

Kenya's Regional and International Human Rights Obligations.

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Introduction

The Kenya Human Rights Commission (KHRC) is a premier and flagship Non-Governmental Organization (NGO) in Africa that was established and incorporated on 9th April 1992 by Kenyans exiled in the United States of America (USA) and later registered in Kenya on 20th of January 1994. KHRC founders are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya and beyond.

The KHRC is committed to its **mandate** of *enhancing human rights-centered governance at levels* and a **vision** to *secure human rights states and societies*. Our **Mission** is to *foster human rights, democratic values, human dignity and social justice*. This mandate and vision are executed under four independent strategic objective and thematic programmes; *Transformative Justice (TJ)*; *Economic and Social Justice (ESJ)*; *Political Pluralism and Diversity (PPD)* and *Institutional Support and Development (ISD)* all with an aim to synergise and to deliver at county, national, regional and global levels.

Towards this, the KHRC works with more than thirty Human Rights Networks(HURINETs) and other grassroots communities (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. To this end the KHRC engages in National international and regional human rights instruments which Kenya is party to.

International Human Rights Obligations

The Constitution of Kenya provides that all international laws, treaties and conventions, among other instruments which Kenya has ratified, form part of Kenya's laws. Kenya has thus emerged from what has popularly been called a 'domestication regime', to adopt an 'incorporationist regime' where all international obligations are binding. In the same breadth, Kenya, through the National Assembly, has enacted the Treaty Making and Ratification Act (No. 45 of 2012) This legislation is meant to give effect to the provisions of Article 2(6) of the Constitution, and to lay out the procedure for the making and ratification of treaties. Generally, international obligations are grouped into three: obligation to respect, obligation to protect, and obligation to fulfill.

a) Obligation to Respect: The State or its agencies violate rights through action or inaction, such as when security agencies commit extra-judicial executions, or when they deprive liberty through illegal incarceration of persons.

b) Obligation to Protect: The State and its agencies should take all necessary steps to prevent other actors, State or non-State from violating individual or group rights. For example attack of one ethnic group by another, or failure of companies to pay decent wages to their workers.

c) Obligation to Fulfill: Given that the State is signatory to the relevant international treaties, it should take necessary measures to ensure that all people have access to healthcare, food, and education. In summary, these obligations are particularly meant for states and by extension other actors; in case of breach of respect of people's rights, they should step in to protect such people.

How does a State become a party to a treaty?

In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to abide by the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by it.

In accordance with the final clauses of the relevant treaty, a State can do this either through signature followed by ratification, or through accession.

The difference between Signature, Ratification and Accession of treaties

Most Multilateral treaties, like the human rights treaties, usually provide for signature subject to ratification.

The act of signing does not impose legal obligations on the State. However, signature does indicate the State's intention to take steps to be bound by the treaty at a later date. In other words, signature is a preparatory step on the way to ratification. Signature also creates an obligation to refrain in good faith from acts that would defeat the object and purpose of the treaty.

Definitive acts, undertaken at the international level, whereby a State establishes its consent to be bound by a treaty *which it has already signed*. It does this by depositing an "instrument of ratification" with the Secretary- General of the United Nations. To ratify a treaty, the State must have signed the treaty first;

If a State expresses its consent to be bound without first having signed the treaty, the process is called accession. Upon ratification or accession, the State becomes legally bound by the treaty as one of its State parties.¹

Below finds Kenya's international and regional human rights Obligations

International humanitarian law

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field²

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea³,

Convention (III) relative to the Treatment of Prisoners of War⁴,

Convention (IV) relative to the Protection of Civilian Persons in Time of War⁵,

¹ The United Nations Human Rights Office Of The High Commissioner; (2012) The United Nations Human Rights Treaty System

² 12th August 1949

³ 12 August 1949

⁴ 12 August 1949

⁵ 12 August 1949

Additional Protocol I 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),⁶ Additional Protocol II 1977: Protocol Additional to the Geneva Conventions⁷, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),⁸
Additional Protocol III 2005: Protocol additional to the Geneva Conventions⁹, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III),¹⁰

Limits to acceptable wartime conduct

- (i) Hague Convention 1954: Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹¹
- (ii) Hague Protocol 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict, ¹².
- (iii)Hague Protocol 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict,¹³.
- (iv)ENMOD Convention 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,¹⁴

Racial discrimination

- International Human rights Law ICERD 1965: International Convention on the Elimination of All Forms of Racial Discrimination,¹⁵.

⁶ 8 June 1977.

⁷ 12 August 1949

⁸ 8 June 1977

⁹ 12 August 1949

¹⁰ 8 December 2005

¹¹ 14 May 1954

¹² 14 May 1954

¹³ 26 March 1999

¹⁴ 18 May 1977

¹⁵ 21 December 1965

Civil and political rights

- a) ICCPR 1966: International Covenant on Civil and Political Rights,¹⁶
- b) ICCPR - OP1 1966: Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966.
- c) ICCPR - OP2 1989: Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,¹⁷

Economic, social and cultural rights

ICESCR 1966: International Covenant on Economic, Social and Cultural Rights¹⁸,

Elimination of discrimination against women

- CEDAW 1979: Convention on the Elimination of All Forms of Discrimination against Women¹⁹,
- OP-CEDAW 1999: Optional Protocol to the Convention on the Elimination of Discrimination against Women,²⁰

Conventions against torture

- CAT 1984: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²¹.
- OP-CAT 2002: Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,²²

Rights of the Child

- (i) CRC 1990: Convention on the Rights of the Child,²³.

¹⁶ 16 December 1966

¹⁷ 15 December 1989.

¹⁸ 16 December 1966.

¹⁹ 18 December 1979

²⁰ 10 December 1999.

²¹ 10 December 1984

²² 18 December 2002.

²³ 20 November 1989

- (ii) CRC Optional Protocol Armed Conflict 2000: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,²⁴
- (iii) CRC Optional Protocol Sale of Children 2000: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,²⁵

Migrant Workers

- ICRMW 1990 International: Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²⁶

Persons Living with Disabilities

- Disability Rights Convention: Convention on the Rights of Persons with Disabilities.

Weaponry

- (a) Convention on Enforced Disappearances [not yet in force].
- (b) International Convention for the Protection of All Persons from Enforced Disappearance Weapons Geneva Gas Protocol 1925: Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,²⁷
- (c) Biological Weapons Convention 1972: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,²⁸.
- (d) Chemical Weapons Convention 1993: Convention on the prohibition of them development, production, stockpiling and use of chemical weapons and on their destruction,²⁹.
- (e) Convention on Certain Conventional Weapons 1980: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,³⁰

²⁴ 25 May 2000.

²⁵ 25 May 2000.

²⁶ 18 December 1990

²⁷ 17 June 1925.

²⁸ 10 April 1972

²⁹ 13 January 1993

³⁰ 10 October 1980

- (f) CCW Protocol I 1980: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II),³¹
- (g) CCW Prot. II 1980: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices,³²
- (h) CCW Prot. III 1980: Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva,³³ CCW Prot. IV 1995: Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention),³⁴ CCW Protocol II (amended) 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices³⁵ CCW Amendment 2001: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,³⁶ CCW Prot. V 2003: Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003 Ottawa Treaty 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,³⁷

Refugees

- Refugee Convention 1951: Convention Relating to the Status of Refugees,³⁸.
- Refugee Protocol 1967: Protocol Relating to the Status of Refugees,³⁹

International criminal law

- (i) Slavery Convention 1926: Slavery Convention,⁴⁰
- (ii) Genocide Convention 1948: Convention on the Prevention and Punishment of the Crime of Genocide,⁴¹.

³¹ 10 October 1980

³² 10 October 1980

³³ (Protocol II)

³⁴ 13 October 1995

³⁵ as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996)

³⁶ 10 October 1980. Amendment article 1, 21 December 2001.

³⁷ 18 September 1997 Cluster Bomb Convention 2008 Convention on Cluster Munitions, 30 May 2008.

³⁸ 28 July 1951

³⁹ 4 October 1967

⁴⁰ 25 September 1926

- (iii) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968: Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,⁴²
- (iv) ICC Rome Statute 1998: Rome Statute of the International Criminal Court, 17 July 1998.

Terrorism

- a) International Convention against the Taking of Hostages ⁴³.
- b) International Convention for the Suppression of the Financing of Terrorism,⁴⁴.
- c) International Convention for the Suppression of Terrorist Bombings,⁴⁵

Universal Periodic Review: Kenya's commitments

In June 2015, the HRC formally adopted the outcomes of the Universal Periodic Review (UPR) for Kenya.⁴⁶ During that formal adoption of its UPR by the HRC, the Kenyan Government provided final responses to all the 253 recommendations it had received during its second UPR in January 2015. The Government of Kenya accepted 192 recommendations and noted 61 other recommendations.

Some of the recommendations that the Government noted were on the death penalty, but there was some form of commitment from the Government through Stephen Ndung'u Karau, Permanent Representative of Kenya to the UN Office at Geneva, who noted that the Government of Kenya would continue debating on a possibility of abolition of death penalty. Other recommendations that were noted were those that touched on the Media laws, the freedom of expression bill and the data protection bill. All these constitute legislations that are aim to protect rights.

⁴¹ 9 December 1948

⁴² 26 November 1968

⁴³ 17 December 1979

⁴⁴ 9 December 1999

⁴⁵ 25 November 1997

⁴⁶ Human Rights Council, Fifteenth session, Agenda item 6, Universal Periodic Review (2015), Report of the Working Group on the Universal Periodic Review* Kenya

This process marked the beginning of the implementation phase of the recommendations and through the coordination of the KHRC, KNCHR and UPR Info, civil society developed an implementation plan which was shared with the Government, which committed to partner with civil society to develop a joint implementation matrix that takes into consideration all the 192 recommendations that it accepted. To this end, Kenya will be reporting back to the HRC during its third cycle in 2019/2020 based on steps it has undertaken to fulfil/implemented the recommendations it had accepted.

THE TABLE BELOW HIGHLIGHTS KENYA’S MAIN INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Convention/treaty	Date of adoption (States)	Year of signing (Kenya)	Year of ratification (Kenya)
International humanitarian law			
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	12 August 1949	1966	1967
Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	12 August 1949	1966	1967
Convention (III) relative to the Treatment of Prisoners of War	12 August 1949	1966	1967
Convention (IV) relative to the Protection of Civilian Persons in Time	12 August 1949		1966

of War			
Additional Protocol I 1977: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	8 June 1977		1999
Additional Protocol II 1977: Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	12 August 1949 8 June 1977		1999
Additional Protocol III 2005: Protocol additional to the Geneva Conventions , and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)	12 August 1949 8 December 2005		2013
Racial discrimination			
International Human rights Law ICERD 1965: International Convention on the Elimination of All Forms of Racial Discrimination	21 December 1965		2001
Civil and political rights			
ICCPR 1966: International Covenant on Civil and Political Rights,	16 December 1966		1972

ICCPR - OP1 1966: Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966.			Not ratified
ICCPR - OP2 1989: Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	15 December 1989		Not ratified
Economic, Social and Cultural rights			
ICESCR 1966: International Covenant on Economic, Social and Cultural Rights	16 December 1966		1972
Elimination of Discrimination against Women			
CEDAW 1979: Convention on the Elimination of All Forms of Discrimination against Women.	18 December 1979		1984
OP-CEDAW 1999: Optional Protocol to the Convention on the Elimination of Discrimination against Women	10 December 1999		Not ratified
Conventions against Torture			
CAT 1984: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.	10 December 1984		1997

OP-CAT 2002: Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	18 December 2002		Not ratified
Rights of the Child			
CRC 1990: Convention on the Rights of the Child	20 November 1989	1990	1990
CRC Optional Protocol Armed Conflict 2000: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	25 May 2000.	2000	2002
CRC Optional Protocol Sale of Children 2000: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	25 May 2000	2000	Not ratified
Migrant Workers			
ICRMW 1990 International: Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,	18 December 1990	No action	No action
Persons Living with Disabilities			
Disability Rights Convention: Convention on the Rights of Persons with Disabilities.	2007	2007	2008

Refugees			
Refugee Convention 1951: Convention Relating to the Status of Refugees	28 July 1951		1966
Refugee Protocol 1967: Protocol Relating to the Status of Refugees,	4 October 1967		1981
International Criminal Law			
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968: Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity	9 December 1968		1972
ICC Rome Statute 1998: Rome Statute of the International Criminal Court, 17 July 1998.	26 November 1998		2005

1.0.1 Kenya's Regional Human Rights Commitments

Kenya has been a member of the African Union (AU) and its predecessor the Organisation of African Unity (OAU) since its independence in 1963. At the regional level, Kenya has ratified the following key human rights Instruments:

- a) The African Charter on Human and Peoples' Rights (African Charter)⁴⁷;
- b) The African Charter on the Rights and Welfare of the Child⁴⁸;
- c) The AU Convention on Preventing and Combating Corruption⁴⁹;
- d) The AU Convention Governing Specific Aspects of Refugee Problems in Africa 1974; and,
- e) The Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) 2003.

The African Commission on Human and People's Rights

The African Charter was adopted on June 27, 1981 in Nairobi, Kenya. The Charter, OAU Doc CAB/LEG/67/3 Rev 5, entered into force on October 21, 1986. Kenya ratified the African Charter on January 23, 1992. Since then, it has domesticated most of the provisions of the Charter through various pieces of legislation. In accordance with Article 62 of the African Charter, States Parties to the Charter are required to submit to the African Commission every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter.

The Government of the Republic of Kenya has also not consistently adhered to its obligations under Article 62 of the Charter to prepare periodic State reports on measures undertaken to implement the Charter. In May 2015 however, Kenya submitted its combined 8th - 11th periodic report covering the period 2008- September 2014. The report has been made public in accordance with Rule 74 of the Rules of Procedure of the African Commission. Kenya's report will be considered during the 57th Ordinary Session of the African Commission where the Commission will issue recommendations to the Government of Kenya.

⁴⁷ 1981

⁴⁸ 1990

⁴⁹ 2003

There are instances where Kenya has disregarded the Commission's recommendations. A typical example is recently, when the Kenyan state disregarded interim measures issued pursuant to Communication 276/2003, *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois community Vs. Kenya*.⁵⁰ In a landmark decision, the African Commission in May 2009 found the Kenyan government guilty of violating the rights of the country's indigenous Endorois community, by evicting them from their lands to make way for a wildlife reserve.

In accordance with Article 62 of the African Charter, State Parties to the Charter are required to submit every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter. The Government of the Republic of Kenya submitted to the Commission, its combined 8th -11th periodic report covering the period 2008 - September 2014, in conformity with Article 62.

The report was considered before the African Commission on November 9, 2015 when the State made its presentation and later on, on November 10 responded to question posed by the Commission. Even as the Concluding Observations are yet to be availed, NGOs raised various issues that were referred to the Kenyan Delegation during the consideration of the report.

CSOs recognized that Kenya has a progressive Constitution, but however, its implementation is hindered by the numerous issues that ranged from the shrinking civic space, transitional justice issues with regards to the implementation of the Truth Justice and Reconciliation Commission (TJRC) recommendations, rampant corruption of public resources, hindrances to public participation, freedom of expression and access to information, accountability for human rights violations by security agencies, issues affecting minorities (including refugees) to issues of gender equality and equity.

The African Court on Human and People's Rights

Kenya is also a State party to the Protocol establishing the African Court on Human and People's Rights (African Court) since 2004. In March 2013, the African Court on Human and Peoples' Rights issued a provisional measures order requiring the Kenyan Government to stop land transactions in the Mau Forest and refrain from taking any action which would harm the case, until it had reached a decision. The Court, while

⁵⁰ MRG 2010, *Landmark decision rules Kenya's removal of indigenous people from ancestral land illegal*, viewed 16 July 2015, <http://www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html>

delivering its ruling, found that, if the evictions continued, there existed a situation of extreme gravity and urgency as well as a risk of irreparable harm to the Ogiek community.⁵¹

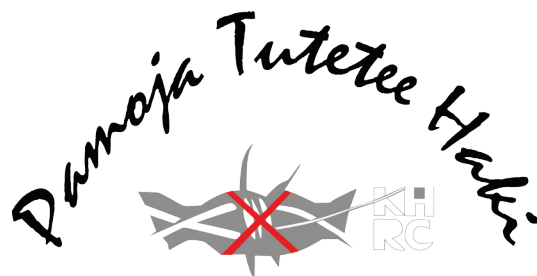
Kenya is however yet to make the declaration under Article 34 (6) of the Protocol establishing the African Court, thus enabling individuals and NGOs in Kenya to have direct access to the Court where domestic remedies, in respect of State and non-state actors responsibility for human rights violations, have been exhausted.

The East African Court of Justice

Kenya is also party to the East African Court of Justice (EACJ) which is an international court tasked with resolving disputes between Member States of the East African Community (EAC). The EACJ was established by Article 9 of the Treaty for the Establishment of the East African Community and is charged with interpreting and enforcing the treaty as its primary mandate, which came into force on July 7, 2000. The East African Court of Justice does not have competence to hear individual complaints of alleged violations of human rights law. However, in January 2015, the EACJ began hearing an appeal on alleged failure by Uganda, Kenya and Burundi to make individual Country declarations in acceptance of the competence of the EAC.⁵²

⁵¹ MRG 2014, *African Court to hear Ogiek community land rights case against the Kenyan government*, viewed 16 July 2015, <http://www.minorityrights.org/12799/press-releases/african-court-to-hear-ogiek-community-land-rights-case-against-the-kenyan-government.html>

⁵² See *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007)



**KENYA HUMAN RIGHTS
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