

**An appraisal of the role of the Universal Periodic Review Mechanism in securing
selected sexual, reproductive and health rights in Kenya**

LLM Mini-dissertation

BY

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DECLARATION

I, Dominic Rono, declare that this mini-dissertation is original and to the best of my knowledge it has never been presented in the University of Pretoria or any other institution and neither been published nor presented for the requirements of an academic degree. I also declare that any secondary information used in this proposal has been duly acknowledged.

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DEDICATION

To all those who continually seek to ensure that the rights of all are protected, promoted and fulfilled.

ABSTRACT

The mini-dissertation appraises the Universal Periodic Review (UPR) in securing sexual and reproductive rights in Kenya. It seeks to establish the measures that have been put in place by Kenya to implement the ‘accepted’ recommendations, the extent to which the recommendations have been implemented and the challenges that have made Kenya not to implement some of the ‘accepted’ recommendations. Kenya has put in place measures to implement the recommendations, some of which have been partially achieved; it has also faced challenges in implementation of the recommendations. The UPR has played a modest yet significant role in securing sexual, reproductive rights in Kenya.

SUMMARY OF THE MINI-DISSERTATION

The research appraised the implementation of ‘accepted’ recommendations accepted by Kenya under the auspices of the Universal Periodic Review (UPR) in the first cycle. The ‘accepted’ recommendations that the research appraises relate to sexual reproductive rights made to Kenya and pose the question whether the implementation of the ‘accepted’ recommendations has made a positive impact on the ground resulting to the greater enjoyment of human rights.

The first cycle of the UPR took place from 2008 to 2011, with Kenya being reviewed on 6 May 2010. After the review Kenya, ‘accepted’ a total of 150 recommendations and noted one recommendation. Out of the 150 recommendations that were ‘accepted’, 26 recommendations related to sexual reproductive rights.

For the purposes of this research the recommendations touching on sexual reproductive health and rights were clustered into three main clusters for ease of analysis. The three groups are : (i) violence against women which encompass female genital mutilation (FGM) and domestic violence; (ii) maternal and infant mortality; and (iii) sexual orientation, gender identity and expression (SOGIE).

With respect to FGM Kenya ‘accepted’ several recommendations aimed at reducing and eradicating the practice in Kenya. The acceptance of the recommendations triggered positive action by Kenya such as the enactment of Prevention of Genital Mutilation Act, No. 32 of 2011, and the establishment of an anti-FGM Board charged with the responsibility of putting in place programmes and measures to eradicate FGM. The anti-FGM Board has carried out country wide sensitisations on the need to abandon the practice of FGM and assisting communities to embrace other alternative forms of rites of passage. The law enforcement agencies have utilised the Female Genital Mutilation Act to prosecute suspects engaged in FGM. The net effect of the sensitisation carried out by the FGM Board has been a more

sensitised public and reduced incidence of FGM. The increase in prosecutions has also lead to reduced incidences of FGM and deterrence due to the stiff sanctions provided for in the Female Genital Mutilation Act. In the final analysis the State has largely implemented the ‘accepted’ recommendations with regard to FGM.

The State received and ‘accepted’ recommendations made to it with regard to gender based violence, which included the reduction of gender based violence, non-discrimination of women in property inheritance, prosecution of sexual offenders and gender violence offenders by ensuring that cases of domestic violence and sexual offence/s are properly investigated and prosecuted. The State has to a large extent implemented the ‘accepted’ recommendations relating to domestic violence by enacting legislation such as the Matrimonial Property Act, 2013, the Protection against Domestic Violence Act, Act No.2 of 2015, the Sexual Offences Act, Chapter62 A of 2014, and the Marriage Act, Act No. 4 of 2014. The State established gender report desks in most of the police stations around the country to specifically receive complaints of domestic and sexual violence. Gender and sexual violence recovery centres have been established around the country to specifically deal with cases of domestic and sexual violence to provide victims with medical and psychosocial support. The State undertook training for all the actors in the criminal justice system with the aim of improving their capacity to specifically deal with domestic and sexual violence cases. The police officers for example have been trained on how to conduct gender and sexual violence investigations while the prosecutors have been trained on aspects of prosecution of sexual and domestic violence cases.

The State ‘accepted’ a recommendation to continue with its efforts to reduce maternal and infant mortality. The State has to a large extent continued to implement measures aimed at reducing maternal and infant mortality. In June 2013, Kenya implemented the free maternity policy which provided a framework for provision of free maternity services in all the public

health facilities across the country. Due to this effort, there was an increase in the number of mothers who gave birth in health facilities given that they initially resorted to seeking the services of traditional birth attendants (TBA) due to the high cost of delivery in a health facility. The State also increased funding to the health sector to cater for maternity services, provision of housing for health care workers and for the employment of additional health care workers. The increase of funds for maternity services ensured that the services continued to be free while the recruitment of more health care workers has ensured that the services provided would be of a high quality and accessible. The increase in the number of women giving birth in health facilities has improved the health of the mothers and children born since they are required to attend clinic for immunisation and routine check-up therefore increasing their survival and reducing infant mortality. The efforts of the State have also been complimented by the efforts of the first lady under the ‘beyond zero campaign,’ which seeks to equip each health facility with mobile clinics specially targeting pregnant women in marginalised areas. This has ensured that the health care becomes accessible for all including the most marginalised.

With respect to SOGIE, the State ‘accepted’ a recommendation to put in place an anti-discrimination legislation which would provide for non-discrimination on the basis of SOGIE. However, the State did not take any measures to enact an anti-discrimination legislation or protect the rights of sexual and gender minorities. The State through its agencies did not provide an enabling environment for the lesbian, gay, bi-sexual and transgender (LGBTI) to exercise and enjoy their rights. The State for example declined to register the National, Gay and Lesbian Human Rights Commission (NGLHRC) and the Transgender Education and Advocacy Organisation (TEA). The LGBTI community had to seek recourse in court to compel the State to register their organisations while the transgender

community had to move to court to compel the State to register their organisation and to compel the State to change gender mark(s) in their official documents.

In conclusion the State largely implemented the recommendations that it ‘accepted’ with varying degrees of benefit to the citizens. Though it may be difficult to pin-point that the State implemented the ‘accepted’ recommendations because it committed to it, it is important to State that the UPR mechanism recommendations were beneficial in adding and sustaining impetus to the States commitment to respect and fulfil its obligations.

The research makes various recommendations key among being that Kenya in the spirit of the UPR of improving the human rights situation in the ground should consider implementing the ‘noted’ recommendations since some of the recommendations that did not enjoy the support of Kenya are integral in the enjoyment of rights. Recommending States ought to consider making specific and action oriented recommendations which will make it easy for the State to understand and implement the recommendations and enable other actors to monitor the implementation of the recommendations.

LIST OF ACCRONYMS

CEDAW	Convention on Elimination of Discrimination against Women
CRPD	Convention on Rights of Persons with Disabilities
COVAW	Coalition on Violence against Women
FP	Family planning
ICCPR	International Covenant on Civil and Political Rights
ICED	International Convention for the Protection of all Persons from Enforced Disappearance
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on Migrant Workers
KDH	Kenya Demographic Health Survey
KNCHR	Kenya National Commission on Human Rights
LGBTI	Lesbian, gay, bi-sexual, transgender and intersex
MDGs	Millennium Development Goals
MMR	Maternal Mortality Rate
NGLC	National Gay and Lesbian Commission
NGO	Non-governmental organisations
NHRI	National human rights institutions
NPA	National Plan of Action
ODPP	Office of the Director of Public Prosecution
OHCHR	Office of the High Commissioner for Human rights
PAC	Post abortion care
PoA	Programme of Action
RS	Recommending State
SGBV	Sexual and gender based violence



SOGIE	Sexual orientation, gender identity and expression
SRHR	Sexual, reproductive and health rights
STIs	Sexually transmitted infections
SuR	State under review
TBA	Traditional birth attendants
TBM	Treaty body mechanism
TEA	Transgender Education Advocacy
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
UNICEF	United Nations Children's Fund

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The Protection against Domestic Violence Act, Act No. 2 of 2015

Judicature Act, Act No. 16 of 1967

Marriage Act, Act No.4 of 2014

Married Women Property Act, 1882

Penal Code, Chapter 63 Laws of Kenya, 1970

The Prohibition of Female Genital Mutilation Act, Act No. 32 of 2011

Sexual Offences Act, Act No. 3 of 2006

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CHAPTER 1: INTRODUCTION

This Chapter explores the concept of sexual, reproductive rights as it relates to the Universal Periodic Review (UPR). It also, discusses the UPR process in the context of the developments and changes that came about with the Human Rights Council. It further explores the literature on UPR and sexual reproductive rights. The chapter also discusses the methodology adopted to answer the research questions and sets out the chapter outline.

1.1 Background to the study

Sexual, reproductive health and rights are fundamental human rights that every State must strive to fulfil. These rights are guaranteed in various international and regional instruments which Kenya is a State party to. These rights are also guaranteed in the Kenyan Constitution, national laws and policies.

In 1994, the United Nations coordinated an International Conference on Population and Development (ICPD) which resulted in the development of a Programme of Action (PoA). The PoA was first among the international development frameworks to address issues related to sexuality and reproductive health, and rights.¹ The ICPD largely articulated issues around reproductive rights; it subsumed issues on sexual rights under it. It is important to recognise the importance of the ICPD in protecting sexual health for the purposes of enhancing the protection to the right to life and personal relations.² The PoA defines an individual's sexual and reproductive health as complete well-being related to sexual activity and reproduction.³ Reproductive rights have been clarified in paragraph 7.3 of the PoA. These are not new rights but human rights that already exist in human

¹ United Nations Population Fund *Cairo Programme of Action: 1994*

² United Nations Population Fund (n 1 above) Paragraph 7.2

³ United Nations Population Fund (n 2 above)

rights instruments related to sexual, reproductive autonomy and the attainment of sexual and reproductive health.⁴ At the regional level, for example, Article 14(1) of African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) acknowledges sexual health as a core right as opposed to a derivative right. Article 14(1) enjoins State parties to ensure that the right to health of women including reproductive rights is respected and promoted.

The World Health Organisation (WHO) has defined sexual health to be a State of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity.⁵ It further States that sexual health requires a positive a respectful approach to sexuality and sexual relationships, as well as possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.⁶ From the definition by WHO sexual rights are defined to include the right of all persons to be free of coercion, discrimination and violence; the highest attainable standard of health, including access to sexual and reproductive health, seek, receive and impart information related to sexuality, sexuality education; respect for bodily integrity; choose their own partner; decide their sexuality; consensual relations; consensual marriage; decide whether or not and when to have children and pursue a satisfying and pleasurable sexual life.⁷

⁴ United Nations Population Fund (n 1 above)

⁵ World Health Organisation 'Report of technical consultation on sexual health' 2002.

⁶ World Health Organisation (n 5 above)

⁷ C Ngwena & E Durojaye *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 19

Despite the protections afforded by international and regional treaties, access to sexual, reproductive health and rights has been a challenge in Kenya,⁸ as it has been in most parts of sub-Saharan Africa. The challenges to access to sexual and reproductive rights are numerous key among them is patriarchal nature of Kenyan communities who do not value the needs and the voice of the woman in decision making. The role of the woman is relegated to the lower ranks of society and decisions made on their behalf by men.⁹ The negative effect of this value system is that women are discriminated against and decisions are made on their behalf by men who do not understand and appreciate the needs of women. In family settings for example, a man would make unilateral decision on how many children a woman would have without respecting the autonomy of a woman to make such a decision given that the decision would materially affect the health of a woman.¹⁰

Due to retrogressive customs in some Kenyan communities, women and young girls are coerced to undergo female genital mutilation (FGM) in order for them to be married off and dowry paid to their family. Patriarchy continues to exacerbate the problem since low dowry is paid for uncircumcised girl coupled with the preference by most suitors to marry a circumcised girl.¹¹

Some of the international human rights treaties that guarantees the right to sexual reproductive health and rights include the International Covenant on Economic, Social

⁸ Kenya National Commission on Human Rights realising sexual and reproductive health rights in Kenya; A myth or reality (2010) 24

⁹ Centre for Reproductive Rights A Guide to aligning development goals to human rights standards on reproductive equality (2014) 10

¹⁰ Centre for Reproductive (n 10 above) 11

¹¹ African Union *The effects of traditional and religious practices of child marriage on Africa's socio-economic development* (2015) 10

and Cultural Rights(ICESCR), the International Covenant on Civil and Political Rights(ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment(CAT),the Convention on the Rights of Persons with Disabilities(CRPD), the Convention on Elimination of Discrimination against Women(CEDAW) and the United Nations Convention on the Rights of the Child (CRC).At the regional level Kenya is a State party to Maputo Protocol.

At the national level the Constitution of Kenya (2010) guarantees the right to the highest attainable standard of health including reproductive health. Article 43(1)(a),43(2) and 43(3) provides that no one shall be denied emergency medical treatment and that the State shall provide social security to persons who are unable to support themselves and their dependants. Kenya is therefore obligated to work progressively towards fulfilling this right. Despite the fact that the Kenyan Constitution in Article 26 guarantees the right to life, it takes cognizance in Article 26(4) that a woman can be helped to terminate a pregnancy when in the opinion of a medical practitioner the life of the mother is in danger.

The Constitution in Article 2(5) provides that the general rules of international law shall form part of the law of Kenya. This means that international law is a source of law in Kenya. Article 2(6) States that any treaty ratified by Kenya shall form part of the law. By virtue of these provisions, Kenya has been converted from a dualist into a monist State. The challenge, however, is that the Constitution does not make a ranking between

international law and the provisions of the Constitution.¹² This, however, does not seem to be a unique position as regards the Kenyan Constitution.¹³

The ratification of treaties creates a reporting obligation on Kenya that requires it to submit initial and periodic reports¹⁴ to the respective treaty bodies on the implementation of the treaty.¹⁵ A distinction has to be made on the obligation to submit an initial report and periodic reports under the provisions of a particular treaty.¹⁶ The submission of the report by a State party is meant to provide an opportunity to the State to explain the steps that it has taken and take stock of the measures that it has put in place to enhance the realization of the rights for its people in line with the provisions of the treaty.¹⁷ When reporting to the treaty body mechanism (TBM) created by the treaty, a State is required to provide information on the implementation of the treaty at the national level.¹⁸ It has to report on the legislative, judicial and administrative measures adopted to achieve the rights in the treaty.

The examination of the State party report by TBM and the response by the State representatives by way of ‘constructive dialogue’ is seen to be an opportunity to point out to the State the positive developments, the areas of concern and to make

¹² Article 2(5) Constitution of Kenya, 2010

¹³ F Viljoen *International human rights law in Africa* (2012) 21

¹⁴ See Article 17 International Covenant on Economic Social Cultural Rights, Article 9 Convention on Elimination of Racial Discrimination, Article 40 of International Covenant on Civil, Political Rights, Article 18 of Covenant on Elimination of Discrimination against Women and Article 44 of the Convention on the Rights of the Child

¹⁵ (n 14 above)

¹⁶ In most cases the initial report is submitted within a period of one year after the ratification of a treaty whereas the periodic reports are submitted after a longer period of time depending on the workings of a particular treaty body monitoring

¹⁷ Viljoen (n 13 above) 38

¹⁸ (n 14 above)

recommendations to it for improvement.¹⁹ After the review the State is expected to implement the recommendations in order to improve the human rights situation on the ground; the recommendations will also form part of the starting point in the next discussions with the State in the process of continuous engagement with the TBM.²⁰ TBMs initially developed their own unique reporting formats that States were expected to adhere to when submitting their treaty reports. However, many State parties were unable to meet the reporting timelines due the multiple reporting requirements therefore necessitating the simplification of the reporting procedure by the TBMs reviewing their reporting guidelines in line and in light of the ‘harmonised guidelines’ which were adopted by most TBMs. The harmonised guidelines provided for the adoption of the simplified reporting procedure,²¹ which proceeds with the State under review submitting a report on the implementation of the treaty which forms a basis for the preparation of a list of issues,²² highlighting the major concerns regarding the implementation of the treaty in the State under consideration.

Like many other States that have ratified various treaties, Kenya has submitted its periodic reports when due to the various treaty bodies albeit not in a timely manner in some instances.²³ The ratification of a treaty by a State creates a reporting obligation on it with a corresponding obligation to implement the provisions of the treaty; all treaties have corresponding bodies, mainly committees that are charged with ensuring implementation of the provisions of treaties by State parties. The questions that are often

¹⁹ (n 14 above)

²⁰ (n 14 above)

²¹ United Nations General Assembly Resolution 68/268

²² United Nations reform: measures and proposals, UNGAOR, 66thSess, Agenda item 124, UN Doc A/66/860

²³ Kenya had delayed in submitting its State party report in respect to the International Covenant on Civil and Political Rights; the report was due on 1 April 2008 but was submitted on 22 August 2010; The State submitted CEDAW report on 12 May 2009 while the same was due on 8 April 2009

posed with respect to ratification of treaties are whether ratification of a treaty by a State signifies that the State will commit and comply with the provisions of the treaty and what informs a State to ratify a treaty.

Simmons has simplified and categorised the types of States that ratify treaties into sincere ratifiers, false negatives and strategic ratifiers.²⁴ Sincere ratifiers ratify treaties sincerely believing the contents of the treaty and in honest anticipation that they will comply with the provisions of the treaty.²⁵ False negatives are States that believe and are committed to the principles enunciated in a treaty but still fail to ratify a treaty. The reasons for not ratifying a treaty may vary but may include the fact that a State may not be able to marshal sufficient support in the domestic front in order to ensure that the treaty has support domestically.²⁶ Strategic ratifiers, are States who ratify treaties because other States are ratifying a particular treaty, to them the aim for such ratification is generally to gain short term diplomatic advantages with no real possibility that the provisions of the treaty will be complied with in the long term.²⁷

Theories of State compliance with treaties have developed over time; these theories include the realist theory, liberalism theory, the normative approach and the institutional theory. The realists propound that States comply with international treaties because of self-interest, since treaties reflect the power and interest of the State.²⁸ The realist school further propounds that the States will only comply with treaties because the treaty does not engage a national interest and if it does, it is only because the treaty is consistent with

²⁴ BA Simmons *Mobilising for human rights* (2009) 114

²⁵ Simmons (n 24 above) 114

²⁶ Simmons (n 24 above) 114

²⁷ Simmons (n 24 above) 114

²⁸ Simmons (n 24 above) 114

its national interest.²⁹ Compliance against the self-interest of the State is often interpreted to be a result of influence by a more powerful State or an actor.³⁰ Due to fears of retaliation or non-cooperation of some other States, the State party may comply with the provisions of a treaty albeit the fact that compliance is not in its best interest.³¹

Liberalism theory agrees with the general theory as propounded by the realists in that State interest is central but also States that regime type is important in understanding the role of the law in inter State relations.³²

The normative approach to compliance postulates that the normative force of a treaty inspires an ethical pull on the State to comply.³³ From this perspective a credible system of compliance will enhance compliance with the treaty provisions if coupled with a fair, credible and transparent manner of implementation.³⁴ The States will also comply because they believe that it is the right thing to do or that the people who run the State believe that it is the right thing to do.³⁵

The institutional theory views compliance from the perspective that States comply with international treaties when they are members of an institutional arrangements where actors are rational actors with the aim of setting the common standard of behaviour.³⁶

A distinction has to be made between compliance and implementation since a State may comply with treaty but fail to implement its commitments and the recommendations

²⁹ Simmons (n 24 above) 125

³⁰ J Goldsmith & E Posner *The Limits of International law*(2005)100

³¹ Goldsmith (n 30 above) 100

³² Viljoen (n 13 above) 34

³³ Viljoen (n 13 above) 34

³⁴ Goldsmith (n 29 above) 100

³⁵ Goldsmith (n 29 above) 100

³⁶ Viljoen (n 13 above) 34

made to it by TBMs. Implementation has been defined to be the specific action taken by a State in response to its international commitment such as taking measures by way of enactment of domestic legislations and enforcement the same.

The UN Commission on Human Rights was the first international organisation mandated to deal with human rights issues around the world.³⁷ The Commission operated from 1946 to 2006 before it was disbanded and succeeded by the Human Rights Council in 2006.³⁸ The UN Commission on Human Rights faced numerous challenges which revolved around politicisation, regionalism, membership and non-responsiveness of the Commission to human rights issues around the world which led to calls for its reform.³⁹

Due to the challenges faced by the UN Commission on Human Rights⁴⁰ and TBMs in general, calls were made to reform the UN Commission on Human Rights to ensure that it responded to the emerging human rights challenges in the world.⁴¹ The need to reform the UN Commission on Human Rights was seen to be a way in which human rights issues would be addressed equally in all parts of the world. It must however, be noted that the greatest role and achievement of Commission on Human Rights (CHR) was the development of human rights norms and standards and not implementation of the norms and standards, most of the international instruments⁴² used today were drafted by CHR with the assistance of its sub commission.⁴³

³⁷ ECOSOC resolution 5(1), 'Commission on Human Rights' 16 February 1946, UN Doc. E/Res/5(1)

³⁸ R Freedman *The United Nations human Rights Council; A critique and Early assessment* (2014)10

³⁹ Freedman (n 38 above) 11-26

⁴⁰ The United Nations Commission on Human Rights was the first international organisation mandated to deal with international human rights; the Commission was established pursuant to ECOSOC Resolution 5(1), 'Commission on Human Rights', 16 February 1946.

⁴¹ B Ramcharan *The Human Rights Council* (2011) 20

⁴² Universal Declaration of Human Rights, International Covenant on Civil, Political Rights and International Covenant on Economic, Social and Cultural rights are some of the international treaties drafted under the auspices of the Commission for Human Rights

⁴³ Ramcharan (n 41 above) 25

The United Nation Human Rights Council (UNHRC) was established in 2006 by UN General Assembly (UNGA) resolution 60/251,⁴⁴ with the core mandate to promote universal respect for the protection of human rights and fundamental freedoms for all.⁴⁵ Member States seeking membership to the Human Rights Council must uphold the highest standard in the promotion and protection of human rights and must fully cooperate with the Council.⁴⁶ Among some of the key undertakings of the UN Human Rights Council was to undertake the UPR, which constitutes both a new role for the UN Human Rights Council and a new mechanism for all UN members, and to build a stronger and a more effective human rights institution compared to its predecessor, the UN Commission on Human Rights.⁴⁷ It is important to note that member States make voluntary human rights commitments on the promotion and protection of human rights within the State as a show of commitment of upholding the highest standard of promotion and protection of human rights.

1.2 Background to the Universal Periodic Review

The UPR is a creation of Human Rights Council,⁴⁸ which involves the periodic review of the human rights records of all the United Nations member States. The review is based on equal treatment of all the States and provides an opportunity to the State under review to declare what action it has undertaken within its territory with the ultimate goal of improving the human rights situation in the country.⁴⁹

⁴⁴ General Assembly resolution 60/251 establishing the Human rights council affirmed some of the essential foundations of international human rights law including the United Nations Charter, the Universal Declaration of Human Rights among other Covenants.

⁴⁵ Ramcharan(n 41 above) 30

⁴⁶ United Nations General Assembly A/Res/60/251,the resolution does not however provide a guideline or framework for the form and content of the voluntary pledges

⁴⁷ Ramcharan (n 41 above) 20

⁴⁸ United Nations General Assembly Resolution 60/251

⁴⁹ United Nations General Assembly (n 46 above)

The reviews are conducted by the UPR Working Group, which consists of the 47 members of the United Nations Human Rights Council. However, any UN member State can take part in the dialogue with the State under review; the role of the State in this instance is to make recommendations to the State under review.⁵⁰ Before the review of the human rights record of the State under review the State is required to submit its national report. Other actors are also at liberty to submit reports to the United Nations Human Rights Council. Non-governmental organisations play an important role in the process of the review of the State since they can file reports which are often referred to as stakeholder reports. Information contained in the reports of independent human rights experts and groups are also taken into consideration alongside the reports of other UN entities operating within the country under review.⁵¹

The aim of the review⁵² is to improve the human rights situation on the ground, fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State. The review also aims to enhance the State's capacity and need for technical assistance, in consultation with, and with the consent of, the State concerned.⁵³ The General Assembly in resolution 60/251 took cognisance of the fact that States may need to share best practice among themselves and other stakeholders; support for cooperation in the promotion and protection of human rights; and encouragement of full cooperation and engagement with the HRC, other human rights bodies and the Office of the High Commissioner for Human Rights (OHCHR).⁵⁴ United Nations resolution 5/1⁵⁵ provides that the review of the State will be

⁵⁰ H Charlesworth & E Larking *Human Rights and the Universal Periodic Review; Rituals and Ritualism* (2014) 91

⁵¹ United Nations General Assembly (n 46 above) Paragraph 5

⁵² Human Rights Council Resolution (n 48 above)

⁵³ Human Rights Council Resolution (n 48 above)

⁵⁴ Human Rights Council Resolution (n 48 above)

based on three reports.⁵⁶ These reports include the State report,⁵⁷ the summary of submissions made by stakeholders,⁵⁸ done by the Office of the High Commissioner of Human Rights and a summary of a compilation by the United Nations agencies operating in the country under review.⁵⁹ It must be noted that the reviewing States have a right to make reference to the individual submissions made by stakeholders in putting across questions to the State and making recommendations based on the information contained in the individual stakeholder submission.⁶⁰

The UPR assesses the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party; (4) voluntary pledges and commitments made by the State and, (5) applicable international humanitarian law.⁶¹ Reviews take place through an interactive discussion between the State under review and other UN member States. This takes place during a meeting of the UPR Working Group, during this discussion any UN member States can pose questions, make comments or make recommendations to the States under review.⁶²

Following the review by the Working Group, a report is prepared by the troika with the involvement of the State under review with assistance from the Office of the High Commissioner for Human Rights (OHCHR).⁶³ This report, referred to as the “outcome report,” provides a summary of the actual discussion which consists of the questions,

⁵⁵ Human Rights Council (n 48 above)

⁵⁶ Human Rights Council (n 48 above) Paragraph 15

⁵⁷ Human Rights Council (n 48 above) Paragraph 15(a)

⁵⁸ Human Rights Council (n 48 above) Paragraph 15(c)

⁵⁹ Human Rights Council (n 48 above) Paragraph 15(b)

⁶⁰ Human Rights Council (n 48 above) Paragraph 15(c)

⁶¹ Human Rights Council Resolution 5/1. Paragraph 1

⁶² Human Rights Council (n 48 above) Paragraph 18

⁶³ Human Rights Council (n 48 above)

comments and recommendations made by States to the country under review, as well as the responses by the reviewed State.⁶⁴

During the Working Group session half an hour is allocated to adopt each of the ‘outcome reports’ for the States reviewed that session.⁶⁵ These take place no sooner than 48 hours after the country review. The reviewed State has the opportunity to make preliminary comments on the recommendations, choosing to either accept or note them.⁶⁶ Both ‘accepted’ and ‘noted’ recommendations are included in the report. After the report has been adopted, editorial modifications can be made to the report by State on its own Statements within the following two weeks.⁶⁷

The report is then adopted at a plenary session of the United Nations Human Rights Council where the State under review can reply to questions and issues that were not sufficiently addressed during the working group and respond to recommendations that were raised by States during the review.⁶⁸ Time is also allocated to member and observer States who may wish to express their opinion on the outcome of the review and for NHRIs, NGOs and other stakeholders to make general comments.⁶⁹ During the second review the State is expected to provide information on what it has done to implement the recommendations made during the first review as well as on any developments in the field of human rights.⁷⁰ The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance,

⁶⁴ Human Rights Council (n 48 above) Paragraph 26

⁶⁵ Human Rights Council (n 48 above) Paragraph 28

⁶⁶ Human Rights Council (n 48 above) Paragraph 31

⁶⁷ Human Rights Council (n 48 above) Paragraph 32

⁶⁸ Human Rights Council (n 48 above)

⁶⁹ Human Rights Council (n 48 above) Paragraph 31

⁷⁰ Human Rights Council (n 48 above) Paragraph 34

in consultation with the country concerned. If necessary, the Human Rights Council will address cases where States are not co-operating.⁷¹

1.3 Research problem

Kenya was first reviewed under the UPR on 6 May 2010. A total of 166 recommendations were made to Kenya by the recommending States. Kenya ‘accepted’⁷² 165 and ‘noted’⁷³ one recommendation that relates to decriminalization of same-sex relations.⁷⁴ It was expected that since Kenya accepted some recommendations relating to sexual, reproductive rights it would put in place a mechanism to implement the accepted recommendations. Despite Kenya accepting the recommendations, Kenyans continue to face challenges in enjoying rights particularly sexual reproductive rights in spite of Kenya voluntarily accepting the recommendations as it relates to sexual reproductive rights. The expectation was that Kenya was going to implement the accepted recommendations which would translate to improvement of human rights situation on the ground.

1.4 Research questions

It is against the above background that the following questions are posed:(i)What measures has Kenya put in place to implement the ‘accepted’ UPR recommendations related to sexual, reproductive and health rights? (ii)To what extent has Kenya implemented the ‘accepted’ recommendations of the UPR related to sexual, reproductive and health rights? and (iii)What were the challenges in the implementation of the ‘accepted’ the UPR recommendations related to sexual, reproductive and health rights?

⁷¹ Human Rights Council (n 48 above) Paragraph 33

⁷² Human Rights Council Resolution 5/1 Paragraph 32

⁷³ Human Rights Council (n 48 above)

⁷⁴ Human Rights Council *Report of the working group on the Universal Periodic Review:2010*

1.5 Justification for study

There is a dearth of literature on the appraisal of the effectiveness of the UPR system in the promotion and protection of sexual, reproductive and health rights in Kenya. The aim of this study is therefore to address this gap and contribute to the understanding of the role that the UPR has played in the promotion and protection of sexual reproductive health and rights. The research also exposes the weakness of the UPR system in securing sexual, reproductive and health rights with the aim of making suggestions to improve the system to make it more responsive and to achieve its desired objectives.

1.6 Limitation of the study

The research is based on the selected recommendations relating to selected sexual, reproductive rights accepted by Kenya in the first cycle of the UPR, with occasional reference to the accepted recommendations made to Kenya in the second cycle since implementation of the recommendations has not commenced. The research does not therefore analyse all the accepted UPR recommendations, it must be noted that it is difficult to attribute all the positive changes to the fact that Kenya accepted the UPR recommendations.

1.7 Methodology

The research employs a literature review, which involves accessing both online sources and review of secondary source in leading books and journals. This provides background information on the UPR and the measures which Kenya has put in place to implement the

recommendations. The research collects data from official United Nations documents,⁷⁵ and the data base of UPR info,⁷⁶ the United Nations Human Rights Index,⁷⁷ and Sexual rights Initiative database.⁷⁸ The data collected from these sources are key in assessing the implementation plan put in place by the government of Kenya. An appraisal of the official government documents such as the mid-term report⁷⁹ submitted to the Human Rights Council as well as comments made by the Attorney General are important in understanding and appreciating the challenges faced by the State in implementing some of the recommendations that the State accepted during the review by the Human Rights Council.

1.8 Chapter outline

Chapter 1 explores the process under the UPR including its creation, the objectives of the UPR process, the procedure adopted by the UNHRC with respect to the UPR process and the successes of the UPR process. Chapter 2 analyses the recommendations that were made to Kenya and ‘accepted’ by the State in the first cycle. The Chapter also appraises the measures that have been put in place by the State to effectuate the implementation of the ‘accepted’ recommendations. Chapter 3 is based on the analysis of the midterm report submitted by State to the United Nations Human Rights Council and the yearly assessment conducted by the Kenya Stakeholders Coalition on UPR, an analysis is conducted on the status of implementation of the accepted recommendations relating to sexual, reproductive and health rights. Chapter 4 deals with conclusions of the research and make recommendations based on the conclusions drawn.

⁷⁵ Documents accessed include the General Assembly resolutions and the Resolutions made under the auspices of the Human Rights Council.

⁷⁶ <http://www.upr-info.org/en>

⁷⁷ <http://uhri.ohchr.org/en>

⁷⁸ <http://sexualrightsinitiative.com/>

⁷⁹ Government of Kenya *Universal Periodic Review of the UN Human Rights Council National Midterm report* (2012)

CHAPTER 2: REVIEW OF KENYA BY HUMAN RIGHTS COUNCIL

The first part of this Chapter discusses the process of reporting under the UPR by Kenya to the Human Rights Council and the review of Kenya. The second part appraises the accepted recommendations made to Kenya with respect to sexual, reproductive rights and further contextualises sexual, and reproductive rights within the framework of UPR, on this basis, the Chapter analyses three themes namely: (i) violence against women which include female genital mutilation, early marriages and domestic violence; (ii) reduction of infant and maternal mortality; and the rights as it relates to sexual orientation, gender identity and expression(SOGIE).

2.1 The process of reporting to the Human Rights Council

The UPR process being a new process attracted much optimism given that for the first time non-State actors would have an opportunity to engage with the process by contributing to the State report.⁸⁰ The general guidelines to States submitting information to the Human Rights Council encourages the State to prepare the information they submit ‘through a broad consultation process at the national level with all relevant stakeholders,’⁸¹ and also by submitting a stakeholder report.⁸² The stakeholders are at liberty to submit separate reports or joint submissions to the Human Rights Council with respect to the human rights situation in the country.⁸³ The stakeholders could include civil society organisations, academics, individuals and national human rights institutions. It is out of these reports that the Office of the High Commissioner for Human Rights will

⁸⁰ H Collister *Rituals and implementation in the Universal Periodic Review and the human rights treaty system* (2014) 130

⁸¹ Para 15(a) Human Rights Council general guidelines for preparation of information under Universal Periodic Review adopted at the 6th session

⁸² Human Rights Council (n 48 above) Paragraph 15(c)

⁸³ Human Rights Council (n 48 above) Paragraph 15(c)

derive information in preparation of the summary of the stakeholder report to be used by the reviewing States.

Before the review of Kenya, it had submitted a national report⁸⁴ detailing measures that it had taken to implement the various provisions of the Charter of the United Nations, the Universal Declaration of Human Rights, of the human rights treaties to which it is a party to and the voluntary pledges and commitments it has made, including those given when presenting its candidatures for election to the HRC; and applicable international humanitarian law.⁸⁵

With regard to Kenya's first UPR national report, the process of developing the report was highly consultative.⁸⁶ All stakeholders were given an opportunity to input and raise concerns about the human rights situation in the country.⁸⁷ Non-State actors also played a critical role in mobilising organisations to make individual⁸⁸ and group submissions⁸⁹ on various human rights themes depending on their comprehensive and availability of information. Once all the submissions had been made, the Office of the Attorney General convened all stakeholders to thrash out any contentious issues that arose from the submissions made by various actors.⁹⁰ The stakeholders⁹¹ made various submissions with respect to sexual and reproductive health rights. The submissions touched on

⁸⁴ National Report submitted in line with Human Rights Council Resolution 5/1

⁸⁵ Human Rights Council Resolution 5/1(n 48 above) Paragraph 1(a-d)

⁸⁶ This engagement happened under the aegis of the Inter-Ministerial Committee on International Human Rights Obligations: this Committee was established by the Government in 2005 and includes membership from government ministries, the KNCHR and human rights organisations. Its mandate is to advise the Government with regard to its international obligations

⁸⁷ Collister (n 80 above) 133

⁸⁸ Collister (n 80 above) 133

⁸⁹ Collister (n 80 above) 133

⁹⁰ Kenya National Commission on Human Rights *Accounting for human rights protection under the UPR* (2011) 16

⁹¹ The Summary of stakeholder submissions was prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(c) of the annex to the Human Rights Council Resolution 5/1

domestic violence, female genital mutilation, sexual orientation, gender identity and expression and maternal mortality.

Prior the review of Kenya, the stakeholders developed an advocacy charter⁹² that was used to lobby foreign embassies in Kenya and Geneva to make certain recommendations to State based on the submissions made on the human rights situation on the ground. It was hoped that the States making recommendations would make specific recommendations that would be easy for the State to understand and implement and also be easy to monitor.⁹³

2.2 Review of Kenya by Human Rights Council

By 2011 the Human Rights Council through the UPR process, had reviewed the human rights records of all UN member States.⁹⁴ The Human Rights Council through its working group reviewed Kenya's human rights record on 6 May 2010. This was the first time that Kenya was undergoing review under the UPR mechanism given that this was the first cycle of the UPR.⁹⁵ The Working Group (WG) adopted the country's report on 10 May 2010. Later that year, on 22 September, Kenya's outcome report was adopted by the United Nations Human Rights Council (HRC).

Kenya was reviewed by the Human Rights Council under the old constitutional order. The adoption of the working group report on the review of Kenya was on 22 September 2010, a month after the promulgation of a new Constitution on 27 August 2010.

⁹² Kenya National Commission on Human Rights (n 90 above)22

⁹³ Kenya National Commission on Human Rights (n 90 above)58

⁹⁴ Asia Pacific Forum *The United Nations declaration on the rights of indigenous people; manual for National Human Rights Institutions*(2013) 103

⁹⁵ The first cycle of the UPR ran from 2008 to 2011. Kenya was reviewed in the 8th session on 6 May 2010

2.3 The recommendations made to Kenya

The Human Rights Council made 150 recommendations to Kenya. Out of the 150 recommendations that were made, Kenya accepted 128, postponed a decision on 15, and seven recommendations did not enjoy Kenya's support.⁹⁶ After the review in Geneva and the adoption of the Working Group report, the State engaged with stakeholders and out of the seven recommendations that had not enjoyed the support of Kenya's delegation in May, only the one dealing with decriminalising same-sex unions has been rejected wholly without any variations, based on the reasoning that such unions are against the culture of the people of Kenya. This means that, finally, Kenya accepted 149 recommendations out of the 150.⁹⁷

As at the time of the adoption of the Working Group report, the State had passed and promulgated a new Constitution which addressed many of the recommendations made to it. The bulk of the recommendations made to the State were on the need for law reform and institutional reforms given that post-election violence had been experienced in Kenya in 2007/2008. The recommendations made to Kenya in the area of sexual and reproductive rights include female genital mutilation, access to contraceptives, comprehensive sexuality education, infant and maternal mortality, sexual orientation, gender identity and expression, abortion and early marriages.⁹⁸

⁹⁶ Human Rights Council *Report of the working group on the Universal Periodic Review* (2010) 13-23

⁹⁷ Government of Kenya (n 79 above)

⁹⁸ Human Rights Council (n 96 above)

2.4 Contextualizing sexual and reproductive health and rights

While it is conceded that the concepts of reproductive health and sexual health are interrelated⁹⁹ they are also distinct from each other.¹⁰⁰ In analysing the recommendations made to Kenya all the recommendations made with respect to sexual and reproductive health¹⁰¹ and rights¹⁰² will be taken into account. The following sub-sections explore the human rights situation in Kenya with respect to violence against women which include domestic violence, female genital mutilation, and early marriages. The section also explores the situation on the ground with respect to infant and maternal mortality and the situation with respect to SOGIE rights.

2.5 Violence against women

Violence against women has been defined by the 1993 Declaration on the Elimination of Violence against Women as any act of violence based on gender whose outcome include: any physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, in either public or in private life.¹⁰³ It also includes but not limited to ‘physical, sexual and psychological violence occurring within the family set up and includes acts such as battery, sexual abuse of female children, bride price related violence, rape within the context of marriage, female genital cutting and other harmful traditional practices.’¹⁰⁴ Violence against women also occurs within the general community and includes acts such as rape, sexual abuse, sexual

⁹⁹ R Dixon-Muller *The sexuality connection in reproductive health*(1993) 24

¹⁰⁰ R Dixon-Muller (n 99 above)

¹⁰¹ Sexual health is a State of physical, emotional, mental and social well-being in relation to sexuality; it is not only the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships.

¹⁰² R Dixon-Muller (n 99 above) on the definition of sexual rights as distinguished from sexual health

¹⁰³ Article 1 of the Declaration on the Elimination of Violence against Women

¹⁰⁴ Declaration on the Elimination of Violence against Women (n 103 above)

harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.¹⁰⁵

2.5.1 Domestic violence

Violence against women is a manifestation of unequal power relations between men and women resulting in discrimination and domination by men against women. The unequal power relations has an effect of subordinating women, violence is often used by men as a social mechanism to force women into a subordinate position as compared to men.¹⁰⁶ The incidence of rape, defilement, and sexual assault of young girls and women has been on the rise in Kenya. Due to this rise the Kenyan Parliament enacted the Sexual Offences Act,¹⁰⁷ to supplement the provisions of the Penal Code,¹⁰⁸ which were found to be inadequate to address the emerging concerns related to rape, defilement and sexual assault.

The incidence of sexual assault and defilement is generally high in Kenya with the highest prevalence in informal settlements.¹⁰⁹ The reasons for this phenomenon are varied, and include lack of parental protection, vulnerability of young girls and women and the generally high incidence of crime in the informal settlement.¹¹⁰ Like in many other developing countries, Kenya faces acute shortage of security personnel.¹¹¹ The effect of which is highly felt in the informal settlements. This problem is exacerbated by the inaction of the security agencies, and the attitude of police, the police are perceived to view domestic and sexual violence cases as serious cases that need to be investigated by police, and are therefore left to be dealt with within the family setting.¹¹²

¹⁰⁵ Declaration on the Elimination of Violence against Women (n 103 above)

¹⁰⁶ Declaration on the Elimination of Violence against Women (n 103 above)

¹⁰⁷ Sexual Offences Act, Chapter 62 A Laws of Kenya

¹⁰⁸ Penal Code, Chapter 63 Laws of Kenya

¹⁰⁹ Government of Kenya, *The Kenya violence against children study* (2010) 2

¹¹⁰ Government of Kenya (n 109 above) 4

¹¹¹ Government of Kenya, *Kenya Police Service Strategic Plan, 2003-2007*(2003)7

¹¹² Government of Kenya (n 111 above) 8

CEDAW in General Recommendation 19 of 1992 affirmed that the State has the responsibility to provide security and to take action when cases of violence are reported by conducting credible investigations and prosecution of those found culpable. The non-action by the security agencies in Kenya to credibly investigate and prosecute cases of violence against women has led to an endemic culture of impunity being entrenched particularly with respect to cases related to sexual offences.

The High Court in *CK (A Child) & 11 others v Commissioner of Police & 2 others*¹¹³ affirmed the position of the General Comment that even though the security agencies were not directly responsible for the violation of the rights of the victims, they were responsible for the failure to ensure criminal consequences through proper and effective investigations and prosecution. The Court further held that the failure of the security agencies had created a culture of immunity for commission of sexual offences. The significance of the Court decision is that the security agencies ought to deal properly with cases that are reported to them by conducting proper and credible investigations and by ensuring that the cases that have been investigated are prosecuted.

With respect to domestic violence the stakeholders Stated in the joint submission that despite the fact that Kenya had enacted the Sexual Offences Act, and was in the process of enacting the Domestic Violence Bill, there was still a high number of domestic violence cases being reported but with no action being taken against the perpetrators.¹¹⁴ The stakeholders therefore made a recommendation that there was need for the State to

¹¹³ *C.K (A Child) & 11 Others v Commissioner of Police & 2 others* (2012) eKLR available on <http://kenyalaw.org/caselaw/cases/view/89322/>

¹¹⁴ Human Rights Council *Working group report on the Universal Periodic Review* Paragraph 21

launch a national campaign to raise awareness on domestic violence and implement the Sexual Offences Act.¹¹⁵

Due to the fact that the UPR process is a complementary process to the other United Nations mechanisms¹¹⁶ the United Nations agencies working in Kenya made submissions based on the previous recommendations made to the State by other treaty body committees (TBMs).¹¹⁷ The UN agencies Stated in their submissions that the Committee on Economic, Social and Cultural Rights had expressed a concern about the incidence of domestic violence and the fact that despite the high incidence, there was still a low number of complaints being reported. The Committee was concerned by the absence of specific criminal law provisions specifically criminalising domestic violence.¹¹⁸

The Human Rights Council made several recommendations to Kenya with respect to violence against women. The recommendations accepted by Kenya with respect to violence against women include the need to undertake more effective measures to address the problems of impunity, violence and trafficking in women and girls, including through the strengthening of law enforcement and the judicial system and intensive media and education programmes aimed at increasing public awareness on the rights of women,¹¹⁹ and to take measures to guarantee effective access for the women victims of gender-based violence to justice, redress and protection.¹²⁰ The Kenyan government was further urged to draft a plan to combat violence against women, and establish reliable

¹¹⁵ Human Rights Council (n 48 above) Paragraph 22

¹¹⁶ Human Rights Council (n 48 above)

¹¹⁷ Human Rights Council (n 48 above) Paragraph 15

¹¹⁸ Human Rights Council *Concluding observations by the CESCR* Paragraph 22

¹¹⁹ Human Rights Council (n 114 above) Recommendation 101.47

¹²⁰ Human Rights Council (n 114 above) Recommendation 101.48

indicators in this field.¹²¹ It was also urged to strengthen protection for women and children against violence and exploitation.¹²² In addition, the State also accepted a recommendation to implement measures to prevent, punish and eradicate all forms of violence against women, devoting special attention to the situation of women in communities of refugees and internally displaced persons, and also completely eradicate the practice of female genital mutilation.¹²³

2.5.2 Female genital mutilation

The World Health Organization has defined Female genital mutilation (FGM) as “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.”¹²⁴ The practice of FGM has been found to have no known health benefits,¹²⁵ causes severe pain and has several immediate and long-term health, physical and psychological consequences.¹²⁶ FGM is a form of violence and a harmful practice that violates established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex,¹²⁷ the right to life (when the procedure results in death),¹²⁸ and the right to freedom from torture or cruel,¹²⁹ inhuman or degrading treatment or punishment.¹³⁰ Many communities especially in Kenya have used culture to justify the practice of FGM, while the right to practice one’s culture is recognized and provided for under the International Covenant on Civil and Political Rights.¹³¹ The Covenant in Article 18(3)

¹²¹ Human Rights Council (n 114 above) Recommendation 101.49

¹²² Human Rights Council (n 114 above) Recommendation 101.50

¹²³ Human Rights Council (n 114 above) Recommendation 101.51

¹²⁴ World Health Organisation, *Eliminating Female Genital Mutilation*, an interagency Statement (2010)

¹²⁵ World Health Organisation *Eliminating Female genital mutilation* (1997) 1

¹²⁶ World Health Organisation (n 125 above) 1

¹²⁷ World Health Organisation (n 125 above) 1

¹²⁸ World Health Organisation (n 125 above)

¹²⁹ World Health Organisation (n 125 above)

¹³⁰ World Health Organisation (n 125 above)

¹³¹ Article 4 of the International Covenant on Civil and Political Rights

stipulates that the right to one's culture may be subject to limitations necessary to protect the fundamental rights, it therefore follows that social and cultural claims cannot therefore be used to justify FGM. FGM could potentially contribute to an increase in maternal mortality and morbidity due to a reduction in the vaginal tract. Hence it may lead to a high likelihood to create complications during child birth. The right to life is protected under various international instruments including: The Universal Declaration of Human Rights,¹³² International Covenant on Economic, Social and Cultural Rights,¹³³ International Covenant on Civil and Political Rights (ICCPR);¹³⁴ and the Convention on the Rights of the Child (CRC).¹³⁵ States are obligated by the provisions of Article 6 of ICCPR to protect the right to life; General Comment No.6 also requires States to take all necessary efforts to increase life expectancy.¹³⁶ It is important to note that the State is not only required to refrain from taking any negative action but to take necessary action to protect the right.¹³⁷

The practice of FGM is a form of discrimination against women; the practice is exclusively directed towards women and girls. The practice has a negative effect of interfering with the enjoyment of fundamental rights and freedoms. It results in subordination of women and girls.¹³⁸ The right of children to the highest attainable standard of health as provided for under Article 24 of the United Nations Convention on the Rights of the Child has been clarified by the Committee on the Rights of the Child in General Comment No. 15 of 2003 as an inclusive right, extending not only to timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services,

¹³² Article 1 and 3 of the Universal Declaration on Human Rights

¹³³ See the Preamble of the International Covenant on Economic, Social and Cultural Rights

¹³⁴ Article 9(1) of the International Covenant on Economic, Social and Cultural Rights

¹³⁵ Article 19 of Convention on the Rights of the Child

¹³⁶ Human Rights Committee, General Comment No. 6

¹³⁷ Human Rights Committee (n 136 above)

¹³⁸ World Health Organisation (n 124 above) 3

but also to a right to grow and develop to their full potential and live in conditions that enable them to attain the highest standard of health through the implementation of programmes that address the underlying determinants of health. The stakeholders in their submissions Stated that indigenous women face systematic injustices and abuse within their communities, including FGM. According to their submissions FGM was outlawed in 2001 but is still widely practised among numerous indigenous communities.¹³⁹ The Office of the High Commissioner for Human Rights also noted that FGM continues to be practised in Kenya.¹⁴⁰ It further stated that the CESCR noted that the practice is prohibited only if it involves children and recommended adopting legislation criminalising FGM of adult women.¹⁴¹

With respect to FGM the State received and accepted recommendations to adopt and implement measures to eradicate FGM. The measures include public awareness-raising campaigns against this phenomenon,¹⁴² ensuring strict criminalization and carrying out awareness-raising to eradicate its acceptability among the public,¹⁴³ the adoption of legislation and a coherent national policy criminalizing FGM¹⁴⁴ training of members of the police, prosecutors and judges on the strict application of laws and regulations to be adopted in this field,¹⁴⁵ and the elimination of the practice.¹⁴⁶

¹³⁹ Human Rights Council *Summary prepared by the Office of the High Commissioner for Human Rights* (2010) Paragraph 21

¹⁴⁰ Human Rights Council *Compilation prepared by the Office of the High Commissioner for Human Rights* (2010) Paragraph 30

¹⁴¹ Human Rights Council (n 139 above)

¹⁴² Human Rights Council (n 114 above) Recommendation 101.52

¹⁴³ Human Rights Council (n 114 above) Recommendation 101.53

¹⁴⁴ Human Rights Council (n 114 above) Recommendation 101.54

¹⁴⁵ Human Rights Council (n 114above) Recommendation 101.56

¹⁴⁶ Human Rights Council (n 114 above) Recommendation 101.57

2.5.3 Early marriages

Child marriages in Kenya continue to pose a challenge to the enjoyment of rights by young girls despite legislation being enacted outlawing the practice.¹⁴⁷ The CEDAW Committee expressed its concern that child marriages continue to take place, despite the Children's Act setting the minimum age of marriage at 18 years.¹⁴⁸ It expressed concern that in cases where parents were not married at the time of the child's birth and have subsequently not married, legal responsibility for the upbringing of the child falls solely on the mother.¹⁴⁹

2.6 Infant mortality and maternal mortality

In 2009, maternal mortality rate in Kenya was estimated to be above the Millennium Development Goal (MDGs) target of 147 per 100,000 by 2015, current estimates set the maternal mortality rate at 488 deaths per 100,000 live births.¹⁵⁰ With respect to infant mortality rate, the Kenya Demographic Health Survey showed a decrease in the infant mortality rate from 52 to 39 per 1,000 live births, and a decrease in the under-five mortality rate from 74 to 52 per 1,000 live births.¹⁵¹

According to the Ministry of Health, the MDGs targets for maternal and child health could not be achieved since there were still challenges in coverage and disparities in service delivery.¹⁵² The ministry of health attributed the decline of infant mortality and

¹⁴⁷ The Children's Act

¹⁴⁸ Committee on elimination of discrimination against Women *Concluding comments on 5th and 6th Kenya report to committee on elimination of discrimination against women*(2011) paragraph 43-44

¹⁴⁹ CEDAW (n 148 above) Paragraph 44

¹⁵⁰ Government of Kenya *Kenya Demographic and Health Survey* (2009) 121

¹⁵¹ Government of Kenya (n 150 above) 124

¹⁵² Government of Kenya *Kenya Reproductive, Maternal, New born, Child and Adolescent Health Investment Framework* (2016) 21

children under 5 to the use of mosquito nets, increase in antenatal care, skilled attendance at childbirth, postnatal care, contraceptive use, exclusive breastfeeding practices and a decrease in unmet family planning (FP) needs, as well as overall improvements in other social indicators such as education and access to water.¹⁵³

Due to the far reaching effects of maternal mortality worldwide, countries identified maternal mortality as one of the key challenges in achieving development and agreed on improving maternal health as 1 of the 8 MDGs. It is estimated that 20-30 women suffer serious injury or disability due to complications during pregnancy or delivery.¹⁵⁴ These high rates have persisted despite improvements in other health indicators.¹⁵⁵

Thaddeus and another postulate that while there are numerous factors that contribute to maternal mortality, if prompt, adequate treatment is provided, the outcome will usually be satisfactory; therefore, the outcome is most adversely affected by delayed treatment.¹⁵⁶ The three delays according to Thaddeus and another are (1) delay in the decision to seek care; (2) delay in arrival at a health facility; and (3) delay in the provision of adequate care.¹⁵⁷

According to Kenya's 2008-2009 Demographic and Health Survey,¹⁵⁸ the largest percentage (42%) of women who delivered outside a health facility did so because the facility was too far away or there was no transport to the facility. Comparatively, only 17% of the women cited the cost of delivery as the key barrier. According to a public

¹⁵³ Government of Kenya (n 150 above) 21

¹⁵⁴ Kenya National Commission on Human Rights *Realizing Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?* (2012) 40-41

¹⁵⁵ Kenya National Commission on Human Rights (n 154 above) 41

¹⁵⁶ Thaddeus S 'Too far to walk: Maternal mortality in context, (1994) *Social Science & Medicine* 1091

¹⁵⁸ Government of Kenya (n 150 above) 121

inquiry conducted by Kenya National Commission on Human rights (KNCHR),¹⁵⁹ only 36% of public health facilities offering delivery services had all the basic delivery room infrastructure and equipment needed. Facilities in the rural areas and lower level facilities were found to be particularly ill-equipped.¹⁶⁰

The State has the duty bound to promote, protect and fulfil the rights of the citizens, the State has an obligation to ensure that all persons in Kenya enjoy the highest attainable standard of health¹⁶¹ which includes the right to health care services, including reproductive health care. The Constitution in Article 43(2) provides that a person has the right to emergency treatment, the right to inherent dignity and the right to have that dignity respected and protected (Article 28), the right to access information (Article 35) and the right to life (Article 26).

States are obligated by Article 6 of ICCPR to protect the right to life, in line with General Comment No.6 which further obligates the State take all necessary efforts to increase life expectancy,¹⁶² it is important to note that the State are not only required to refrain from taking any negative action but to take necessary action to protect the right. The African Charter guarantees the right to life 4; the Maputo Protocol also provides in Article 4(1) that every woman shall be entitled to respect for her life. The African Commission on Human and Peoples' Rights has also passed a resolution on maternal mortality which

¹⁵⁹ Kenya National Commission on Human Rights (n 154 above) 42

¹⁶⁰ Kenya National Commission on Human Rights (n 154 above) 43

¹⁶¹ Article 43(1) (a) of the Constitution of Kenya which States that 'every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care'

¹⁶² Human Rights Committee, General Comment No.6

provides that preventable maternal mortality is a violation to the rights to life, health and dignity.¹⁶³

The KSC-UPR recommended enactment of the Reproductive Health Bill in order to reduce maternal and infant mortality rate.¹⁶⁴ The State received and accepted a recommendation made by the Holy See to redouble its efforts to save mother and child.¹⁶⁵

2.7 Sexual orientation, gender identities and expression

The Constitution¹⁶⁶ in Article 27 affirms the equality of all persons before the law and that no one shall be discriminated upon by the State directly or indirectly on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹⁶⁷ The fact that the Constitution does not expressly list sexual orientation as a prohibited ground of discrimination it can be argued that this is covered by the phrase ‘on any ground’ in Article 27 of the Constitution. The rights of an individual including sexual and gender minorities are protected by the expanded Bill of Rights which include; the right to life,¹⁶⁸ equality and freedom from discrimination,¹⁶⁹ human dignity,¹⁷⁰ right to privacy,¹⁷¹ the right to the highest attainable standard of health¹⁷² among other rights.

¹⁶³ Resolution of the African Commission on Human and Peoples’ Rights, adopted on 24 November 2008 in Abuja

¹⁶⁴ Human Rights Council (n 139 above) Paragraph 54

¹⁶⁵ Human Rights Council (n 114 above) Recommendation 101.93

¹⁶⁶ Constitution of Kenya (2010)

¹⁶⁷ Constitution of Kenya (n 166 above) Article 27(4)

¹⁶⁸ Constitution of Kenya (n 166 above) Article 26

¹⁶⁹ Constitution of Kenya (n 166above) Article 27

¹⁷⁰ Constitution of Kenya (n 166 above) Article 28

¹⁷¹ Constitution of Kenya (n 166 above) Article 31

¹⁷² Constitution of Kenya (n 166 above) Article 43

The Penal Code criminalises same sex conduct.¹⁷³ The provisions of the Penal Code are discriminatory and violate the provisions of Article 27 among other provisions of the Constitution. Criminalisation also creates an environment of inequality and is contrary to the provisions of ICCPR¹⁷⁴ which provides in Article 26 for protection and equality of all before the law. The ICCPR list the prohibited grounds which include colour, sex, language, religion, political or other opinion, national or social origin, property or other status.

The African Charter on Human and Peoples' Rights¹⁷⁵ (ACHPR) in Article 2 provides that individuals are entitled to the rights under the ACHPR 'without distinction of any kind' while Article 3 of states that the right of every individual to be treated equally and entitles them to equal protection of the law.

In line with the jurisprudence from the Human Rights Committee, Kenya needs to consider repealing the provisions of the Penal Code that criminalises consensual adult same sex conduct in line with the United Nations Human Rights Committee's in *Toonen v Australia*,¹⁷⁶ where the Committee asserted that sexual orientation is a prohibited ground of discrimination and has urged States to repeal all laws criminalizing homosexuality and to enshrine the prohibition of discrimination on the basis of sexual orientation in their constitutions and other fundamental laws.

The principle of equality and non-discrimination is the foundation for the enjoyment of all rights. This was affirmed by the African Commission on Human and Peoples' Rights in *Zimbabwe NGO Human Rights Forum v Zimbabwe*,¹⁷⁷ by stating that the aim of the principle was to ensure equality in treatment of all individuals irrespective of nationality,

¹⁷³ Penal Code, Chapter 63 Laws of Kenya, Section 165

¹⁷⁴ International Covenant on Civil and Political Rights

¹⁷⁵ African Charter on Human and Peoples' Rights

¹⁷⁶ *Toonen v Australia*, Communication No. 488/1992

¹⁷⁷ *Zimbabwe NGO Human Rights Forum v Zimbabwe* 245/02 Paragraph 79

sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

Despite the protection of privacy afforded by the ICCPR in Article 1, sexual minorities in Kenya continue to be subjected to arbitrary and unlawful interference of their privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. The right to privacy is also protected by the Kenyan Constitution.¹⁷⁸In *Toonen*,¹⁷⁹ the UN Human Rights Committee held that it is undisputed that adult consensual activity in private is covered by the concept of privacy. The Committee also held that invasion of privacy can amount to discrimination where such interference makes distinctions between individuals' ability to exercise their right to privacy on the basis of sexual activity, sexual orientation or gender identity. Freedom of expression and association is central to the enjoyment and realisation of human rights, due to the fact that the conduct by sexual minorities is often criminalized. This therefore opens them up for discrimination and violence despite the fact that right to freedom of expression is protected by Article 19 of the ICCPR and Article 9 of the African Charter and Article of the Kenyan Constitution. The continued criminalisation of adult consensual sexual conduct has a negative effect on the enjoyment of the highest attainable standard of health; this has an impact on the availability, accessibility, acceptability and quality of health services for lesbians, gay men, bi-sexual or trans-gender people.

The joint submission made by the stakeholders recommended that Kenya brings its legislation into conformity with its international human rights obligations by repealing all provisions which criminalise sexual activity between consenting adults of the same

¹⁷⁸ Constitution of Kenya (n 170 above)

¹⁷⁹ *Toonen v Australia* (n 176 above)

sex.¹⁸⁰ Kenya Stakeholders Coalition on the Universal Periodic Review (KSC-UPR) recommended that Kenya pass a comprehensive anti-discrimination law affording protection to all individuals irrespective of their sexual orientation or gender identity.¹⁸¹ The Human Rights Council made recommendations to Kenya to take concrete steps to provide for the protection and equal treatment of lesbian, gay, bisexual and transgender persons,¹⁸² and to decriminalize same-sex activity between consenting adults.¹⁸³ The State was urged to repeal all legislative provisions which criminalize sexual activity between consenting adults,¹⁸⁴ and to decriminalize homosexuality by abrogating the legal provisions currently punishing sexual relations between consenting individuals of the same sex.¹⁸⁵ The State was further urged to subscribe to the December 2008 General Assembly Declaration on sexual orientation and human rights.¹⁸⁶

2.8 Chapter Conclusion

Kenya submitted its UPR report to the HRC and submitted itself for review by the member States; in the preparation of the State report the Kenya adopted a highly consultative process before and after the review by the HRC. Kenya accepted most of the recommendations made to it by the United Nations State parties and only rejected 1 recommendation on decriminalisation of consensual same-sex relations. The incidence of violence against women is generally high in Kenya with many cases being unreported and when they get reported the security agencies hardly take action by conducting credible investigations that can lead to prosecution of offenders. Despite the fact that Kenya has enacted enabling legislation and put in place policies to address violence

¹⁸⁰ Human Rights Council (n 139 above) Paragraph 32

¹⁸¹ Human Rights Council (n 139 above)

¹⁸² Human Rights Council (n 114 above) Recommendation 103.5

¹⁸³ Human Rights Council (n 114 above) Recommendation 103.5

¹⁸⁴ Human Rights Council (n 114 above) Recommendation 103.5

¹⁸⁵ Human Rights Council (n 114 above) Recommendation 103.5

¹⁸⁶ Human Rights Council (n 114 above) Recommendation 103.5

against women in general and female genital mutilation and early marriages in particular the enforcement of the law has remained weak therefore negating the gains made by passage of policy and legislation. The anti-FGM Board for example has to be resourced for it to function optimally and help in curbing the incidences of FGM.

The infant and maternal mortality rates are still unacceptably high with Kenya missing the MDG target on reduction of infant mortality this could be attributed to the slow uptake of the free maternity cover by women and the lack of accessibility of health facilities by most women. The maternal mortality continues to be high due to the fact that many women are not able to access contraceptives leading to unintended pregnancies that cannot be easily terminated due to the fact that Kenya does not have in place abortion guidelines to give effect to the permissive nature of the abortion laws.

Sexual and gender minorities continue to face discrimination in Kenya. The denial of registration of these organisation demonstrates that the State has not been keen on protecting the rights of sexual and gender minorities, the Courts have however, been keen in ensuring that sexual and gender minorities enjoy their rights.

CHAPTER 3: IMPLEMENTATION OF UPR RECOMMENDATIONS

The first part of this Chapter discusses the role of Kenya in formulating the framework for implementing the accepted recommendations in relation to sexual, reproductive rights and the measures taken to implement the recommendations. The second part sets out the basis for analysing whether Kenya has implemented the accepted recommendations, the basis being the periodic reports prepared by the Kenya Stakeholder Coalition on Universal Periodic Review (KSC-UPR) and the mid-term report submitted by Kenya to the Human Rights Council (HRC). The Chapter then proceeds to analyse the extent of implementation of recommendations with respect to: (i) violence against women; (ii) reduction of infant and maternal mortality and (iii) and the rights as it relates to sexual orientation, gender identity and expression (SOGIE). The last part of the Chapter draws conclusions with respect to the extent of implementation of recommendations accepted by Kenya.

3.1 Role of the State in the implementation of UPR recommendations

The onus of implementing the Universal Periodic Review (UPR) recommendations received and accepted, lies with the State through its agencies. The State is expected to put in place measures to ensure that the recommendations received are not only implemented but that there are mechanisms in place for monitoring the progress of implementation. It must be noted that while the State is not obliged to implement ‘noted’ recommendations, the State in the subsequent review is expected to illustrate the measures that it has put in place to implement the accepted recommendations to ensure that the human rights situation on the ground is improved. Non-implementation will thus have clear consequences.¹⁸⁷

¹⁸⁷ Human Rights Council (n 48 above)

Upon review by the Human Rights Council on 6 May 2010, Kenya accepted 143 recommendations but stated that it will ‘consider’ the seven outstanding recommendations.¹⁸⁸ Upon return to Geneva, on 22 September 2010, for the adoption of the outcome report on the UPR, Kenya expressed its willingness to accept a further six recommendations. It rejected one recommendation, dealing with the decriminalisation of same-sex unions.¹⁸⁹ The acceptance of the recommendation by the State that it had expressed were under consideration clearly demonstrates the nature and spirit of the UPR process as a process that involves comprehensive consultation and consensus building.¹⁹⁰ Upon return to Kenya, the State through the Department of Justice and Office of the Attorney General held wide consultative meetings¹⁹¹ to bring about consensus on the recommendations that did not initially enjoy the support of Kenya.¹⁹² The consultative process initiated by the Kenya, provided an additional platform for non-State actors after the review to lobby it to accept some of the recommendations that had initially not enjoyed the support of Kenya.¹⁹³

It must be noted that the review of Kenya by the HRC has to be appraised within the context of the constitutional making process that Kenya was undergoing in the year 2009/10. Most of the issues that the HRC raised that were considered controversial by the Kenyan government as going against culture and morality were the same issues that had been canvassed during the constitutional making process; the issues on same-sex relations, abortion and death penalty were the most prominent and were deemed by the

¹⁸⁸ Government of Kenya (n 79 above) 1

¹⁸⁹ Human Rights Council (n 96 above) Recommendation 103.5

¹⁹⁰ Human Rights Council Resolution 5/1

¹⁹¹ Government of Kenya (n 79 above) 2

¹⁹² Kenya National Commission on Human Rights *Accounting for human rights protection under the UPR* (2011) 28

¹⁹³ Kenya National Commission on Human Rights (n 192 above) 28

State as not enjoying the support of by majority of Kenyans given their religious, moral and cultural leanings.¹⁹⁴

Despite the fact that the State has the onus in ensuring that the UPR recommendations are implemented, other actors also have a role to play in ensuring that some of the recommendations are implemented. For example, the HRC made a recommendation directing the Kenya National Commission on Human Rights to work with the State in addressing the issue of death penalty.¹⁹⁵ In responding to the recommendations received, a State under review can seek for technical assistance from more advanced States in areas that they deem that they lack capacity. The more developed States would offer technical support to a developing State especially in areas where the developed State has expertise.¹⁹⁶ This was demonstrated Norway in 2015, after it had made a recommendation to Kenya on the need to develop a national action plan on business and human rights, the Norwegian embassy in Nairobi funded a national initiative to develop a national action plan on business and human rights.¹⁹⁷

The State, with the support of non-State actors, notably, the Kenya Stakeholders Coalition on the Universal Periodic Review(KSC-UPR),¹⁹⁸ developed a UPR implementation plan¹⁹⁹ to action, implement, monitor and report on the progress of implementation of the recommendations received and accepted by the State.²⁰⁰ The

¹⁹⁴ Human Rights Council (n 96 above) 8

¹⁹⁵ Human Rights Council (n 96 above) Paragraph 104

¹⁹⁶ Human Rights Council (n 48 above)

¹⁹⁷ The National Action Plan on business and human rights will be developed by the Office of the Attorney General in collaboration with KNCHR

¹⁹⁸ The Kenya Stakeholders Coalition on the Universal Periodic Review is a coalition of 31 civil society organisations who work in various thematic areas but joined together to engage the Human Rights Council and help develop an implementation plan of the accepted UPR recommendations.

¹⁹⁹ National implementation plan was developed in March 2011 for the effective implementation of the recommendations made to Kenya under the Universal Periodic Review Mechanism

²⁰⁰ Government of Kenya (n 79 above) 4

implementation action plan was therefore a negotiated document between the State and non-State actors, consensus was important given that at the mid-term the State and the non-State actors would be expected to independently give an assessment of the implementation with respect to the accepted recommendations.²⁰¹ The UPR implementation plan had various columns which included the recommendation number,²⁰² the recommending State,²⁰³ the recommendation,²⁰⁴ the indicator,²⁰⁵ the ministry or department responsible,²⁰⁶ other actors,²⁰⁷ and the time frame for implementation.²⁰⁸

Despite the fact that the recommendations made to Kenya were 150 in number, most of them related to nearly the same issues and therefore most of them could easily be clustered into themes such as civil and political rights, institutional reforms, women and children, rights of minorities, right to health and rights of persons with disabilities.

The recommendations related to sexual, reproductive health and rights were cross-cutting and were therefore not combined into a single cluster. This factor is augmented by the fact that rights are indivisible and interrelated. It is however, important to note that the recommendations made on the theme of sexual reproductive health and rights were repetitive and interrelated. In the analysis of the implementation of these rights a generic approach will be taken based on the broader theme and not an analysis of each recommendation to determine if it has been implemented.

²⁰¹ Government of Kenya (n 79 above)

²⁰² Kenya National Commission on Human Rights *Accounting For Human Rights Protection Under The UPR: The Difference Kenya's Stakeholders Made* (2011)

²⁰³ Kenya National Commission on Human Rights (n 202 above) 28

²⁰⁴ Kenya National Commission on Human Rights (n 202 above)

²⁰⁵ Kenya National Commission on Human Rights (n 202 above)

²⁰⁶ Kenya National Commission on Human Rights (n 202 above)

²⁰⁷ Kenya National Commission on Human Rights (n 202 above)

²⁰⁸ Kenya National Commission on Human Rights (n 200 above)

In analysing the extent to which the State has implemented ‘accepted’ recommendations in the sphere of sexual, reproductive health and rights, recommendations clustered in three themes will be analysed. This will be with respect to: violence against women; Infant and maternal mortality; and the rights related to SOGIE.

3.2 Basis for analysis

In line with the provisions of the Human Rights Council resolution 5/1, Kenya submitted its mid-term report to the Human Rights Council in September 2012. The national midterm report prepared and submitted by the State set out the measures that the State had put in place to implement all the accepted recommendations. The Kenya Stakeholders’ Coalition on the UPR based its yearly reports on the agreed upon implementation plan which detailed the implementation of the ‘accepted’ recommendations. These reports track the implementation of the recommendations. The Coalition published three UPR monitoring reports for the period covering 2011 to 2013 appraising the State performance with respect to the UPR recommendations. These reports will therefore form the basis of the analysis on the implementation of the ‘accepted’ recommendations.

In analysing implementation of recommendation this study borrows with modifications categories identified by Viljoen and Louw in their study on compliance with the decisions of the African Commission in which they identified five broad categories of compliance which include: full compliance, non-compliance, partial compliance, situational compliance and unclear cases.²⁰⁹ According to the study full compliance

²⁰⁹ F Viljoen & L Louw ‘State compliance with the recommendations of African Commission on Human and Peoples’ Rights 1994-2004’ (2007) 101 *American Journal of international law* 1

means that the State has shown commitment to comply with all recommendations;²¹⁰ non-compliance is a situation where the State has not implemented the recommendation and has challenged them on factual or legal basis.²¹¹ Partial compliance signifies instances in which the State has implemented some but not all the aspects of the recommendations.²¹² Situational compliance connotes both full and partial compliance and refers to instances in which positive changes occurred but not as a result of deliberate action by government action on the recommendation but due circumstances within the State that lead to compliance.²¹³ The study noted that situational compliance does not mean that the State complied.

This study will, however, adapt and modify the classification alluded to in the study by Viljoen and Louw. The classifications adopted for this study are: full compliance, partial compliance and non-compliance. Full compliance in the context of this study connotes that the State has implemented fully the recommendations received either through its own initiative or through direction by courts of law. Partial compliance denotes that the State has partially implemented the recommendations by action such as putting in place legislative and policy framework but with lack of measures aimed at implementation of such frameworks. Non-compliance means that the State has not taken any action to implement the recommendations.

²¹⁰ Viljoen(n 209 above) 5

²¹¹ As above

²¹² Viljoen(n 209 above) 6

²¹³ As above

3.3 Violence against women

3.3.1 Domestic and gender based violence

According to the Kenya National Health and Demographic Health survey, 1 in 5 Kenyan women will experience sexual violence in their lifetime.²¹⁴ According to the Coalition on Violence against Women (COVAW), an estimated 45% of Kenyan women between the ages of 15 and 49 have experienced physical or sexual violence.²¹⁵ The victims often face re-victimization when reporting their cases as authorities often engage in harmful behaviour that diminishes the victims' confidence in the judicial process.²¹⁶

In 2011, the KSC stated that the prevalence of gender based violence stood at 39 percent. It was KSC's assessment that there was a general lack of legislative framework to deal with gender based violence. The Family Protection Bill had not been enacted though it had provisions for protection orders to be made by the court. However, it did not criminalise domestic violence, it had been hoped that since the Bill covered violence in all sphere it would specifically criminalise domestic violence especially within the family setting.²¹⁷ KSC reported that despite gender based violence desks being established, the desks were being manned by unskilled and untrained officers and were therefore ineffective in dealing with sexual and gender based violence (SGBV) cases that are reported to them.²¹⁸

A study conducted in 2009 in Nairobi with respect to gender desks illustrated that out of 52 percent of the people who reported gender violence considered police not helpful, 39

²¹⁴ Government of Kenya (n 150 above) 98

²¹⁵ Coalition on Violence against Women *Baseline survey* (2013) 28

²¹⁶ Coalition on Violence against Women (n 215 above) 29

²¹⁷ Kenya National Commission on Human Rights *Universal Periodic Review: Annual progress report* (2013)

²¹⁸ Kenya National Commission on Human Rights (n 217 above) 63

percent of those interviewed Stated that police were reluctant to record Statements while 28 percent felt humiliated and handled without courtesy and dignity.²¹⁹

The police in Kenya who receive and investigate cases have been blamed for not responding adequately to reported cases of violence against women. In instances where cases have been reported, victims have felt that during the process of reporting the officers manning the report desks have not been sensitive to the issue being reported and in the manner in which they deal with the persons reporting the violation.²²⁰ The negative treatment of victims at the police station has been attributed to lack of sensitisation of the police officers about the sensitivity of dealing with cases of violence against women. The improper treatment and handling of cases of violence against women has had a negative impact, the victims in most cases do not wish to go back to the police station to follow up on the reported cases.²²¹

The State in the midterm report Stated that Vision 2030 has articulated the commitment to reduce gender based violence by training and increasing the capacity of police officers to handle cases of violence and to eliminate harmful cultural practices such as female genital mutilation.²²²

The prosecution of violence against women cases have often resulted in acquittals. This has been attributed to the lack of capacity of prosecutors to properly and diligently prosecute and present relevant evidence in cases of violence against women.²²³ The State in response to the lack of capacity of the prosecutors established the Sexual Offences,

²¹⁹ Institute of Economic Affairs-Kenya *status of gender desks at police stations in Kenya* (2009)

²²⁰ Agency for Cooperation and Research in Development *Pursuing justice for sexual and gender based violence in Kenya* (2010) 17

²²¹ Agency for Cooperation and Research in Development (n 220 above) 18

²²² Government of Kenya (n 79 above) 13

²²³ Heinrich Boll Stiftung 'Kenya faces challenges towards fight against gender violence' (2014) 1

Gender Violence and Victim's Rights Section within the Office of the Director of Public Prosecution (ODPP) and appointed Special Prosecutors (advocates with expertise) to prosecute selected complicated Sexual and Gender Based Violence cases.²²⁴ The State through the ODPP trained and sensitised investigators, police prosecutors and judicial officers on sexual and gender based violence cases throughout the country aimed at enhancing capacity of law enforcement officers.²²⁵

Generally, access to healthcare in Kenya is a challenge women who have been violated face additional challenges due inaccessibility of healthcare system due to the perception by some healthcare providers that there is no urgency in attending to victim of violations. The establishment of gender recovery centres are aimed at addressing these challenges and provide effective and prompt services to victims of violations.²²⁶ The KSC indicated that the gender recovery centres in Kenya were inadequate to provide support to survivors of SGBV and that the support services to victims of SGBV in Kenya are largely provided for by non-State actors.²²⁷

The State in the midterm report conceded that sexual exploitation of women and girls was a major concern in Kenya²²⁸ it stated it had formulated a reference manual that expounds the Sexual Offences Act and sets standards on best practices.²²⁹ Regulations to the Sexual Offences Act to aid in the effective implementation of the Act and to foster and enhance inter-agency co-operation and collaboration mechanisms in the fight against Sexual and Gender Based Violence were also developed.²³⁰ It was further Stated by the

²²⁴ Government of Kenya (n 79 above) 18

²²⁵ Government of Kenya (n 79 above) 21

²²⁶ Heinrich Boll Stiftung (n 223 above) 2

²²⁷ Kenya National Commission on Human Rights *Universal Periodic Review: Annual progress report* (2011) 38

²²⁸ Government of Kenya (n 79 above) Paragraph 35

²²⁹ Government of Kenya (n 79 above) Paragraph 31

²³⁰ Government of Kenya (n 79 above) 31

State it had with the assistance of UNICEF developed a national policy on gender based violence which is expected to provide guidance on eliminating SGBV with particular reference to violence against girls and women and to provide procedures and specifies systems and guidelines for institutions and services.²³¹

In 2012-2013, the KSC-UPR Stated that the State did not record much progress in terms of implementation of the UPR recommendations with respect to protection of women against violence. The enactment of legislation that would protect women from violence during and after the dissolution of marriages had not been enacted.²³²

The distribution of property upon dissolution of a marriage between spouses in 2013 was governed by the provisions of the 1882 Married Women's Property Act,²³³ which was applicable in Kenya by virtue of the provisions of Section 3(1)(c) of the Judicature Act.²³⁴ The application of the 1882 Married Women's Property Act in Kenya had an effect of denying women a share of the matrimonial property unless they could demonstrate that they directly and substantially contributed to the acquisition of the matrimonial property.²³⁵ In the case of *Echaria v Echaria*,²³⁶ the Court of Appeal negated the principle that a woman is entitled to matrimonial property by demonstrating constructive trust²³⁷ or indirect contribution to the acquisition of the matrimonial

²³¹ Government of Kenya (n 79 above) 33

²³² Kenya National Commission on Human Rights (n 227 above) 39

²³³ The Matrimonial Property Act

²³⁴ Judicature Act, 1967 Chapter 8 Laws of Kenya provides in section 3(1)(c) that the doctrines of equity and statutes of general application in force in England on the 12 August 1897 would be applicable in Kenya

²³⁵ *Echaria v Echaria* was a departure from the law as settled in *Kivuithu v Kivuithu* where the Court of Appeal held that where the property acquired during the subsistence of a marriage is registered in the joint names of spouses, the law assumes that such property is held by parties in equal shares

²³⁶ *Peter Mburu Echaria v Priscilla Njeri Echaria* (2007) eKLR

²³⁷ *Petit v Petit* (1970) AC 777

property²³⁸ and held that the only basis for allowing division of matrimonial property was through financial contribution to the property.²³⁹

The respondent in the *Echaria* case²⁴⁰ filed a communication with the African Commission on Human and Peoples' Rights alleging a breach of the provisions of the African Charter on Human and Peoples' Rights. The communication was however deemed by the African Commission to be inadmissible for failing to comply with the provisions of Article 56(6) of the African Charter.²⁴¹ In an attempt to cure the unjust application of the outdated 1882 Married Women's Property Act, as demonstrated in *Echaria v Echaria* case,²⁴² the State enacted the Matrimonial Property Act to provide clarity as to the definition of contribution,²⁴³ the definition of matrimonial property²⁴⁴ and the mode of distribution of matrimonial property.²⁴⁵ The Protection against Domestic Violence Act²⁴⁶ was assented to on 14 May 2015 and commenced on 4 June 2015, the Act defines violence to include child marriage; female genital mutilation; forced marriage; forced wife inheritance; sexual violence within marriage and defilement.²⁴⁷

3.3.2 Early marriages

With respect to early marriages, Kenya Stated that based on the provisions of Article 45(2) of the Constitution only an adult is allowed marry a person of the opposite sex

²³⁸ *Petit v Petit* (n 237 above)

²³⁹ *Kivuthu v Kivuthu* 1991 2 KAR 241

²⁴⁰ *Peter Mburu Echaria v Priscilla Njeri Echaria* (n 236 above)

²⁴¹ *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the protection of Human Rights) v Kenya* Communication 375/09

²⁴² *Peter Mburu Echaria v Priscilla Njeri Echaria* (n 236 above)

²⁴³ The Matrimonial Property Act (n 233 above)Section 2

²⁴⁴ The Matrimonial Property Act (n 2313above)Section 6

²⁴⁵ The Matrimonial Property Act (n 233 above)Section 7

²⁴⁶ Protection against Domestic Violence Act

²⁴⁷ Protection against Domestic Violence Act (n 246 above)Section 3

based on the consent of parties.²⁴⁸ The State further Stated that the Age of Majority Act in section 2 provides that a person shall be of full age and cease to be under any disability by reason of age on attaining the age of 18 years. As of 2013, the Marriage Bill²⁴⁹ underwent the first reading on 16 July 2013; the Bill set the minimum age of marriage at 18 years²⁵⁰ and made it an offence punishable by a term not exceeding 5 years or a fine not exceeding one million shillings or both to a person who marries a person under the age of 18 years.²⁵¹ The Marriage Act was subsequently enacted in 2014, the Act in section 4 provides that ‘a person shall not marry unless that person has attained the age of eighteen years.’

With respect to child trafficking the State Stated that it had put in place National Plan of Action (NPA) for Combating Human Trafficking 2008-2013 which focuses on prevention, awareness raising, victim protection, legislative reform, law enforcement co-operation, training and exchange of information.²⁵²

UNICEF Stated that despite the efforts made so far, child prostitution and the trafficking of children were still prevalent and there were significant numbers of street children who were vulnerable to various forms of violence and lacked appropriate care and protection.²⁵³

²⁴⁸ Government of Kenya(n 79 above) 14

²⁴⁹ The Marriage bill sought to guarantee the rights of all parties to the marriage at the time of marriage, during marriage and after the dissolution of the marriage

²⁵⁰ The Marriage Bill,2013 Section 3(2)

²⁵¹ The Marriage Bill (n 250 above) Section 4

²⁵² Government of Kenya (n 79 above) 35

²⁵³ Government of Kenya (n 79 above) 34

With respect to the rights of the child the State in its midterm report Stated that it had commenced on a holistic review of the children's Act to align it with the constitutional principles and international standards.²⁵⁴

The State Stated that it had started the review of the Children's Act through an amendment Bill which proposed changes such as raising the age of criminal responsibility from eight to twelve years. Despite these assertions by the State not much progress was made with respect to the passage of the Children (Amendment bill); a new proposed Children's Act was only proposed in August 2016.

Kenya stated that it enacted the Counter Trafficking in Persons Act in 2010 which domesticated the Palermo Protocols.²⁵⁵ The Act deals exclusively with the issue of trafficking and all its elements. Although enacted in 2010, the Act was only commenced in 2012 after children organisations moved to court to have the State compelled to commence the Act.²⁵⁶ It provides a framework within which the victims of trafficking can be protected. It further stated that it has held campaigns to create awareness among hotels and tour operators on the evils of child prostitution and child sex tourism. Hoteliers and other actors in the tourist sector have been encouraged to sign the Code of Conduct against Child Prostitution.²⁵⁷

The State stated that the Act reinforces the Employment Act of 2007, which outlaws child trafficking for the purposes of sexual exploitation, promoting child sex tourism, child prostitution and child pornography. The minimum penalty for child trafficking is a

²⁵⁴ Government of Kenya (n 79 above) 36

²⁵⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and Protocol against the Smuggling of Migrants by Land, Sea and Air

²⁵⁶ *Cradle Foundation v Minister for Gender Children and Social Development & anor*

²⁵⁷ Government of Kenya (n 79 above) 35

fine and 10 years of imprisonment. The minimum penalty for sex trafficking is a fine, 15 years of imprisonment, or both.²⁵⁸

3.3.3 Female genital mutilation

With respect to FGM the State reported in the midterm report that it had enacted the Prohibition of Female Genital Mutilation Act, 2011, which criminalizes the practice of FGM. The Act distinguishes female circumcision from medical, surgical procedures connected to child birth and surgery that are essential for the physical or mental health of a woman as well as surgical procedures performed for therapeutic purposes.²⁵⁹ In a bid to ensure that the public is educated on the harmful effects of FGM the Act establishes an anti-FGM Board with the core mandate of designing, supervising and coordinating public awareness programmes against the practice of FGM.²⁶⁰ Despite the enactment of Prevention of Genital Mutilation Act in 2011, the prevalence of FGM in Kenya stands at 27 percent while child marriages stand at 26 percent. Most communities who practice FGM in Kenya view it as a rite of passage to womanhood and a precursor to marriage.²⁶¹ It should therefore not come as a surprise that although KSC-UPR acknowledged the fact that the State had made progress in the enactment of the Prohibition of Female Genital Mutilation Act, establishing an anti-FGM Board and a national policy and action plan, It expressed the view that the practice still persisted due to the fact that the State has not fully applied the provisions of the Act to eradicate the practice of FGM.²⁶²

Despite the measures that have been put in place to eradicate FGM, there are challenges that have hampered the eradication of FGM. First, law enforcement agencies are often

²⁵⁸ Government of Kenya (n 79 above) 36

²⁵⁹ Prohibition of Female Genital Mutilation Act, Section 2

²⁶⁰ Prohibition of Female Genital Mutilation Act (n 259 above) Section 3

²⁶¹ Government of Kenya (n 150 above) 38

²⁶² Kenya National Commission on Human Rights (n 227 above) 23

under resourced and lack the capacity to effectively investigate and prosecute cases of FGM and child marriages. While the creation of the anti-FGM Board is welcome it still requires additional funding and resources to effectively carry out its mandate.²⁶³ Second, the harmful culture is deeply rooted and has not changed with the advocacy that has been undertaken, the anti-FGM Board has recorded plausible results in some parts of the Kenya, more work in terms of sensitization and design of alternative rites of passage would need to be intensified especially in the indigenous and pastoralist communities.²⁶⁴

3.4 Maternal mortality

In the midterm report, the State Stated that in 2007 it enacted a National Reproductive Health Policy with the aim of improving the reproductive health status of all by increasing equitable access to reproductive health services by improving quality, efficiency and effectiveness of service delivery at all levels and improving responsiveness to the client needs. The State formulated the National Reproductive Health Strategy to give effect to the National Reproductive Health Policy.²⁶⁵

As of June 2013 the maternal mortality rate (MMR) in Kenya stood at 488 deaths per every 100,000 live births per year, largely because women do not always give birth under the care of skilled health providers.²⁶⁶ In a bid to ensure that many mothers give birth in hospital, the State started a programme on free maternity care to ensure that all expectant mothers would be able to access quality maternal healthcare which would lead to a

²⁶³ Heinrich Boll Stiftung Female Genital Mutilation: A fight of Wills (2015) 1

²⁶⁴ H Oloo & Others *Female genital mutilation practices in Kenya: The role of alternative rites of passage* (2007) 16

²⁶⁵ Government of Kenya (n 79 above) 50

²⁶⁶ Government of Kenya (n 150 above) 121

reduction in maternal mortality rates in Kenya.²⁶⁷ It also increased allocation for maternity from 3.46 billion to 4 billion Kenya shillings which in turn has seen the number of mothers delivering babies in hospital increase from 44 to 66 per cent.²⁶⁸ Despite this assertion there have been persistent complaints by county governments that the national government has not been releasing funds meant for free maternity in a timely manner therefore negatively impacting the gains made.²⁶⁹

The maternal deaths caused by abortion in Kenya remain high, at 360 maternal deaths per 100,000 live births annually.²⁷⁰ The lack of abortion guidelines providing clarity on post-abortion care (PAC) were withdrawn by the State, therefore compounding the problem.²⁷¹ Doctors and health care providers are reluctant to offer post abortion care services for fear of harassment and arrest.²⁷² This has contributed to an increase of unsafe abortion and lack of post abortion care therefore contributing to an increase in maternal mortality. For example, in the case of *Republic v John Nyamu & 2 others*,²⁷³ a doctor and his members of staff were charged with the offence of murder contrary to Section 203 as read with Section 204 of Penal Code (Cap.65 of Laws of Kenya). The doctor a gynaecologist was running a clinic that offered gynaecological services which included post-abortion care but when 2 fetuses were found near his clinic he was charged in court. The High Court however, found no evidence against any of the three accused persons at the close of the prosecution case and was therefore not found guilty. The State must therefore endeavor to put in place abortion and post abortion guidelines, it must

²⁶⁷ Kenya National Commission on Human Rights *Implementing free maternal health care in Kenya* (2013) 3

²⁶⁸ Kenya National Commission on Human Rights (n 267 above) 4

²⁶⁹ O Omariba *Contribution of Science-policy cafe to a shift in Kenya's free maternity services Policy* (2016) 2

²⁷⁰ Guttmacher Institute *Abortion and Unintended Pregnancy in Kenya* (2012) 1

²⁷¹ Centre for Reproductive Rights *In harm's way: The impact of Kenya's restrictive abortion law* (2010) 34

²⁷² Centre for Reproductive Rights (n 263 above) 34

²⁷³ *Republic v John Nyamu & 2 others* [2005] eKLR <http://kenyalaw.org/caselaw/cases/view/11246/>

upscale access to contraceptives and release funds for free maternity to the county hospitals in a timely manner.

3.5 Protection of SOGIE rights in Kenya

Despite Kenya not accepting recommendations on SOGIE rights, it accepted a recommendation on the enactment of anti-discrimination legislation.²⁷⁴ There was however not much progress recorded between the period in which Kenya was reviewed in May 2010 and December 2016 in terms of the enactment of a strong anti-discrimination legislation. The State did not even make an attempt to put in place legislation to deal with discrimination based on all the grounds provided for under the provisions of Article 27 of the Constitution.

On the issue of the SOGIE recommendation, specifically, Kenya has not taken any steps to even acknowledge nor discuss the issues of trans-gender and intersex persons in Kenya. The absence of such a discussion impedes any meaningful engagement. Intersex persons in Kenya have not been recognised in law; they face difficulty in obtaining identification documents such as birth certificates and national identity cards. This means that they are unable to vote, open bank accounts and even gain entry into university as identity documents are pre-requisite for admission. The lack of recognition of intersex persons in Kenya as a category that requires protection has led to the violation of the rights of intersex persons in the spheres of education and health among others.

²⁷⁴ Human Rights Council (n 115 above) Recommendation 103.5

In *Richard Muasya v The Attorney General other*,²⁷⁵ the High Court declined the request for a third gender (intersex) to be introduced in Kenyan law. Richard Muasya, an intersex person, was being held in a male prison where he had been sexually harassed by inmates and staff. The Court awarded a sum of 500,000 Kenyan shillings for inhuman and degrading treatment. However, the court refused to acknowledge inter-sex as a third gender, ruling that this would open the ‘floodgates’ to homosexuality which is illegal in Kenya.²⁷⁶

In *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others*,²⁷⁷ the High Court of Kenya ordered the Attorney General to submit to the Court within 90 days of the judgment information related to the organ, agency or institution responsible for collecting and keeping data related to intersex children and persons, generally. The Court further ordered the Attorney General to file a report to the Court within 90 days on the status of a statute regulating the place of intersex persons as a sexual category and guidelines and regulations for corrective surgery for intersex persons. Despite its assurance of non-discrimination against anyone in Kenya, the State has demonstrated that its pronouncements of non-discrimination is mere rhetoric and is not in consonance with its practice, when it for example denied the registration of the National Gay and Lesbian Commission (NGLC), a nongovernmental organisation. The organization had to challenge the refusal to register the organisation by giving reasons that the organisation was likely to corrupt the morals of others in Kenya. Despite the High Court in Kenya affirming the rights of LGBTI to association and recognition and for the registration of NGLC, the State appealed against the judgment. This action by the

²⁷⁵ https://archive.org/stream/RichardMuasyaV The Attorney General Others/MuasyaJudgment_djvu.txt

²⁷⁶ *Richard Muasya v The Attorney General other* (n 275 above) Para 23

²⁷⁷ *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR <http://kenyalaw.org/caselaw/cases/view/104234/>

State seems to be its mode of operation since it had initially refused the registration of Trans-Gender Education Advocacy Organisation (TEA)²⁷⁸ on the same grounds advanced for the refusal of the registration of the LGBTI organisation. The Courts nonetheless ordered the State to register the transgender organisation.²⁷⁹ The government has appealed the decision ordering it to register the LGBTI organisation.²⁸⁰

The criminalisation of consensual same-sex relationships in Kenya has restricted the enjoyment of rights of LGBTI persons in Kenya. Lesbians, gays and bisexual people still suffer human rights violations including discrimination and stigma, exclusion from decision making processes, limited access to sexual reproductive health services, and lack of protection from STIs and HIV and AIDS as well as lack of recognition from the society of their existence.²⁸¹

In terms of legislative reform, the State has not been keen on taking into consideration the submissions and suggestions made by organisations including those that advance the rights of intersex persons in Kenya. For example, the refusal by the State to undertake law reform to address the concerns of transgender persons has led to the group filing suits in the courts to assert their rights. In *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3*

²⁷⁸ *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others* [2014] eKLR

²⁷⁹ *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others* [2014] eKLR

²⁸⁰ The State has appealed against the decision of the High Court in *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others*, the case is pending before the Court of Appeal

²⁸¹ Kenya National Commission on Human Rights (n 152 above) 192

others,²⁸² a non-governmental organisation moved to court to compel the NGO Board and Registrar of Societies to register the transgender organisation, after the organisation had been denied registration. The High Court ordered that the organisation be registered. In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*,²⁸³ an intersex person moved to court to compel the Kenya National Examination Council to change the gender mark in her certificate. The court ordered the Examination Council to issue a certificate to the applicant without a gender mark within 45 days.

The Court further asserted the right of lesbians, gays and transgender persons to register and form an association without hindrance. The High Court in *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others*,²⁸⁴ however, pronounced itself on the issue of the right to assembly and registration an organisation of lesbian, gay and transgender persons and Stated that the Board had infringed the petitioner's freedom of association in refusing to accept the names that had been proposed for registration of the organisation. The Board was therefore compelled to register the organisation.

While the State has not implemented the recommendation that it accepted, the courts have been helpful in advancing and protecting SOGIE rights in Kenya, therefore ensuring that the State does not infringe on SOGIE rights.

3.6 Chapter Conclusion

²⁸² *Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others* [2014] eKLR <http://kenyalaw.org/caselaw/cases/view/100341/>

²⁸³ *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR <http://kenyalaw.org/caselaw/cases/view/101979/>

²⁸⁴ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR <http://kenyalaw.org/caselaw/cases/view/108412/>

The Chapter dealt with implementation of accepted recommendations by Kenya. Kenya put in place an implementation framework to implement accepted recommendations, the plan was developed with the assistance of other partners such as KSC-UPR through a consultative process taking into consideration that while it is the responsibility of the State to implement the accepted recommendations other actors have a role in monitoring the implementation hence the need to include them in the preparation of the implementation plan. Kenya in demonstrating the progress of implementation of the accepted recommendations in line with the implementation plan submitted a midterm report on 10 September 2012 to the HRC detailing the measures that it had undertaken to implement the accepted recommendations. KSC-UPR also prepared yearly reports on what they viewed to have been the progress made by Kenya in the implementation of the accepted recommendations. The midterm report submitted by Kenya and the periodic reports developed by KSC-UPR were the basis for analysing the extent of implementation of the accepted recommendations by Kenya. With regards to violence against women Kenya made progress in the implementation of accepted recommendations in the context of legislative enactments such as the Protection against Domestic Violence Act, the Sexual Offences Act, the Marriage Act, the Age of Majority Act, the Children's Act and the Female Genital Mutilation Act. Kenya made progress with respect to the establishment of more gender recovery centres and training of security agencies on dealing with gender and sexual violence therefore affording redress to victims of violence. With respect to reduction of infant and maternal mortality, Kenya put in place a raft of measures such as the introduction of free maternity care and an increase in budgetary allocation to the health ministry from 3.46 billion Kenya shillings to 4 billion Kenya shillings in 2013. The measures put in place resulted in an increase of women giving birth in hospital from 44 percent to 66 percent, this had a positive impact

in improved healthcare for pregnant women and children born in health facilities. The adoption of National Reproductive Health Strategy to give effect National Reproductive Health Policy had a positive impact in improving access to reproductive health care by women. Kenya did not implement the recommendation on de-criminalisation of consensual same-sex relations, the High Court however, made several rulings affirming the rights of sexual and gender minorities to exercise their right to associate.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

This Chapter draws conclusions from the discussions on implementation of the ‘accepted’ recommendations. The first section addresses the general conclusions on the UPR process as it relates to sexual, reproductive rights in Kenya. It also draws specific conclusions on the areas of violence against women, reduction of infant and maternal mortality and SOGIE rights. It also makes recommendations to the State on ways to improve the UPR process and mechanism and also alludes to the challenges of implementing the ‘accepted’ recommendations.

4.1 General conclusions

From an analysis of the implementation of the UPR recommendations made to Kenya in the first cycle of the UPR with respect to sexual, reproductive health rights, it is apparent that the State has demonstrated an attempt to implement the recommendations that it ‘accepted.’ Kenya’s enthusiasm towards implementation of the recommendations is a demonstration of the wide acceptance of the UPR mechanism. Its implementation of UPR recommendations contrasts with its implementation of the recommendations made to it by TBMs.

The commitment and enthusiasm of the State to implement the recommendations made to it under the UPR can be attributed to the fact that States have the latitude to ‘accept’ or ‘note’ recommendations as they so desire. In this regard, the UPR process differs from TBM where States have no choice but to try and implement the concluding recommendations made to it by the various committees.

While many commentators have expressed the criticism that the UPR process gave the States an opportunity to cherry pick the recommendations that they wished to accept, the converse has also been true.²⁸⁵ States like Kenya that genuinely wants to improve the human rights situation on the ground have gone ahead and implemented recommendations that they did not accept in the first place.²⁸⁶

The UPR has some weaknesses: first, the States under review do not have an obligation to accept the recommendations made to it.²⁸⁷ This poses a challenge with respect to the enjoyment of some rights such as SOGIE rights. Kenya for instance noted all recommendations with respect to SOGIE rights and did not make much progress with respect to implementing the SOGIE rights.²⁸⁸ Second, the nature of recommendations that the recommending States have made to the State under review have largely been vague and too general, to the extent that some of the recommendations do not have timelines for implementation; some of the recommendations are also too broad and are incapable of neither being implemented nor being monitored.²⁸⁹ Third, duplication of recommendations has been a challenge, recommending States have been making the similar recommendations on one human rights issue therefore duplicating the

²⁸⁵ T Sobola ‘Africa’s engagement with Universal Periodic Review: commitment or capitulation’ in H Charlesworth & Anor *Human rights and Universal Periodic Review, rituals and ritualism* (2014) 251

²⁸⁶ Charlesworth, H & Larking (n 50 above) 139

²⁸⁷ Charlesworth, H & Larking (n 50 above) 140

²⁸⁸ Human Rights Council (n 115 above)

²⁸⁹ UPR info *Beyond Promises* (2010) 25

recommendations.²⁹⁰ Last, it been observed by commentators that the recommending States make weak recommendations especially to the States from the same region in the spirit of camaraderie and make tough recommendations with respect to States that they perceive to be unfriendly.²⁹¹

The implementation plan that a State puts in place for the implementation of the recommendation is a key accountability tool for tracking the progress of implementation of recommendations ‘accepted’ by the State and there is demonstration that the commitment by the State in the development of the implementation action plan is key in ensuring that the recommendations are implemented. Despite the fact that the implementation plan might set a timeline for the implementation of recommendation; the implementation at times takes a longer period than the one anticipated in the action plan. In conclusion, it is apparent from the discussions in Chapter 3 that there was progress in terms of implementation of recommendations made to Kenya with respect to sexual, reproductive health and rights.

4.2 Specific conclusions on sexual, reproductive rights in Kenya

4.2.1 Violence against women

From the analysis of the measures put in place by Kenya in the implementation plan on the ‘accepted’ recommendations of the UPR, it is apparent that Kenya has put in place policies and legislative framework to address the high incidence of domestic and gender violence in Kenya. The existence of policies and legislative framework alone cannot eradicate domestic and sexual gender based violence but a commitment by State agents

²⁹⁰ United Nations Development Programme Universal Periodic Review: challenges, Innovation and Leadership (2011) 5

²⁹¹ UPR info (n 289 above) 35

and a multi-sector approach would be the way to deal with the domestic and gender based violence.

The passage of Domestic Violence Protection Act, Act No. 2 of 2015, the Marriage Act, Act No. 4 of 2014, the Sexual Offences Act, Act No. 3 of 2006, the Prohibition of Genital Mutilation Act, Act No. 32 of 2011 and the proposed repeal of Children's Act can be directly attributed to the Kenya's commitment to deal with the domestic and gender based violence arising out of the UPR recommendations. It must be understood that while in some instances the UPR process was not the only process that gave impetus to the enactment of enabling legislation and policies, the UPR process was important in sustaining the momentum with respect to passage of laws and policies.

From the mid-term report the State has shown commitment to take steps to address the issue of domestic and gender based violence by establishing gender desks in all police stations and training security agents to be able to receive and deal with complaints raised by survivors. This initiative was not started due to the State receiving the UPR recommendations but it is apparent that the initiative has been improved due to the fact that the State received and 'accepted' recommendations touching on domestic and gender based violence but also particularly on the need to establish more gender desks and recovery centres.

As part of the ongoing measures, Kenya put in place the Prevention of Female Genital Mutilation Act and established the anti-FGM Board. Although the UPR recommendations cannot be solely credited with the enactment of the legislation and the establishment of the anti-FGM board they can be attributed to the fact that they have help sustain the pressure on the State to continue with initiatives that will help deal with the

issue of FGM. It can be safely concluded Kenya by implementing the interventions around FGM has largely implemented the UPR's recommendations on FGM that was made to it and 'accepted'. The challenge with eradication of the practice of FGM is that, despite the existence of very robust and punitive FGM Act, there has not been much accountability and rigorous application of the law in order for it to serve a deterrent goal. In implementing the recommendation on eradication of FGM, Kenya should step up its effort to ensure that there is accountability for the acts of FGM and a rigorous application of the law. The anti-FGM Board that was set up under the FGM Act is grossly under-resourced and is therefore unable to carry out its broad mandate optimally due to resource challenges. Kenya ought to increase the funding to the Board for it to carry out its activities such as public sensitisation on FGM that would include encouraging communities to embrace alternative rites of passage in place of FGM.

Kenya has therefore partially implemented the accepted recommendations on the eradication of FGM. In the next cycle of review, it is expected that it will put in place the measures outlined above in order to further eradicate FGM.

While Kenya has demonstrated its willingness to address violence against women, its efforts have largely been geared towards putting in place policy and legal frameworks that have not been translated into action. A majority of the gender desks that were established in police stations across the country are not functional. This means that women continue to face challenges in reporting violations at the police station. The law enforcement agencies should take action and fully investigate cases of domestic violence reported at the police stations this continues to be a challenge. Kenya has therefore

partially implemented the recommendations on eradication of domestic violence due to the fact that it has put in place the necessary policy and legislative frameworks.

4.2.2 Maternal and infant mortality

The Committee on Economic, Social and Cultural Rights has in General Comment No. 14 framed maternal mortality as a violation of women's right to health and rights. The World Health Organisation (WHO) in its 2015 report found out that the maternal mortality rate had only decreased by 1.2% in Kenya since, 1990 short of its target of 5.5%.²⁹² Most maternal deaths are due to causes that are directly related to pregnancy and childbirth such as unsafe abortion and complication such as excessive bleeding and obstructed labour. The State through a presidential decree²⁹³ in 2013 introduced free maternity services which helped to reduce the number of unskilled deliveries. Access to skilled providers during delivery has worsened for the lower income earners and the rural poor.²⁹⁴ The initiatives taken by the Kenya cannot be said to be solely because of the UPR recommendations made to it, but because of commitments such as the commitments under the sustainable development goals (SDGs), Vision 2030²⁹⁵ and the constitutional imperatives under Article 43 of the Constitution.²⁹⁶

However, the UPR recommendation reinforced the commitments that the Kenya had already taken. The recommendation in this instance serve to remind the Kenya of its commitments and help monitor the progress made in line with the 'accepted' recommendation.

²⁹²World Health Organisation (et al) Trends in maternal mortality:1990 to 2015 (2015) 19

²⁹³ Kenya National Commission on Human Rights(n 259 above) 4

²⁹⁴Government of Kenya(n 150 above) 24

²⁹⁵ Kenya Vision 2030 is the country's development programme from 2008 to 2030

²⁹⁶ Constitution of Kenya Article 43

With respect to infant and maternal mortality is apparent that the State has taken measures to reduce the infant and maternal mortality because it is the right thing to do therefore falling within the normative approach of compliance which postulates that States will comply because they believe that it is the right thing to do or that the people who run the State believe that it is the right thing to do.²⁹⁷

From the statistics, there is a reduction of both infant and maternal mortality.²⁹⁸ This is attributable to the programmes and strategies that have been put in place by Kenya initially to meet the millennium development goals and now the sustainable development goals. Despite the positive indicators, Kenya did not meet its MDG goals in reduction of both infant and maternal mortality. Until 2013, accessibility of services by children under five was out of reach due to the costs associated with access, the situation only improved in 2013 with the introduction of the free maternity services and the ‘beyond zero’ initiative that covered both the pregnant women and children under five.²⁹⁹ The leading cause of maternal mortality in Kenya is abortion due to unmet contraceptive needs. The situation is due to the restrictive nature of abortion law and the fact that the government has not put in place guidelines on the provision of abortion services to women in need. Kenya ought to put in place the abortion guidelines and upscale its programmes on contraception. Kenya has therefore implemented the recommendation made to it with respect to its efforts to reduce infant and maternal mortality given that Kenya was urged to continue its efforts to reduce infant and maternal mortality.

²⁹⁷ Goldsmith (n 30 above) 100

²⁹⁸ Government of Kenya (n 150 above) 39

²⁹⁹ World Health Organisation (et al) (n 292 above) 18

4.2.3 Sexual orientation, gender identity and expression

The State did not accept recommendations made to it with respect to decriminalisation of same-sex conduct but accepted a recommendation on putting in place an anti-discrimination legislation to protect among others sexual minorities. In the spirit of the UPR, it was hoped that Kenya would implement the recommendation on non-discrimination. Kenya did not attempt to even discuss the SOGIE rights within the context of UPR recommendations. Despite spirited campaigns by non-State actors to have the State decriminalise consensual same-sex relations, the Kenyan government stated that same sex relationships are illegal and immoral according to the Kenyan law and customs.

The courts however stepped in to ensure that the SOGIE rights were enjoyed within the framework of the Kenyan law and the Constitution by making far reaching pronouncements in the court cases that were filed before it. Despite Kenya accepting a general recommendation on non-discrimination, its conduct towards SOGIE issues connoted that its commitment of non-discrimination was not in consonance with its conduct. However, the courts made the government to implement the non-discrimination recommendation through its directions and orders in various court cases that were filed in court. Kenya did not implement the recommendation on decriminalisation of same-sex conduct but took measures to guarantee SOGIE rights albeit through the intervention of the Courts.

4.3 Specific recommendations to Kenya

4.3.1 Form an inter-ministerial committee to oversee international reporting and implementation of recommendations

Kenya ought to consider forming an inter-ministerial committee to deal with issues of international reporting and its attendant obligations. The committee will be important in ensuring that there is coordination between the various ministries in reporting and development of implementation plans that are in tandem with the various ministries objectives. The committee will be critical in tracking the progress of implementation of the UPR recommendations and in ensuring timely reporting on the status of implementation.

4.3.2 Match the accepted recommendations with resources

Kenya should ideally implement the accepted recommendations, the challenge however, has been that some of the accepted recommendations are not implemented because of lack of funds; Kenya should therefore ensure that resources are allocated to match the accepted recommendations for example despite Kenya establishing an anti-FGM Board the Board is unable to optimally perform its functions due to lack of resources.

4.3.3 Enhance collaboration and consultation with non-State actors

Kenya in implementing the accepted recommendations faces challenges such as lack of funds and technical skills. There many organisations that have the skills and the funds to undertake some of the interventions needed to implement some of the recommendations. Kenya in the spirit of UPR should foster close collaborations with such organisations in order to implement some of the UPR recommendations. With respect to monitoring progress and reporting implementation of the UPR recommendations Kenya ought to work closely and collaborate with other non-State actors such as KSC-UPR to ensure that the UPR recommendations are implemented.

4.3.4 Integrate the recommendations in ongoing government initiatives

There is need to integrate the UPR recommendations in government plans such as the Vision 2030 and its medium term plans this will ensure that the UPR recommendations will be planned for implementation and budgets allocated to the interventions to implement the recommendations and that there results will be reported within the larger report on implementation of the governments initiative.

4.4 Recommendations to non-State actors

4.4.1 Timely reporting

Non-State actors such as civil society organisations should consider enhancing their collaboration and formalise their coalition so that each organisation tasked with monitoring implementation of the UPR recommendations is able to prepare and submit its monitoring report in time.

4.4.2 Enhance consultation and collaboration with the State

The onus of implementing UPR recommendations lie with the State while non-State actors such as the civil society have the responsibility of reporting on the implementation of the recommendations. Since it is the State through the various ministries and agencies that implement the UPR recommendations, greater consultation between the State and the non-State actors is important given that the non-State actors would require information from the State agencies in developing their monitoring reports.

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