture and mental torture. Physical torture includes, *inter alia*, systematic beating, punching, kicking, gun shots, food deprivation, electric shocks, forced into fixed or stress body positions, rape, mutilation, exposure to extreme elements, use of drugs. While mental torture includes, *inter alia*, blindfolding, threatening the victim or his family with bodily harm, confining a victim incommunicado in secret places, confining a victim in a solitary cell, prolonged interrogation, sleep deprivation, simulated executions, shame infliction.

Under the Bill, torture does not include any pain or suffering arising from, inherent in or incidental to lawful sanctions.

The Bill defines cruel, inhuman and degrading treatment or punishment to include deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the agent of the person in authority against a person under his custody, causing suffering, gross humiliation or debasement to the person.

As required under Article 4 of the Convention, committing an act of torture in Kenya is a criminal offence. A person who commits torture is liable on conviction to a term of imprisonment not exceeding 25 years, or 15 years for committing cruel, inhuman or degrading treatment or punishment.

As required under Article 3 of the Convention, the draft Bill also prohibits the extradition of a person to another State where there is 'reason to believe that such person is in danger of being subjected to torture or other cruel, inhuman or degrading treatment'.

While the draft Bill aims to tackle impunity for acts of torture in Kenya in line with their international commitments, it is still awaiting parliamentary approval.

Concerns due to prison overcrowding

The Constitution includes a legal guarantee that Parliament should enact legislation that 'provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments.'¹

Yet, mass overcrowding remains the single most important challenge for the Kenya Prison Service. The conditions make it difficult to provide basic needs to prisoners, including adequate living conditions, and access to medical and psychiatric care. There is a lack of appropriate resources allocated to the Kenya Prison Service, including shortage of prison staff and a lack of infrastructure within the prison system to deal with the growing prison population, from 41,000 in 1996 to 52,000 in 2012.

Due to the overcrowded and unhygienic prison conditions, tuberculosis (TB) and other diseases are widespread among prisoners in Kenya. HIV/AIDs is prevalent among prisoners, and the inability of the Kenya Prison Service to distribute condoms to prisoners exacerbates the situation.

¹ Article 51(3) of the Constitution of the Republic of Kenya.

Those that do require medical attention must use the prison health facilities, which lack the most basic health care equipment, supplies and personnel. Only when a prisoner's condition severely deteriorates does the prison permit them to seek treatment in a government hospital outside of the prison.

Concerns relating to the death penalty

PRI and FHRI oppose the death penalty as the ultimate cruel, inhuman and degrading punishment and violation to the right to life, and represent an unacceptable denial of human dignity and integrity.

In his report to the UN General Assembly in 2012, the Special Rapporteur on torture concluded that there is a trend at the regional and national levels to consider the death penalty to *per se* run afoul of the prohibition of torture and cruel, inhuman or degrading treatment.

Further concerns relating to torture and ill-treatment in the context of the death penalty result from the quality of legal aid for indigent defendants, and the conditions in which prisoners on death row are held. They have to be seen in the context of the application of the death penalty beyond the threshold of 'most serious crimes' and of mandatory death sentences, which are a violation of due process and constitute inhumane treatment.

Application of the death penalty

Article 26(3) of the 2010 Constitution provides that '[a] person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law'.

The Kenya Penal Code Act makes reference to five death penalty applicable offences:

1. Murder (section 204 of the Penal Code).
2. Treason (section 40 of the Penal Code).
3. Aggravated robbery (section 296(2) of the Penal Code).
4. Attempted robbery with violence (section 297(2) of the Penal Code)
5. Administering an oath purported to bind a person to commit a capital offence (section 60 of the Penal Code).

While Kenya *de facto* testifies to the presence of an unofficial moratorium on executions and Kenya has not carried out an execution since 1987, large numbers of death sentences continue to be handed down by courts.

In 2012 alone, at least 575² people were sentenced to death in Kenya for murder or robbery with violence, meaning that there are approximately 2,000 people on death row. However, one of the biggest challenges is the reliability of statistics, as the Kenyan government does not publish official statistics on the number of death sentences or number of prisoners on death row.

'Most serious crimes' threshold

Kenya continues to retain, and sentence to death, people who commit offences which do not meet the 'most serious crimes' threshold, in particular: aggravated robbery (section

² Statistics provided by Justice David Musinga, High Court Judge, Kenya, April 2013.

296(2) of the Penal Code) and attempted robbery with violence (section 297(2) of the Penal Code). These two offences require the use or threat of violence with theft (section 295 of the Penal Code). If committed using a weapon, or by a gang, or resulting in actual personal violence to the victim, the offender 'shall be sentenced to death'.

In 2005, the UN Human Rights Committee expressed concern that Kenyan courts impose the death penalty for robbery or attempted robbery with violence, 'which do not qualify as 'most serious crimes' within the meaning of article 6, paragraph 2 of the Covenant [ICCPR].'³ Aggravated robbery or attempted robbery with violence constitutes the highest percentage of capital convicts relative in Kenya.⁴

The scope of the death penalty was also expanded when the Kenya Defence Forces Act was adopted in August 2012, which allows for sentence of death for members of the Kenya Defence Forces for aiding, communicating or assisting the enemy (Articles 58, 59 and 63); spying (Article 60); treachery (Articles 61 and 62); unlawfully advocating for a change of government (Article 67), and mutiny (Articles 72 and 73).

Mandatory death penalty

The five capital offences set out in the Penal Code are all mandatory offences, giving rise to a violation of due process and constituting inhumane treatment. However, in 2010 the Court of Appeal issued a landmark judgement in *Godfrey Ngotho Mutiso v. the Republic* which abolished the mandatory death penalty for murder, as it violated the right to life, and constituted arbitrariness since it failed to provide convicted individuals with an opportunity to mitigate their death sentence.

While the 2010 judgement of the Court of Appeal only referred to murder (Section 204 of the Penal Code), and not to the other four mandatory capital offences in the Penal Code, the Court did state that the same principle might well apply to other offences that attract a mandatory death sentence.⁵

However, in June 2011, in applying the *Mutiso* judgement in the case of *R v. John Kimita Mwaniki*⁶, the High Court created some uncertainty in this area of law. The Court referred to the myriad of other statutes in Kenya where the expression 'shall' is deliberately used, specifically referring to the Sexual Offences Act and the Drugs Narcotics and Psychotropic Substances Act. The Court was concerned that the precedent in *Mutiso* would create chaos and engender minimal sentencing. The Court expressed concern that following *Mutiso* the High Court would become inundated with applications for revision from 'shall' to 'may'. Following this judgement, there is concern by human rights activists and lawyers that the court's reasoning in *Mwaniki* may restrict future courts in the application of *Mutiso* with regard to other offences which attract a mandatory death sentence.

Neither the Kenya Supreme Court nor the legislature has confirmed that all mandatory death sentences (and not just for crimes of murder) violate the right to life and the prohibition of cruel, inhuman and degrading punishment in Kenya's Constitution, and Sections 40, 296(2), 297(2) and 60 of the Penal Code still retain a mandatory death sentence.

³ Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/KEN, 29 April 2005, para. 13.

⁴ Position Paper No. 2 on the Abolition of the Death Penalty, Kenya National Commission on Human Rights (KNCHR), 2007, para. 31.

⁵ *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008, para. 36.

⁶ *Republic v. John Kimita Mwaniki* [2011] eKLR.

Fair trial concerns

Defendants are entitled to state-funded legal counsel 'if substantial injustice would otherwise result'.⁷ However, where legal aid is granted, the quality of legal representation is often very poor, and the defendant seldom meets their lawyer before trial, rendering legal representation ineffective. Legal aid lawyers are poorly remunerated by the state, and pro bono legal assistance may sometimes be available through NGOs, but is usually limited to major cities. This raises serious concerns that indigent individuals accused of a capital offence have been sentenced to death following unfair trials, in violation of Articles 1 and 16 of the Convention.

The insecurity about legal representation in death penalty applicable cases also run counter to Principle 3 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the General Assembly in December 2012, which state that 'states should ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.'

Death row conditions

Measures to partly address the problem of overcrowding by rehabilitation programmes designed for re-integration into society do not affect those prisoners on death row.

Most prison facilities where death row inmates are imprisoned lack appropriate sanitation infrastructure. Most cells use buckets as toilets. There are often water shortages, which have in recent years led to widespread diseases such as typhoid. Access to food is rationed due to the large numbers of inmates. There are inadequate mattresses and bedding for inmates. Most prisoners sleep in single file.

Although there is a *de facto* moratorium on executions, there is no guarantee that executions will not resume, meaning that prisoners on death row remain in fear of execution, giving rise to the death row phenomenon.

Progressive steps towards abolition

In the last ten years, progressive steps have been taken at the national and international level to indicate a commitment towards positively reducing and restricting the application of the death penalty in practice, leading to its eventual abolition. This has included commutations of death row prisoners in 2003 and 2009 due to the 'undue mental anguish and suffering, psychological trauma and anxiety' that come from 'extended stays on death row',⁸ and various political statements that indicate the government is reviewing the impact of the imposition of the death penalty in society.⁹

Although these can be seen as positive steps moving in the right direction, as Kenya only maintains a *de facto* moratorium on executions, there is still a risk that executions may resume, and there are serious concerns that the death penalty continues to be implemented in a way that raises violations of the Convention.

⁷ Article 50(2)(h) of the Constitution of the Republic of Kenya, 2010.

⁸ Nick Wadhams, *Kenya's Death Row Inmates Get Life Instead*, Time Magazine, 5 August 2009, <<http://www.time.com/time/world/article/0,8599,1914708,00.html>> (accessed 7 February 2012).

⁹ National report submitted to the UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 22 February 2010, para. 38.

Brief about Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI)

PRI and FHRI are currently working in partnership on a two-year project to campaign for the progressive abolition of the death penalty and its replacement with humane alternative sanctions East Africa: Kenya, Uganda and Tanzania. This programme of work has been funded under the European Union's Instrument for Democracy and Human Rights (EIDHR). It was launched in November 2012 and will be completed on November 2014.

As part of our programme of work, we are providing technical and practical support to parliamentarians and key decision-makers to undertake legal and policy reform, training prison officials on international standards for the treatment and management of death row prisoners and those serving a life sentence, building the capacity of local and regional civil society and coalitions to advocate for change, encouraging independent and evidence-based journalism on the death penalty and on alternative sanctions, as well as conducting research on emerging issues, and undertaking advocacy at the international, regional and country level to complement activity-based actions.

The Foundation for Human Rights Initiative (FHRI) is an independent, non-governmental, non-partisan and not-for-profit human rights advocacy organisation established in December 1991. It seeks to remove impediments to democratic development and meaningful enjoyment of the fundamental freedoms enshrined in the 1995 Uganda Constitution and other internationally recognised human rights instruments.

Penal Reform International (PRI) is an international non-governmental organisation working on penal and criminal justice reform worldwide. It aims to develop and promote international standards for the administration of justice, reduce the unnecessary use of imprisonment and promote the use of alternative sanctions which encourage reintegration while taking into account the interests of victims. PRI also works for the prevention of torture and ill-treatment and for a proportionate and sensitive response to women and juveniles in conflict with the law, and promotes the abolition of the death penalty and the implementation of humane alternative sanctions.

PRI has Consultative Status with the United Nations (ECOSOC) and the Council of Europe. It has Observer Status with the African Commission on Human and Peoples' Rights and the Inter-Parliamentary Union. PRI is also a registered civil society organisation with the Organization of American States (OAS). PRI is on the Steering Committee of the World Coalition against the Death Penalty (WCADP).

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