



## **Kenya's Compliance with the International Covenant on Economic, Social and Cultural Rights**

### **Suggested List of Issues Prior to Reporting**

**Submitted by The Advocates for Human Rights**

a non-governmental organization in special consultative status with ECOSOC since 1996

with

**The World Coalition Against the Death Penalty**

**ICJ Kenya**

**The Kenya Human Rights Commission**

and

**The Cornell Center on the Death Penalty Worldwide**

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**The Advocates for Human Rights** (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983, The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a death penalty project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

**The World Coalition Against the Death Penalty** (WCADP), an alliance of more than 150 NGOs, bar associations, local authorities, and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

**ICJ Kenya** is a non-governmental, non-profit and a member-based organization. Established in 1959, ICJ Kenya is the only autonomous national section of ICJ based in Geneva, Switzerland. ICJ Kenya is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya. The organization has a membership drawn from the Bar and the Bench. ICJ Kenya seeks to promote a just, free and equitable society. ICJ Kenya is a member of the World Organization Against Torture (OMCT) SOS-Torture Network and the East African Coalition on the Abolition of the Death Penalty. ICJ Kenya has observer status with the African Commission on Human and Peoples' rights.

**The Kenya Human Rights Commission (KHRC)** is a premier and flagship Non-Governmental Organization (NGO) in Africa with a mandate of enhancing human rights centered governance at all levels, a vision of a society of free people and a mission to root human dignity, freedoms and social justice in Kenya and beyond. KHRC works with more than thirty Human Rights Networks (HURINETs) and other grassroots community organizations based in more than thirty counties in Kenya; partners with more than thirty national level state- and non-state actors and coalitions; and more than fifty sub-regional, regional and international human rights organizations and networks.

The KHRC has been recognized for countless and remarkable accomplishments, including but not limited to sustaining tenacity, resilience and commitment to provide the requisite political and technical responses and leadership to key human rights, governance and transitional justice issues at all the levels in society, building rights movement through facilitation of community-based human rights networks and incubation and support of nascent human rights organizations at National, Regional and International level. KHRC's work around abolition of the death penalty has entailed policy, advocacy and legal interventions that are aimed at complete abolition of the death penalty in Kenya. To this end, KHRC has been able to advocate for complete abolition of the death penalty at the National and Transnational level. KHRC is a member of the world coalition against the Death Penalty.

**The Cornell Center on the Death Penalty Worldwide** is a US-based research, advocacy, and training center focused on capital punishment and international law. It publishes reports and manuals on death penalty issues, provides transparent data on death penalty laws and practices around the world, trains capital lawyers in best practices, and engages in targeted advocacy and litigation. Its staff and faculty advisors have collectively spent more than eight decades representing hundreds of prisoners facing the death penalty. In 2019 it was awarded the World Justice Challenge Award in recognition for its work on behalf of death-sentenced prisoners in Malawi.

## EXECUTIVE SUMMARY

1. Kenya's continued use of the death penalty as a sentence in criminal cases creates significant risk that it is not upholding and cannot uphold its obligations under the International Covenant on Economic, Social and Cultural Rights, as Kenya's use of the death penalty implicates various cultural, social and economic rights. Kenya has not carried out any executions since the late 1980s, and in October 2016, the Kenyan President commuted all sentences of death in the country to life sentences.<sup>1</sup> But Kenyan courts continue to hand down death sentences.
2. This report recommends that the Committee on Economic, Social and Cultural Rights recommend that Kenya formally abolish the death penalty, commute the sentences of all persons on death row, and revise laws to remove capital punishment from the list of principal sentences. Kenya should also take active steps to address the intersecting issues of access to justice, discrimination, domestic violence, poverty, and access to healthcare, particularly as they are relevant in capital cases. First, Kenya should take additional steps to ensure that all defendants have access to well-qualified legal counsel with adequate funding for a thorough pre-trial investigation and an increase in transparency within the criminal justice system in order to engender trust by the Kenyan people in the criminal justice system, particularly for people from disadvantaged socio-economic backgrounds. Second, Kenya should ensure that judicial actors have adequate training regarding gender-specific defenses and gender-specific mitigation in capital trials to account for the context of gender-based violence that may lead victims of such violence to commit death-eligible offenses. Third, Kenya should ensure that poverty does not adversely affect defendants' fair trial rights. Last, Kenya needs to ensure that people in detention, particularly people under sentence of death, have adequate access to medical and health care.

### **Kenya fails to uphold its obligations under the International Covenant on Economic, Social and Cultural Rights**

3. In continuing to sentence defendants to death and maintaining a population of persons on death row, Kenya fails to uphold its obligations under the Covenant.

#### **I. Legal aid**

##### *Defendants in capital cases face barriers to legal aid and other fair trial issues.*

4. In its 2016 Concluding Observations, the Committee recommended that Kenya expedite the adoption of the Legal Aid Bill, expand the National Legal Aid and Awareness Programme, and allocate sufficient resources to the Programme so that disadvantaged and marginalized individuals, particularly indigenous peoples, women, people living in rural areas and urban informal settlements, are able to claim their economic, social and cultural rights.<sup>2</sup> As discussed in further detail below, Kenya has taken steps to address Legal Aid issues, but the efficacy of those efforts is unclear, particularly with regard to people charged with capital offenses.

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<sup>1</sup> Reuters Staff, *Kenyan president commutes all death sentences to life in prison*, (Oct. 26, 2016) available at <https://www.reuters.com/article/us-kenya-president/kenyan-president-commutes-all-death-sentences-to-life-in-prison-idUSKCN12O1PN>.

<sup>2</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya*, adopted by the Committee at its 20<sup>th</sup> meeting (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 10.

5. The Sixth Periodic Report outlines provisions of the Legal Aid Act, 2016 as well as progress in rolling out legal aid services in seven marginalized regions.<sup>3</sup>
6. Access to justice in death penalty cases is hindered by overall problems with the Kenyan judicial system. The court system has a notable backlog of cases.<sup>4</sup> Trial delays frequently occur because witnesses or legal counsel fail to appear, because prosecutors do not have police files, or judges simply cancel trial dates without notice.<sup>5</sup> Some scholars have noted that delay in court proceedings, particularly when a person is under sentence of death or at risk of being sentenced to death, can itself constitute cruel and degrading treatment.<sup>6</sup>
7. Moreover, litigation discovery laws are unclear, which may hinder defense attorneys' efforts; defense attorneys often do not have access to government evidence before trial, and that government evidence can itself be deficient.<sup>7</sup> According to the Cornell Center on the Death Penalty Worldwide, "Investigators often do not conduct quality investigations, and in the absence of modern forensic labs, prosecutors often rely on outdated evidence in court, which increases the risk of wrongful convictions. Kenya is largely dependent on the Government Chemist to perform forensic testing, though the Government Chemist is understaffed and often uses outdated technology. Forensic tests are often unreliable because of tampering, contamination, and poor conservation of the criminal evidence. Other challenges include lack of or inadequate pre-trial access to evidence held by the government and a prohibition on entering into evidence photographs other than those taken by official police photographers."<sup>8</sup>
8. Despite Kenya's constitutional guarantees of a fair trial, it is not clear that all defendants in capital cases are entitled to attorneys, even when they lack economic means to fund their own defense. The Constitution of Kenya states that "[e]very accused person has the right to a fair trial, which includes the right . . . to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."<sup>9</sup> In 2017, the Supreme Court in *Republic of Kenya v. Karisa Chengo & 2 others*, considered whether failure to provide free legal aid in capital cases violates a defendant's fair trial rights. The Court did not decide the issue, but instead remanded the case to the High Court for a determination of whether, in the particular circumstances of the three cases before the court, the failure to provide free legal representation violated the Legal Aid Act, No. 6 of 2016, which requires the state to provide free legal representation if substantial

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<sup>3</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 16-19.

<sup>4</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. E, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>; United States Department of State, *2019 Country Reports on Human Rights Practices: Kenya*, sec. 1 subp. E, available online at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kenya/>.

<sup>5</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. E, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>; United States Department of State, *2019 Country Reports on Human Rights Practices: Kenya*, sec. 1 subp. E, available online at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kenya/>.

<sup>6</sup> Andrew Novak, *The Judicial Dialogue in Transnational Human Rights Litigation: Muruatetu & Anor v Republic and the Abolition of the Death Penalty in Kenya*, 18 Hum. Rts. L. Rev. 771, 778 (2018).

<sup>7</sup> Andrew Novak, *The Judicial Dialogue in Transnational Human Rights Litigation: Muruatetu & Anor v Republic and the Abolition of the Death Penalty in Kenya*, 18 Hum. Rts. L. Rev. 771, 778 (2018).

<sup>8</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>9</sup> Constitution of Kenya, Art. 50(2)(h) (2010).

injustice would result from non-representation.<sup>10</sup> On remand, the High Court did not find that one of the defendants had a right to free legal representation, but nonetheless reduced the sentence to time served, in light of the circumstances of the offense.<sup>11</sup>

9. In 2017, Kenya initiated its “National Action Plan on Legal Aid” for 2017-2022, but its effects are not yet understood. The Action Plan was supposed to address inadequate legal representation, insufficient compensation for attorneys, and the lack of legal counsel in rural areas.<sup>12</sup> It is not clear the extent to which this Action Plan has improved the quality of legal representation for people at risk of being sentenced to death. According to the Cornell Center on the Death Penalty Worldwide:

Appointed capital defenders face low pay at approximately USD \$150 per case and a backlog of cases, which cause delays in justice. Furthermore, attorneys are only appointed after investigation, if conducted, is complete and pleas have been made, limiting their ability to influence the critical pre-trial preparations for the case. Attorneys rarely conduct investigations as these are typically led by the police investigative unit. . . . Furthermore, some capital defense lawyers fear for their personal safety.<sup>13</sup>

#### 10. Suggested Questions:

- Please clarify the number of women under sentence of death and how those figures are calculated.
- Who decides whether someone is entitled to an attorney under the Legal Aid Act and what criteria do they use to make that decision?
- Who is entitled to Legal Aid services under the Kenya Legal Aid Programme?
- What is considered “substantial injustice” in order to qualify for an attorney in Kenya?
- At what point during the process does the court assign a Legal Aid attorney to a qualified defendant? What obstacles can defendants face in exercising their right to counsel in the lead-up to trial and during trial?
- What efforts has the State Party made to ensure that all people at risk of being sentenced to death and all people who have been sentenced to death are provided with sufficient legal aid and due process?
- What policies and procedures are in place to ensure that any person charged with a capital offense has access to qualified legal counsel with prior experience in capital cases, and to ensure that their legal counsel has adequate resources to conduct investigations and hire experts to mount an effective defense?

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<sup>10</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>11</sup> *Karisa Chengo v. Republic of Kenya*, Crim. App. No 49 of 2012, (High Ct. Feb. 14, 2019), <http://kenyalaw.org/caselaw/cases/view/168396>.

<sup>12</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>13</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

- Has the Legal Aid Programme had any apparent effect on the pronouncement of death sentences in Kenyan courts?
- Are all defendants at risk of being sentenced to death entitled to legal representation in Kenyan courts?
- What percentage of people currently on death row did not have legal representation at trial or on appeal?
- Since the 2017 *Karisa Chengo* case, has any Kenyan court elaborated upon the need for legal representation in capital cases?

## II. Domestic violence

***Women who have experienced domestic violence are more likely to be sentenced to death, particularly when they kill their abusers, and they can experience gender-based violence on death row.***

11. In its 2016 Concluding Observations, the Committee noted that although it welcomed “the adoption of the Protection against Domestic Violence Act, the Committee is concerned that the Act is not effectively enforced and that domestic violence is still pervasive, particularly against women, children and persons with disabilities and that the majority of cases of domestic violence go unreported.”<sup>14</sup> The Committee recommended that “that the State party take all the measures necessary to strengthen enforcement of the Act, including by conducting training for law enforcement officials and judges on the application of the Act and awareness-raising campaigns for the public.”<sup>15</sup>
12. The Sixth Periodic Report sets forth the legal definition of domestic violence, asserts that “a number of domestic violence cases [are] reported to the police every year,” but concedes that “the State continues to face some challenges with regard to the actual prosecution of the same.”<sup>16</sup> To the extent the report discusses training regarding domestic violence, such training appears to be limited to police officers and does not extend to the judiciary.<sup>17</sup> It does not encompass any training regarding people in conflict with the law who are victims of gender-based violence.<sup>18</sup>
13. The World Coalition Against the Death Penalty recognizes that “gender-based violence is a constitutive element of the profiles of women sentenced to death and of the circumstances leading to the crimes, particularly in the context of the murder of family members attributed to

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<sup>14</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 37.

<sup>15</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 38.

<sup>16</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 123-24.

<sup>17</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶ 125.

<sup>18</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 123-27.

gender-based violence. Moreover, gender-based violence is also widely found on death row once the sentence is passed.”<sup>19</sup>

14. In Kenya, women who have experienced gender-based violence are over-represented in the profile of women sentenced to death.<sup>20</sup> According to Kenyan prison data, there are between 54 and 597 women in custody under sentence of death,<sup>21</sup> and a large proportion of them were convicted of murder in the context of gender-based violence.<sup>22</sup> For example, many women who face intimate partner violence and killed their partners as an act of self-defense nonetheless face the death penalty for their crimes, and courts often do not consider a history of domestic violence as a mitigating factor in sentencing these women.<sup>23</sup>

15. The World Coalition notes that countries like Kenya need to recognize these issues and provide “training to judicial actors, including lawyers, judges, and police, on how to address gender-based violence and intersectional discrimination.”<sup>24</sup>

16. Suggested Questions:

- To what extent, if any, is domestic violence considered a mitigating factor in the sentencing of women convicted of killing their alleged abusers?
- What steps are taken within the prison system to ensure women are free from gender-based violence?
- What data exist on violence women face within the Kenya Prison System?
- How many women on Kenya’s death row are victims of gender-based violence?
- How many women on Kenya’s death row were charged with crimes in which the victim was a domestic or intimate partner or former partner?

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<sup>19</sup> World Coalition Against the Death Penalty, *Reflecting on the links between the death penalty and gender-based violence*, 25 Nov. 2022, available at <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

<sup>20</sup> World Coalition Against the Death Penalty, *Reflecting on the links between the death penalty and gender-based violence*, 25 Nov. 2022, available at <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

<sup>21</sup> This number reflects the total number of women as of November 2022 who were in prison on charges that could warrant a death sentence. However, it should be noted that the numbers of death row prisoners fluctuate as there have been two significant instances (in 2009 and 2016) of Kenyan Presidents commuting the sentences of all death row prisoners. See Carolyn Hoyle, *The Death Penalty in Kenya: A Punishment that has Died Out in Practice*, The Death Penalty Project (2022) available at <https://deathpenaltyproject.org/new-research-examines-kenyan-attitudes-towards-the-death-penalty/>. According to a recent report from the Kenya Prison Service, 42 women were committed to prison under sentence of death in 2017, 6 in 2018, 5 in 2019, zero in 2020, and 1 in 2021. Kenya National Bureau of Statistics, *Economic Survey 2022*, at 378, available at <https://www.knbs.or.ke/wp-content/uploads/2022/05/2022-Economic-Survey1.pdf> (last visited Jan. 9, 2023).

<sup>22</sup> World Coalition Against the Death Penalty, *Reflecting on the links between the death penalty and gender-based violence*, 25 Nov. 2022, available at <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

<sup>23</sup> World Coalition Against the Death Penalty, *Reflecting on the links between the death penalty and gender-based violence*, 25 Nov. 2022, available at <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

<sup>24</sup> World Coalition Against the Death Penalty, *Reflecting on the links between the death penalty and gender-based violence*, 25 Nov. 2022, available at <https://worldcoalition.org/2022/11/25/reflecting-on-the-links-between-the-death-penalty-and-gender-based-violence/>.

- Does Kenya recognize self-defense in the context of long-term domestic violence as a valid defense to murder charges? What are the standards for self-defense in Kenyan courts?
- Does Kenya allow courts to consider a defendant’s history of being a victim of domestic violence when sentencing a defendant?
- What training is available to judges and other judicial officers presiding over criminal proceedings, particularly in capital cases, to educate them about the importance of considering gender-specific defenses and gender-specific mitigation in capital trials, including trauma, gender-based violence, economic pressures, and family caretaking responsibilities? What training is available for judges and other judicial officers presiding over criminal proceedings, particularly in capital cases, regarding gender-based discrimination, domestic violence, gender-based violence, and tactics of coercive control that can lead to women committing death-eligible offenses?
- What training is available to capital defense counsel representing women, trans persons, nonbinary persons, and gender-nonconforming persons regarding gender-specific defenses and mitigation in capital trials, encompassing trauma, gender-based violence, economic pressures, and family caretaking responsibilities?
- What measures are being taken to facilitate the presence of women in the judiciary?

### III. Poverty

***Poverty has a major impact on which Kenyans face the death penalty, and the majority of Kenyans on death row generally come from impoverished backgrounds and lack access to education.***

17. In its 2016 Concluding Observations, the Committee noted its concern over the “high percentage of people living under the poverty line and the failure of [Kenya] to significantly reduce the poverty rate.”<sup>25</sup> The Committee recommended that Kenya “intensify its efforts to eradicate poverty, including through the comprehensive analysis of the needs of the most disadvantaged and marginalized individuals and groups and adoption of concrete and targeted measures to address them.”<sup>26</sup>
18. The Sixth Periodic Report refers to a 2020 Comprehensive Poverty Report, which “makes several recommendations to address poverty in the country.”<sup>27</sup> The Sixth Periodic Report does not identify any provisions or recommendations that would address the effects of poverty on people in conflict with the law.<sup>28</sup>

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<sup>25</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 41.

<sup>26</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 42.

<sup>27</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 139-40.

<sup>28</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 139-53.



19. The UN Office of the High Commissioner on Human Rights noted in 2018 that UN poverty experts had found that poverty leads to a violation of a wide range of human rights, and the death penalty is essentially “reserved for the poor.”<sup>29</sup>
20. According to the OHCHR, in Kenya, people in poverty are vastly overrepresented on death row. In fact, “the majority of the more than 800 people on death row in Kenya as of March 2018 were poor, had little or no education and lived in rural areas, where standards of living are typically lower. Out of 142 male and 25 female death row inmates [at that time], only one man and one woman had a university education.”<sup>30</sup>
21. Suggested Questions:
- What statistics does Kenya maintain on the socio-economic status of inmates on death row?
  - What proportion of people currently on death row come from families who are living in poverty?
  - What steps has the State Party taken to implement the Committee’s recommendations to reduce poverty within the country?
  - What efforts are being made to ensure that Kenyans living in poverty have access to resources they may need to navigate the criminal legal system?
  - In addition to Legal Aid, what steps have authorities taken to ensure that Kenyans of all socio-economic statuses have equal access to justice?

#### **IV. Access to health care**

***Health care in Kenyan prisons is lacking, and the security level can affect a person’s access to health care.***

22. In its 2016 Concluding Observations, the Committee noted its concern over the “inadequate budget allocation to the health sector, very limited coverage of the National Health Insurance Fund and the significant share of out-of-pocket payments in health expenditure, which limit access to health for disadvantaged and marginalized persons.” The Committee also noted its regret over the “regional disparities in access to health-care services and the delay in enacting the Health Bill.”<sup>31</sup>
23. The Committee recommended that Kenya “take concrete measures to enhance access to health services, particularly for disadvantaged and marginalized individuals and groups, including through increasing budgetary allocation to the health sector and expanding the coverage of the

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<sup>29</sup> UNOHCHR, *Death row reserved for the poor*, 16 Oct. 2018 available at <https://www.ohchr.org/en/stories/2018/10/death-row-reserved-poor>.

<sup>30</sup> UNOHCHR, *Death row reserved for the poor*, 16 Oct. 2018 available at <https://www.ohchr.org/en/stories/2018/10/death-row-reserved-poor>.

<sup>31</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 51.

National Health Insurance Fund. It also recommend[ed] that the State party expeditiously adopt the Health Bill and amend the Anti-Counterfeit Act, 2008.”<sup>32</sup>

24. The Sixth Periodic Report recognizes that the Constitution of Kenya guarantees the right to health as a fundamental human right, and outlines measures Kenya has taken to extend health service coverage for all, including vulnerable groups.<sup>33</sup> But the report focuses exclusively on community-based health care and makes no mention of access to health care in custodial settings.<sup>34</sup>
25. The Kenyan government reported to the Committee Against Torture that the Persons Deprived of Liberty Act was enacted in 2014, and that the National Legal Aid Act was established in 2016.<sup>35</sup> Kenya reported that all persons in custody have access to medical treatment and healthcare.<sup>36</sup>
26. According to the Kenya National Commission on Human Rights, Kenyan prisons fall short of “international, regional and national standards and principles with relation to accessible and quality medical health care services in penal institutions.”<sup>37</sup> One of the major factors within the Kenyan prison system which limits access to healthcare is the tension between health care and security, and the security function at times interferes with individuals’ right to access healthcare.<sup>38</sup> It is unclear whether those individuals subject to the highest security, such as people under sentence of death, have even less access to healthcare than other people in detention.
27. Suggested questions:
  - Please describe the medical and health facilities and medical and health services available to people under sentence of death and explain how they differ from facilities and services available to other persons in custody and from facilities and services available in the community.
  - Please explain how custodial security levels affect access to health care for persons in detention.

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<sup>32</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the on the combined second to fifth periodic reports of Kenya, adopted by the Committee at its 20<sup>th</sup> meeting* (4 March 2016), U.N. Doc. E/C.12/KEN/CO/2-5, ¶ 51.

<sup>33</sup> Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶ 171.

<sup>34</sup> See Committee on Economic, Social, and Cultural Rights, *Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021*, (Dec. 7, 2022), E/C.12/KEN/6, ¶¶ 171-204.

<sup>35</sup> Committee Against Torture, *Third periodic report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, (Dec. 26 2018), U.N. Doc. CAT/C/KEN/3, ¶¶ 14-17.

<sup>36</sup> Committee Against Torture, *Third periodic report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, (Dec. 26 2018), U.N. Doc. CAT/C/KEN/3, ¶¶ 14-17.

<sup>37</sup> Kenya National Commission on Human Rights, *State of Healthcare for Prisoners in Kenya*, (2019) available at [https://www.knchr.org/Portals/0/EcosocReports/State%20Of%20Healthcare%20For%20Prisoners%20In%20Kenya\\_Print%20ready.pdf?ver=2019-09-23-102658-900](https://www.knchr.org/Portals/0/EcosocReports/State%20Of%20Healthcare%20For%20Prisoners%20In%20Kenya_Print%20ready.pdf?ver=2019-09-23-102658-900).

<sup>38</sup> Kenya National Commission on Human Rights, *State of Healthcare for Prisoners in Kenya*, (2019) available at [https://www.knchr.org/Portals/0/EcosocReports/State%20Of%20Healthcare%20For%20Prisoners%20In%20Kenya\\_Print%20ready.pdf?ver=2019-09-23-102658-900](https://www.knchr.org/Portals/0/EcosocReports/State%20Of%20Healthcare%20For%20Prisoners%20In%20Kenya_Print%20ready.pdf?ver=2019-09-23-102658-900) at p. 19.

- What steps have authorities taken to ensure that detention conditions for persons under sentence of death comply with Rules 24-35 of the Nelson Mandela Rules?