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— AGAINST THE DEATH PENALTY —



## KENYA

### Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Death Penalty

**Submitted by The Advocates for Human Rights**

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

**The World Coalition Against the Death Penalty**  
and  
**the International Commission of Jurists Kenya**

**for the 73rd Session of the Committee against Torture**  
**19 April–13 May 2022**

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**The Advocates for Human Rights** (The Advocates) is a volunteer-based nongovernmental 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** is a volunteer-based non-government organization committed to strengthen the international dimension of the fight against the death penalty. Established in 2002, 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.

## EXECUTIVE SUMMARY

1. Kenya has not carried out any executions since the late 1980s. Nonetheless, Kenya continues to hand down the death penalty as a sentence in criminal cases. Accordingly, this report recommends that the Committee Against Torture 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 further take steps to prohibit introduction of evidence obtained through torture and ill-treatment in criminal proceedings and to ensure that all persons at risk of being sentenced to death have access to well-qualified legal counsel with adequate funding for a thorough pre-trial investigation. Kenya should ensure that no person is removed to a country where they may be at risk of being sentenced to death, and should take concrete steps to ensure that conditions of detention for persons under sentence of death comply with the Nelson Mandela Rules.

### **Kenya fails to uphold its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

#### **I. Death Penalty (arts. 2 and 16)**

2. In its 2013 Concluding Observations, the Committee expressed concern about legal uncertainty of the death penalty following judgments from the High Court, about the high number of death sentences, including for minor offences, and the conditions of the 1,600 persons on death row at the time. The Committee recommended that Kenya reconsider the possibility of abolishing the death penalty and also recommended that Kenya “ensure that all persons on death row are treated humanely.” The Committee also encouraged Kenyan authorities to “support the efforts of the Kenya National Commission on Human Rights to conduct a survey and awareness-raising measures regarding public opinion on the death penalty.”<sup>1</sup>
3. In its List of issues prior to submission of the third periodic report of Kenya, the Committee did not specifically reference the death penalty but raised several issues relevant to people at risk of being sentenced to death and to people who are on death row.
4. Kenyan law authorizes the death penalty for several crimes, including murder, administering an oath purporting to bind a person to commit a capital offense, robbery and attempted robbery with violence (not resulting in death), treason, and several military offenses not resulting in death.<sup>2</sup>
5. Kenya has not carried out an execution since 1987.<sup>3</sup> In recent years, Kenya has commuted thousands of death sentences by presidential decree. In 2016, President Kenyatta commuted the death sentences of all prisoners on death row.<sup>4</sup> Kenya has continued some commutations

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<sup>1</sup> Committee against Torture, *Concluding observations on the second periodic report of Kenya*, (19 June 2013), U.N. Doc. CAT/C/KEN/CO/2, ¶ 33.

<sup>2</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 12, 2022).

<sup>3</sup> Mary Kulundu, “No, Kenya is not introducing the death penalty for wildlife poachers,” Fact Check, available at <https://factcheck.afp.com/no-kenya-not-introducing-death-penalty-wildlife-poachers> (last updated February 7, 2020).

<sup>4</sup> “President Commutes All Death Sentences in Kenya,” Death Penalty Information Center, available at <https://deathpenaltyinfo.org/news/president-commutes-all-death-sentences-in-kenya> (published October 27, 2016).

during the COVID-19 pandemic.<sup>5</sup> Nonetheless, authorities sentenced at least 29 people to death in 2019, continued to sentence people to death in 2020, and as of the end of 2020, at least 1,000 people were on death row.<sup>6</sup>

6. The Supreme Court of Kenya in 2017 issued a landmark decision striking down the mandatory death penalty for murder. The case, entitled *Francis Karioko Muruatetu and Another v. Republic*,<sup>7</sup> has important implications for access to justice in the sentencing process for all Kenyans under sentence of death.
7. In *Muruatetu*, the petitioners had been convicted of murder and given the then-mandatory sentence of death. The Court held that the mandatory death penalty for murder convictions was unconstitutional.<sup>8</sup> The Court found that the mandatory death sentence deprived judges of their right to consider mitigating circumstances, and deprived convicted persons of their right to appeal their sentences. The Court further held that the mandatory death sentence was an unfair and unjust procedure for the termination of life.<sup>9</sup> In rendering its decision, the Court concluded that the mandatory death penalty violated a person's right to dignity, justice, and equality.<sup>10</sup>
8. Following the *Muruatetu* decision, the Court gave public agencies a year to prepare a plan for resentencing hearings for persons sentenced to death for murder.<sup>11</sup> The national assembly and senate were also directed to draw up amendments to the law to comport with the *Muruatetu* decision. Progress on all fronts has been very slow. In the interim, lower courts have been confused as to how to deal with sentencing and applying their own interpretations of the decision.<sup>12</sup>
9. The attorney general's task force recommendations in the wake of *Muruatetu* stated that the death penalty should be reserved "for the rarest of rare cases involving intentional and aggravated acts of killing."<sup>13</sup> Nonetheless, as discussed in paragraph 4 above, Kenyan law authorizes the death penalty for crimes that do not involve an intentional killing by the person who is eligible for the death penalty.
10. In July 2021, the Supreme Court concluded that the national assembly, senate, attorney general, and the Kenya law reform commission had failed to meet the court's deadline for revisions to

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<sup>5</sup> "Covid-19: Calling for a Worldwide Moratorium on the Death Penalty During the Pandemic," World Coalition Against the Death Penalty, available at <https://worldcoalition.org/2020/06/18/covid-19-calling-for-a-worldwide-moratorium-on-the-death-penalty-during-the-pandemic/> (published June 18, 2020).

<sup>6</sup> Amnesty International, *Death Sentences and Executions 2020* (2021), at 13, available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT5037602021ENGLISH.pdf>.

<sup>7</sup> Jacqueline Mwangi, *Francis Karioko Muruatetu v Republic*, 112 Am. J. Int'l L. 707 (Oct. 2018).

<sup>8</sup> Jacqueline Mwangi, *Francis Karioko Muruatetu v Republic*, 112 Am. J. Int'l L. 709 (Oct. 2018).

<sup>9</sup> Jacqueline Mwangi, *Francis Karioko Muruatetu v Republic*, 112 Am. J. Int'l L. 710 (Oct. 2018).

<sup>10</sup> Lilian Chenwi, The Downfall of the Mandatory Death Penalty in Kenya, 63 J. Afr. L. 25, 43-45 (2019); *see also* 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, 785-87 (2018)

<sup>11</sup> Carmel Rickard, "Death Penalty Case Re-Visited by Kenya Supreme Court, African Lii, available at <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court> (published July 9, 2021).

<sup>12</sup> Carmel Rickard, "Death Penalty Case Re-Visited by Kenya Supreme Court, African Lii, available at <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court> (published July 9, 2021).

<sup>13</sup> Amnesty International, "Kenya: No crime justifies the death sentence," available at <https://www.amnesty.org/en/latest/news/2018/07/kenya-no-crime-justifies-the-death-sentence/> (published July 19, 2018).

the country's death penalty scheme.<sup>14</sup> The Court issued special directions, noting with concern that some magistrates had entertained applications for resentencing in cases where they lacked jurisdiction.<sup>15</sup> The guidelines clarified that *Muruatetu* applied only to convictions for murder and that all persons who had been sentenced to death by virtue of the mandatory death penalty for that crime were entitled to resentencing hearings.<sup>16</sup> The Court also clarified that people sentenced to death for other crimes falling under the scope of the mandatory death penalty are ineligible for resentencing under *Muruatetu*.<sup>17</sup>

11. In its List of issues, the Committee expressed concern that safeguards against torture were afforded by law to persons in custody but not upheld in practice, and requested an update on measures to ensure that all persons in custody are afforded fundamental legal safeguards.<sup>18</sup> Measures to be reported on include police compliance with legal safeguards, and investigations into reports of denial of fundamental legal safeguards. The Committee also requested an update on access to justice issues, including the Legal Aid Bill and Legal Aid Programme.<sup>19</sup>

***Defendants in capital cases are at risk of being subjected to torture and ill-treatment during interrogations***

12. The Kenyan government reports that the Persons Deprived of Liberty Act was enacted in 2014, and that the National Legal Aid Act was established in 2016.<sup>20</sup> The response notes that all persons in custody are entitled to communicate with an advocate or family member and have access to medical treatment and healthcare.<sup>21</sup> The report also notes that the Judiciary is in the process of clearing a backlog of cases, and is focusing on other efficient processes for its justice system.<sup>22</sup> Kenya further reports that law enforcement agencies are required to attend fora on the proper treatment of persons who are detained, held in custody, or imprisoned.<sup>23</sup>
13. Despite these steps, the Cornell Center on the Death Penalty Worldwide reports that, “despite the Constitution’s protection against torture[,] [i]n practice, police use torture and violence during interrogations and against pre-trial detainees and prisoners. Human rights organizations and the media have reported cases of torture and indiscriminate police violence committed

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<sup>14</sup> Carmel Rickard, *Death penalty case re-visited by Kenya Supreme Court*, African Lii, July 9, 2021, <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court>.

<sup>15</sup> Carmel Rickard, *Death penalty case re-visited by Kenya Supreme Court*, African Lii, July 9, 2021, <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court>.

<sup>16</sup> Carmel Rickard, *Death penalty case re-visited by Kenya Supreme Court*, African Lii, July 9, 2021, <https://africanlii.org/article/20210709/death-penalty-case-re-visited-kenya-supreme-court>.

<sup>17</sup> Linda Kitenge, *Why is Kenya’s Supreme Court rolling back its opposition to the mandatory death penalty?* Reprieve, Aug. 24, 2021, <https://reprieve.org/uk/2021/08/24/why-is-kenyas-supreme-court-rolling-back-its-opposition-to-the-mandatory-death-penalty/>.

<sup>18</sup> Committee against Torture, *List of issues prior to the submission of the third periodic report of Kenya*, (January 11, 2016), U.N. Doc. CAT/C/KEN/QPR/3, ¶ 5.

<sup>19</sup> Committee Against Torture, *List of issues prior to the submission of the third periodic report of Kenya*, (January 11, 2016), U.N. Doc. CAT/C/KEN/QPR/3, ¶ 6.

<sup>20</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>21</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>22</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, ¶ 21.

<sup>23</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, ¶ 15.

with impunity.”<sup>24</sup> The 2020 U.S. State Department Country Report notes that “NGOs continued to receive reports of torture and other inhuman or degrading treatment by government forces,” including 43 cases of torture and other inhuman treatment perpetrated by police during 2020, as of October 1, 2020.<sup>25</sup> The Report also noted “[p]olice and prison officials reportedly used torture and violence during interrogations as well as to punish pretrial detainees and convicted prisoners.”<sup>26</sup> Methods of torture include physical battery, bondage in painful positions, and electric shock.<sup>27</sup>

14. Victims of police abuse can file complaints, and the IPOA investigated allegations of excessive force that led to serious injuries.<sup>28</sup> However, “NGOs reported police used disciplinary transfers of officers to hide their identities and frustrate investigations into their alleged crimes.”<sup>29</sup>
15. In August 2020, the National Police Service began to digitize records of incidents and complaints, in order to “reduce opportunities for police to alter or delete records and increase accountability.”<sup>30</sup>

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

16. The Kenya Supreme Court has issued new guidelines for judicial sentencing policies, but sentencing structure around the death penalty remains unclear.<sup>31</sup> It is therefore accordingly unclear how the rights of detained persons are upheld throughout the trial and sentencing process.
17. Further, 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>32</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>33</sup> Some scholars have noted

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<sup>24</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>25</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>26</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>27</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>28</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>29</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>30</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>31</sup> Amnesty International, “Kenya: No crime justifies the death sentence,” available at <https://www.amnesty.org/en/latest/news/2018/07/kenya-no-crime-justifies-the-death-sentence/> (published July 19, 2018).

<sup>32</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>33</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/>.

that delay in court proceedings, particularly where death row is concerned, can itself constitute cruel and degrading treatment.<sup>34</sup>

18. Moreover, litigation discovery laws are unclear, which may hinder defense attorneys' efforts, and defense attorneys often do not have access to government evidence before trial.<sup>35</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>36</sup>
19. 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>37</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 injustice would result from non-representation.<sup>38</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>39</sup>
20. In 2017, Kenya initiated its "National Action Plan on Legal Aid" for 2017-2022. The Action Plan was supposed to address low quality legal representation, inadequate compensation for attorneys, and the lack of legal counsel in rural areas.<sup>40</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

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<sup>34</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>35</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>36</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>37</sup> Constitution of Kenya, Art. 50(2)(h) (2010).

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

<sup>39</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>40</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

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>41</sup>

## **II. Kenya engages in refoulement to countries where returnees are at risk of being sentenced to death (List of issues paragraph 3, Article 3)**

21. The Committee requested information about measures taken to ensure that Kenya complies with its non-refoulement obligations under the Convention, and statistics regarding asylum requests and deportations.<sup>42</sup>
22. The State Party's response states that Kenya's legal framework forbidding extradition to countries where a person may be subjected to torture include the Refugee Act, Counter-Trafficking in Persons Act, and the Prevention of Torture Act.<sup>43</sup>
23. Nonetheless, Human Rights Watch reported in January 2017 that "[i]n recent years, Kenya has unlawfully deported several prominent opposition members from neighboring countries to their countries of origin, despite being recognized as refugees under Kenyan law."<sup>44</sup> For example, "Kenya deported South Sudanese opposition spokesman James Gatdek Dak in November 2016 to South Sudan, even though he had refugee status." Gatdek was subsequently sentenced to death by hanging for treason, but was pardoned in October 2018.<sup>45</sup> Similar deportations of asylum-seekers and refugees have continued, with reports of such practices as recently as May 2021.<sup>46</sup>

## **III. People under sentence of death face conditions of detention amounting to torture or cruel, inhuman, or degrading treatment or punishment (List of issues paragraph 6, Article 11)**

24. The Committee requested information on the Kenya National Commission on Human Rights' visits to places of detention, attendant conclusions and recommendations, consequential

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<sup>41</sup> Cornell Center on the Death Penalty Worldwide, Kenya,

<https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>42</sup> Committee Against Torture, *List of issues prior to the submission of the third periodic report of Kenya*, (January 11, 2016), U.N. Doc. CAT/C/KEN/QPR/3, ¶¶ 14-15.

<sup>43</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, ¶¶ 52-57.

<sup>44</sup> *Two South Sudanese dissidents detained in Kenya – activists*, Reuters, Jan. 25, 2017, available online at <https://www.reuters.com/article/uk-southsudan-kenya-idAFKBN1590MW>.

<sup>45</sup> Amnesty International, *Kenya: Court drops oversight on enforced disappearance of two South Sudanese critics*, Feb. 12, 2019, available at <https://www.amnesty.org/en/latest/news/2019/02/kenya-court-drops-oversight-on-enforced-disappearance-of-two-south-sudanese-critics/>.

<sup>46</sup> Human Rights Watch, *Kenya, Events of 2021*, <https://www.hrw.org/world-report/2022/country-chapters/kenya#> (last visited Mar. 18, 2022). See also *Kenya denies arrest, deportation of IPOB leader, Nnamdi Kanu*, Nigerian Tribune, July 3, 2021, <https://tribuneonlineng.com/kenya-denies-arrest-deportation-of-ipob-leader-nnamdi-kanu/> (last visited Mar. 18, 2022); *Kenya must not deport fleeing opposition Tanzanian MP and his family*, Amnesty International, Nov. 9, 2020, <https://www.amnesty.org/en/latest/news/2020/11/kenya-must-not-deport-fleeing-opposition-tanzanian-mp-and-his-family/> (last visited Mar. 18, 2022).

investigations and measures taken to reduce poor prison conditions such as overcrowding, long pre-trial detention, and inter-prisoner violence.<sup>47</sup>

25. According to the State Party's response, the Kenyan National Commission on Human Rights conducted monitoring visits, and findings included overcrowding, poor sanitary conditions, inadequate ventilation/lighting, and lack of clean water and nutritional food.<sup>48</sup>
26. Kenya holds people under sentence of death in maximum-security prisons such as Kamiti, Naivasha, Kingongo, Kibos, Manyani, Kodiaga, Shimo Law Tewa, and Lang'ata prisons.<sup>49</sup> According to the Cornell Center on the Death Penalty Worldwide, "[p]rison conditions in Kenya are widely reported to be substandard and have been the subject of both media and government scrutiny in recent years. Detainees who face capital charges are separated from others in detention, but still face the range of issues that plague the general system such as overcrowding, unhygienic conditions, abuse, and torture."<sup>50</sup> The 2020 U.S. State Department Country Report notes that "[h]uman rights organizations reported prison, detention center, and police station conditions were harsh due to overcrowding, food and water shortages, and inadequate sanitary conditions and medical care."<sup>51</sup> The average prisoner population was nearly 200 percent of capacity, including a large population of pretrial detainees, despite efforts to reduce overcrowding by releasing low risk inmates, developing alternatives to pretrial detention, and promoting sentence reduction (including through expanded use of plea bargaining).<sup>52</sup> In September 2020, the Prison Commission reported that the prison system faced serious challenges from communicable diseases such as tuberculosis.<sup>53</sup> Prisoners received inadequate portions of food, and water shortages continued.<sup>54</sup>
27. An inspection of 201 prisons from July 2019 to June 2020 found some improvements in sanitary conditions, availability of medical care, and availability of adequate food and water.<sup>55</sup>

#### **IV. Suggested recommendations**

28. The coauthors of this report offer the following suggested recommendations for Kenya:
  - Abolish the death penalty and replace it with a sentence that is fair, proportionate, and respects international human rights standards.

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<sup>47</sup> Committee Against Torture, *List of issues prior to the submission of the third periodic report of Kenya*, (January 11, 2016), U.N. Doc. CAT/C/KEN/QPR/3, ¶¶ 18-20.

<sup>48</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, ¶¶ 71-74.

<sup>49</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>50</sup> Cornell Center on the Death Penalty Worldwide, Kenya, <https://deathpenaltyworldwide.org/database/#/results/country?id=38> (last visited Mar. 13, 2022).

<sup>51</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>52</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>53</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>54</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

<sup>55</sup> United States Department of State Country Report, *Kenya 2020 Human Rights Report*, sec. 1, subp. C, available online at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/kenya/>.

- In the interim, establish an official moratorium on executions, effective immediately, direct all judges to cease sentencing people to death, and commute all existing death sentences to sentences that are fair, proportionate, and respect international human rights standards.
- In the meantime, ensure that all persons sentenced to death by operation of the mandatory death penalty scheme are provided with timely resentencing hearings, and ensure that all such persons have access to free legal counsel to prepare for those hearings, as well as state funding to gather evidence to present at the hearings.
- Bar courts from considering any evidence obtained through torture, except with respect to evidence of the crime of torture itself, and create a mechanism by which defendants may raise the issue of inadmissibility before trial. Ensure that all judicial authorities receive adequate training and support to assess such allegations and have the capacity to bar consideration of such evidence.
- Ensure that all persons charged with capital offenses are provided with legal counsel free of charge, and ensure that they have access to counsel from the time of charging through any appeals, including during any interrogations.
- Create a capital defense budget to fund pre-trial investigations for indigent defendants in capital cases, and ensure that legal counsel have adequate resources to conduct thorough pre-trial investigations in capital cases, including with respect to mitigation factors at the time of sentencing.
- Ensure that authorities conduct a full, transparent, and independent investigation of any reported threats issued to attorneys representing individuals charged with capital offenses.
- Prohibit deportation or extradition of any person to a country where that person is at risk of being sentenced to death.
- Take concrete measures to improve conditions in prisons for all persons, including people on death row, in accordance with the Nelson Mandela Rules.