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# amnesty international

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## Kenya

### A human rights memorandum to the new Government

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In December 2002 Kenyans exercised their right to participate in the political life of their country in elections which, building on a strong mobilisation of civil society, were much more peaceful than the preceding ones. Despite apprehensions of political violence and intimidation, fewer human rights abuses were committed in the context of the elections than had been feared.

The process to elect a new president, members of parliament and civic representatives during the general elections of 27 December 2002 was conducted in a manner that allowed most Kenyans to express themselves freely and to tell politicians what kind of society they want to live in.

Every Kenyan has the right to live in a society where basic rights are respected in law and in practice. As the new Government takes office Amnesty International calls upon the newly-elected leaders to commit themselves to respect and uphold the fundamental rights and freedoms of the people, enshrined in domestic law as well as in the international human rights treaties signed and ratified by Kenya.

Amnesty International welcomes the positive signs for human rights in Kenya, namely expressions of commitment to abolish the death penalty, transitional justice, the prosecution of suspected perpetrators of torture and the provision of compensation to survivors of torture, steps to protect the rights of street children and a change in policy for refugees. Amnesty International urges the Government of Kenya to take prompt actions in these areas by introducing the appropriate legislations in parliament where these are required and taking any other required administrative steps.

Amnesty International further urges the Kenyan Government to consider, in particular, the following areas:

- **Impunity**

Amnesty International calls for thorough and independent investigations into all alleged human rights abuses that have been reported in the run up to the December 2002 elections; into the human rights abuses described in the Akiwumi Commission report; and into all political assassinations and disappearances. Those found responsible must be brought to justice.

- **Torture and ill-treatment**

Amnesty International appeals to the Government to make a clear statement that it will not tolerate torture and ill-treatment by law enforcement officials; that any allegations of torture will be considered by the presiding magistrate; that doctors will be trained to document acts of torture; that it will complete the implementation of all recommendations contained in the 1999 report of the UN Special Rapporteur on Torture.

- **Violence against women**

The organization calls for the reform of laws and practices to make all acts of violence against women, including marital rape, criminal offences; the establishment of mechanisms in police stations, hospitals and medical clinics to facilitate sensitive and effective handling of violence against women cases, as well as programs to educate and train judicial officers about gender-based crimes.

- **Administration of Justice and Judicial Reform**

Amnesty International urges the Government to guarantee the right to a fair trial for all Kenyans and press forward with judicial reform by ensuring that a comprehensive set of procedures to deal with corrupt court officers and judges is in place, providing adequate financial and technical resources for judicial reform and improving the professional standards of all court officers through training.

- **The Review of the Constitution of Kenya**

The organization urges the Government to prioritize the constitutional reform process in order to guarantee the human rights of all Kenyan in the long term.

- **Ratification of International Human Rights Instruments**

Amnesty International calls for the ratification of all the international human rights instruments that the Kenya has not yet ratified.

## **Impunity**

Amnesty International views impunity as the failure to bring to justice those who commit human rights abuses. Ignoring such abuses sends the wrong signal that perpetrators, in escaping justice, can continue to act without hindrance while ignoring the rule of law.<sup>1</sup>

It is therefore imperative that serious human rights abuses be investigated. Amnesty International calls for thorough and independent investigations into all alleged human rights abuses that have been reported in the run-up to the 27 December 2002 elections. Many such acts were committed around the country, including the burning of homes in Kwanza along the border of Trans Nzoia, setting ablaze of a hut in Mumias, with the resultant death of a family of three, intimidation and violence which sometimes led to killings by outlawed militias. An arson attack on two houses of a Kenya African National Union (KANU) civic candidate in Nyeri District left seven family members dead. Swift completion of investigations is required with a view to bringing the suspected perpetrators to justice and providing the victims with redress.

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<sup>1</sup> See Amnesty International *Kenya: Ending the Cycle of Impunity*, June 2001 (AI Index: AFR 32/11/01)

In 1998, a judicial enquiry into the ethnic clashes in Kenya since 1991 was commissioned. The 'Akiwumi Commission' report into these widespread politically motivated ethnic clashes, which resulted in death and displacement, has now been made public. Amnesty International strongly urges the new Government to order investigations into all allegations of involvement in the ethnic clashes and to bring those responsible for human rights abuses to justice, no matter who they are.

As Kenya moves into a new era in its history, accountability for past actions should not be overlooked. Kenyans are yet to know the truth about deaths in police custody or disappearances of victims of torture, killings such as the assassination 13 years ago of former Minister of Foreign Affairs Robert Ouko, to name but one out of many.

Amnesty International seeks a public commitment from the new Government that it will ensure that past and future allegations of human rights abuses will be promptly and thoroughly investigated and that all perpetrators brought to justice.

### **Torture and ill-treatment**

Torture is prohibited under the international and regional human rights treaties to which Kenya is a party. However ample evidence prior to the elections showed that anyone arrested or jailed in Kenya was at risk of torture or ill-treatment. The use of torture by law enforcement officials was reportedly widespread and systematic, primarily to obtain information or confessions, but also as a means of carrying out punishments.<sup>2</sup>

While several detainees as well as prisoners have met with death in custody, only a few cases of suspects charged with torture have reached the courts. Amnesty International calls on the Kenyan Government to address the issue of death in custody as well as security and physical integrity of those in detention as a priority.

Amnesty International further calls on the Government to make a clear pledge that it will not tolerate torture and ill-treatment by police and other security or prison officers; that any police or prison officer implicated in acts of torture or ill-treatment will immediately be suspended from duty pending a full inquiry and those found responsible will be brought to justice; that it will seek to ensure further training for law enforcement officers and prison officers in carrying out their duty in accordance with human rights standards, that any allegations of torture will be considered by the presiding magistrate, even in the absence of a complaint by the victim or relatives; it will ensure doctors are trained in being able to document acts of torture that they are free from harassment and intimidation by the police; that the government will embark without delay on programs aiming at the rehabilitation of victims of torture and compensate them; and that it will continue with the implementation of all the recommendations contained in the report of the UN Special Rapporteur on torture on his 1999 mission to Kenya.

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<sup>2</sup> See Amnesty International *Kenya - Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*, December 2000 (AI Index: AFR 32/10/00) and *Kenya: Ending the Cycle of Impunity*, June 2001 (AI Index: AFR 32/11/01)

## **Violence Against Women**

Violence, particularly sexual violence, against women, committed by both security officials and private individuals, is a serious concern for Amnesty International. Every day, women are physically and sexually abused in all social and ethnic groups in Kenya. Violence is a crime that shocks and traumatizes the survivor as well as the whole of society, thus undermining their status. Victims suffer largely in silence.

Amnesty International welcomes the progressive steps taken by the Government to render Female Genital Mutilation (FGM) a crime through the enactment of the Children's Act, ensuring that a child shall not be subjected to cultural rites, customs or traditional practices that are likely to negatively affect the child. However, thousands of girls remain at risk of being subjected to FGM in Kenya and the Government needs to ensure that the law is enforced.

Many women who have been victims of rape or other forms of sexual abuse are too intimidated by certain cultural attitudes and state inaction to seek redress. For example, marital rape is not recognized as a criminal offence in Kenyan law because of the presumption that consent to sexual intercourse is given by the act of marriage, as well as because of custom and tradition. Women rarely go forward to seek redress for such acts as this can often lead to hostility from the family, the community and the police, with little hope of success. Those who do seek justice are often confronted by a judicial system that ignores, denies and even condones violence against women, and protects perpetrators, whether they are state officials or private individuals.<sup>3</sup>

Amnesty International believes that acts of violence against women constitute torture for which the state is accountable when they are of such nature and severity envisaged by the concept of torture in international standards. The state has generally failed to fulfill its obligations under the standards of due diligence to provide effective protection to victims, investigation of such acts and prosecution of perpetrators.

Amnesty International acknowledges the positive step taken recently in the case of the 14-year old girl reportedly raped by a police officer at Kamukunji police station in Nairobi, whereby the alleged perpetrator has been suspended from duty while investigations are carried out. The organization however takes note of the difficulties faced by the victim before her complaint was registered.

Amnesty International urges the Kenyan Government to make women's rights a priority by endorsing gender-sensitive policies and attitudes. The organization also calls for the reform of laws and practices, the enactment of the Domestic Violence (Family Protection) Bill, to make all acts of violence against women, including marital rape, criminal offences, by ensuring effective protection, investigation and prosecution. The Kenyan Government should also overhaul all practices to end impunity for violence against women, and to conform to its obligations under international human rights norms.

In addition, the organization urges the Government to establish mechanisms such as "rape desks" or "gender desks" and appropriate interviewing facilities in police stations in order to facilitate sensitive and effective handling of such cases.

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<sup>3</sup> See Amnesty International *Kenya: Rape – the invisible crime*, March 2002 (AI Index: AFR 32/001/02)

The Government should ensure that standardized forms, such as the medical examination (P3) forms for the documentation of reports of violence against women, should allow for adequate documentation of medical evidence. Mechanisms should be in place to ensure that victims are able to obtain such forms easily and have them completed by the necessary parties without undue hindrance.

Hospitals and medical clinics should provide special units or procedures to help identify women victims of violence and provide them with medical care and counseling, including on HIV/AIDS, other sexually transmitted diseases and risk of pregnancy. Victims of violence and their dependents should obtain prompt reparation, including compensation and rehabilitation.

The Government should also initiate programs to educate and train judicial officers about gender-based crimes so that they are sensitive to the needs of women victims of violence, especially those victims of sexual violence.

### **Administration of Justice and Judicial Reform**

Access to justice is a cornerstone of a society which respects human rights and the rule of law. When citizens seek justice, they need to find it and doing justice to all must be the fundamental objective of any legal system. It has been difficult in many instances for the people of Kenya to enforce their rights through the justice system. Going to court may be fraught with difficulties and long delays, coupled with an atmosphere of mistrust in the ability of the system to deliver justice. The result is that confidence in the judicial system is seriously impaired.

In July 2002 a panel of Commonwealth legal experts carried out a study of the court system in Kenya and concluded that it was largely incompetent and ineffective. In addition, some members of the judiciary were susceptible to bribery and political interference and pressure. One of the recommendations the experts made was to set up a committee to hear complaints against members of the judiciary to determine whether they should be referred to a tribunal for investigation.

Amnesty International commends the recent actions taken by the newly-elected Government to prosecute a member of the judiciary on several charges of graft, for alleged bribe-taking, thus showing its commitment to restore faith in the judicial system for Kenyans to be able to enjoy the right to a fair trial.

Amnesty International has long advocated judicial reform and the need to strengthen the Kenyan judiciary to ensure independence and impartiality in order to provide victims of human rights violations greater protection. The justice system is at crossroads and the new Government should take the necessary steps along the right path in order to install a judiciary that can command respect. Short term measures should not be used to deal with long-term problems. Recommendations for reform include ensuring that a comprehensive set of procedures to deal with corrupt court officers and judges are in place, providing adequate financial and technical resources in the area of judicial reform, improving the professional standards of all court officers through the provision of training in preparation of cases, case management and fact-finding through the court process. Another recommendation is to link judicial reform to constitutional reform in order to bring about a strong and complete overhaul of the system to create an independent and impartial judiciary that will not fear to deliver even-handed justice.

### **The Review of the Constitution of Kenya**

The constitutional reform process has reached a critical turning-point as the draft constitution of Kenya released in September 2002, needs to be debated at a National Constitutional Conference. Halted during the election period, it now needs to move forward.

The draft constitution contains provisions that would further strengthen the enjoyment of fundamental rights by Kenyan citizens. The new Government has a unique opportunity to make significant improvements for human rights protection for the people by prioritizing the constitutional reform process and ensuring that Kenyan law and practice are consistent with the full range of international and regional human rights law and standards.

For Amnesty International, the constitutional reform process is an opportunity to support local NGOs and civil society and to raise specific human rights concerns, namely, the abolition of the death penalty and corporal punishment, gender issues, torture and ill-treatment and accountability for human rights violations.

Amnesty International urges the new Government to show its commitment in adopting a new constitution that is protective of the fundamental rights of citizens and that gives a justiciable guarantee for such rights in the long term. The Government needs to prioritize constitutional reform now because any delay may result in public confidence in the reform process, as well as its credibility, being seriously jeopardized.

### **Ratification of International Human Rights Instruments**

Human rights instruments are at the core of universal and regional human rights systems. When a State becomes a party to an international human rights instrument, it becomes bound by certain obligations, including:

- to promote rights contained in the treaties
- to secure those rights for all and translate them into policies and strategies;
- to prevent violations of these rights under the treaty;
- to provide remedies to the victims should their rights be violated

Kenya is a party to:

- International Covenant on Civil and Political Rights (ICCPR), but it has not ratified its First Optional Protocol giving a individual victim the right to petition and its Second Optional Protocol aiming at the abolition of the death penalty;
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Elimination of Discrimination of All Forms of Discrimination Against Women (CEDAW), but not its Optional Protocol giving an individual victim the right to petition;
- The Convention Against Torture (CAT);

- The Convention on the Rights of the Child (CRC); it has ratified its first Optional Protocol on the involvement of children in armed conflict, but has only signed the second Optional Protocol on the sale of children, child prostitution and child pornography;
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The Convention relating to the Status of Refugees;
- Rome Statute of the International Criminal Court; signed in August 1999 but not yet ratified;
- African Charter on Human and Peoples' Rights;
- African Charter on the Rights and Welfare of the Child.

Amnesty International welcomes Kenya's participation in these treaties, and calls on the Government to ensure their full implementation. Amnesty International also calls on the Government of Kenya to ratify all the international human rights instruments the country has not yet ratified, including the two protocols to the ICCPR, the protocol to CEDAW, the second protocol to the CRC and the Protocol establishing the African Court on Human and Peoples' Rights.

**Attached:**

*Kenya: Ending the Cycle of Impunity*, June 2001 (AI Index: AFR 32/11/01)

*Kenya - Prisons: Deaths due to torture and cruel, inhuman and degrading conditions*, December 2002 (AI Index: AFR 32/10/00)

*Kenya: Rape – the invisible crime*, March 2002 (AI Index: AFR 32/001/02)