

HUMAN RIGHTS WATCH
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KENYA

Rights at Risk: Issues of Concern for Kenyan Children

A Report Prepared for the Committee on the Rights of the Child by Human Rights Watch

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Human Rights Watch welcomes the submission of Kenya's first Country Report on the Implementation of the U.N. Convention on the Rights of the Child. This is a valuable opportunity to inform the Committee on the Rights of the Child of Human Rights Watch's work and particular concerns for Kenyan children. Human Rights Watch has undertaken three fact-finding investigations to Kenya over the past five years and has published two reports on Kenyan children's rights: *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (1997) and *Spare the Child: Corporal Punishment of Children in Kenyan Schools* (1999). A report on HIV/AIDS-affected children in Kenya is forthcoming this year. Copies of the reports are provided here for committee members' review, along with the following highlights of our findings and recommendations concerning Kenyan children.

I. Police Abuse of Street Children

Governments throughout the world have treated street children¹ as a blight to be eradicated rather than as children to be nurtured and protected. While street children have received a fair amount of national and international public attention, that attention has been focused largely on social, economic and health problems of the children. Little attention has been paid to the constant police violence and abuse, including murder, from which these children suffer. This often neglected side of street children's lives has been a focus of Human Rights Watch's research and action in Kenya.

¹The term "street children" refers here to the broad spectrum of children for whom the street more than their family has become their real home. They may not necessarily be orphaned, abandoned or homeless, and may have family members in nearby slum areas or in faraway villages, to which they might occasionally return after spending periods on the street. Whatever their situation, these children live without the protection, supervision or direction of responsible adults and regard the street, more than their family, as their home.

Upwards of 40,000 street children live in Kenya today, with over half of their population concentrated in the capital, Nairobi. With their numbers on the rise, police and local government authorities are increasingly at a loss as to what to do with them. While some of these children may in fact be involved in criminal activity, the government response has been to criminalize large numbers of street children just because they are homeless, rounding them up and arresting them in large numbers, detaining them in jails and remand centers, and charging them in court with petty crimes or the status offense of being *Ain need of protection or discipline*.² Rounding up street children is viewed as a way to keep the growing street population in check, particularly at times of international conferences or public celebrations, when national and international attention is focused on a city. Although police and government officials may maintain that children are rounded up and arrested for the purposes of reuniting them with their families or placing them in appropriate institutions for their care, the manner in which the children are treated belies such intentions; street children are arrested and dealt with as hardened criminals.

Law enforcement officials who police the streets often demonstrate brutal attitudes towards street children and abuse and exploit the children with impunity. Children interviewed by Human Rights Watch reported that they were frequently harassed, beaten (kicked, slapped, or struck with rifle butts, canes or whips), and had their money taken from them by police on the streets. Girls in Nairobi reported being sexually propositioned or coerced into having sexual relations with police, in order to avoid arrest, and several cases of rape have been reported.³ NGO street workers and street children reported that abuse by police was far worse at night, when the risk of public censure is likely to be less. Group roundups of street children usually occur at night, during the course of which children are often manhandled, taunted, and beaten as they are hauled off to jail. Twenty-five out of 45 street children interviewed by Human Rights Watch who had been arrested by police said they were beaten at the time of arrest and/or at the police station in lock-up. Seven of the 45 children interviewed stated that they were not beaten.⁴

Once arrested, street children are held in deplorable conditions in crowded police station cells, often without toilets or bedding, with little food, and inadequate supplies of water. They are almost

² Before the repeal of Kenya's Vagrancy Act in 1998, street children were most often arrested and charged with the crime of vagrancy. Repeal of the Vagrancy Act, however, has not diminished the frequency of arrests of street children, who continue to be arrested and simply charged with other offenses, including the status offense of being *Ain need of protection or discipline*, authorized under the Children and Young Persons Act.

³ Most recently, the WEMA Street Girls Center pressed charges against two Mombasa police officers, Mwingi Chula and Peter Ndwiga, for the rape of a thirteen-year-old street girl in May 1999.

⁴ The other thirteen of the forty-five interviewees who had been arrested did not discuss their treatment by police.

always mixed with adults, and are frequently beaten by police in the station. Despite Kenyan legal requirements that a person arrested without a warrant be brought before a magistrate without delay (ordinarily within 24 hours), street children stay in lockups for periods extending from several days to weeks without review of the legality of their detention by judicial authorities. They are then either brought to court, or released back onto the streets.

Given the brutal attitude that many Kenyan police display toward street children, it is not surprising that in recent years police violence against street children has risen to a deadly level. A dangerous legal precedent was set in 1995, in a highly publicized case involving the shooting and killing of a 15-year-old street boy, Simon Kamande Ampaniu, by police reserve officer Arvinderjit Singh Chaudha in Nairobi in 1994. The officer argued that he had acted in self-defense after the boy allegedly threatened him with a knife. The High Court judge presiding over the case found that there was insufficient evidence to support the claim that the boy had been armed, yet ruled in favor of the defendant, reasoning that the boy was killed in the course of arrest after having committed a crime.⁵ The court effectively justified the use of lethal force against street children when a crime was alleged to have been committed. In 1996, another unarmed street boy, Daudi Ismael, was shot and killed in Nairobi's Uhuru Park by a police reserve officer who claimed that the unarmed boy had attempted to steal a purse. According to eyewitnesses interviewed by Human Rights Watch days after the shooting, the boy was shot in the chest at close range as he emerged from a pipe in which he had gone to relieve himself, and there was no purse visible on his body.⁶ After much public outcry and press coverage, an inquest file was opened but the officer has still not been prosecuted. After numerous delays and difficulties in obtaining evidence, the officer is reported to have fled the country.

Establishing police accountability in Kenya is seriously hampered by the fact that street children must complain directly to police about cases of police abuse. For many street children, even venturing near a police station to report an incident is risking jail time. Thus the great majority of cases of police abuse of street children go unreported and undetected. Even when complaints are reported to police, there are no guarantees that complaints will be taken seriously and investigated, minimizing even the possibility of internal disciplinary action, let alone formal public redress. With regard to formal legal redress it is important to note that police themselves are the ones who make the determination whether to lodge a criminal charge against an officer accused of violating the law. Further, where such a determination is made, prosecutions are often carried out by police members of the Criminal Investigation Department (CID), and not by independent prosecutors, raising serious conflict of interest issues.⁷ Finally, while individuals may commence private criminal actions against police, the high cost of

⁵ For further details on the case, see *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya*, (New York: Human Rights Watch, 1997) p. 28.

⁶ For further details on the case, see *Juvenile Injustice*, pp. 29-30.

⁷ State counsels, under the Attorney General's Office, prosecute only high level cases, involving

legal fees are far beyond the means of street children and those who seek to assist them. The results are that police abuse of street children continues unabated and unchecked.

Even where there are advocates willing and able to assist street children in seeking justice, police accountability and an end to the abuses will not be achieved without the full commitment of the Kenyan government. In addition to greater accountability of police for abuses committed against street children, better training is needed for police on the use of force and policing methods, particularly regarding children. The Kenyan Police Act contains no guidelines on the use of force, aside from guidelines on the use of firearms. Human Rights Watch strongly recommends that the Police Act be amended to include clear guidelines on limits on the use of general force that comply with the U.N. Code of Conduct for Law Enforcement Officials and with the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. All police coming into contact with children should be specially trained on how to handle children's cases, to ensure that children's special needs and rights are respected rather than abused.

II. The Juvenile Justice System

The treatment of street children by police is symptomatic of a larger pattern of mistreatment of Kenyan children within the justice system as a whole. Once arrested, Kenyan children enter the revolving doors of the juvenile justice system and begin a path that takes them from police lock-up to court, from court to remand detention centers where they may circulate back and forth between court appearances and remand for months or even years before finally receiving disposition of their cases. For this reason many children plead guilty to crimes they are accused of, simply in order to avoid spending time in remand detention centers or remand prisons where conditions are known to be particularly harsh. Without representation by legal counsel and often without the presence of a parent or legal guardian, children are subjected to brief hearings on their cases whereby they may be deprived of their liberty and committed for years to juvenile correctional institutions known as approved schools or borstal institutions. Under Kenyan law, children 14 years old and above may also be committed to regular adult prisons, although this practice is admittedly rare. For some, police will simply mete out their own form of summary justice in the form of a beating, and release the children from jail without their ever going to court.

The primary law in Kenya concerning children in conflict with the law is the Children and Young Persons Act (CYPA). The CYPA establishes juvenile courts for the purpose of hearing all charges against persons under eighteen years of age, except in cases where children are charged jointly with adults (these cases are heard in regular adult courts). The jurisdiction of juvenile courts extend to both

serious offenses or high ranking officers. Most ordinary criminal cases are prosecuted by Apolice prosecutors≡ who are employed within the Criminal Investigations Department within the police force, and who are trained to prosecute criminal cases but who are not lawyers.

criminal matters and to non-criminal "protection or discipline" matters. Juvenile courts must sit in a different building or on different days or at different times from regular courts for adults, and are closed to the public. However, only one separate juvenile court exists in all of Kenya, in Nairobi.⁸ The rest of Kenya's juvenile courts are in fact regular courts that process children's cases on an *ad hoc* basis. In practice, the special protections accorded to children under the CYP A are often disregarded, as children are often tried in regular adult courts without cognizance of the fact that they are children. Sixteen out of 40 children interviewed by Human Rights Watch, and who had been brought to court, said their trials took place in regular courts for adults mixed with adult cases.

Whether in regular courts or in juvenile courts, proceedings are rushed and do not allow children fair opportunities to be heard. Confused and frightened in court, children often do not understand the nature of the legal proceedings or the dispositions of their cases. Translation is not always available for children who need it. None of the 40 children interviewed by Human Rights Watch had been represented by legal or other counsel, and only five said that they had family members present in court.

Even in Kenya's single juvenile court, due respect is not paid to the rights of the child and to the rights of the child as accused. In the juvenile court in Nairobi, where Human Rights Watch observed proceedings for two days, the atmosphere of the court room was intimidating and frightening for children, as well as extremely rushed, with not more than a few minutes spent on each child's case. Children were visibly frightened, sometimes breaking down into tears and responding inaudibly to the stern questioning of the presiding magistrate. None of the 94 children processed on those days were represented by legal or other counsel and only a few had family members present in the court room. The juvenile magistrate did, however, make efforts to explain to the children what was happening to them, indicating where they were being sent, what correctional measures he was ordering, or what date they would reappear in court. In contrast, children who had been processed in regular adult courts, *ad hoc* juvenile courts, told Human Rights that they were not informed at all of the status of their cases, were confused about the nature and purpose of the proceedings, and were unaware of the disposition of their cases.

Pending final adjudication and disposition of their cases, street children are committed by courts to temporary detention in juvenile remand homes (for children 15 years and younger) or to adult remand prisons (for children at least 14 years old) where they may languish for indefinite periods of time, usually between several weeks and months, and sometimes even years. There are 11 juvenile remand homes (under the administration of the Children's Department) in Kenya, with a reported capacity of 2500 children. No efforts are made to separate children by severity of their offenses, or to separate children accused or convicted of criminal offenses, from children in need of

⁸ Human Rights Watch was informed that a separate juvenile court was also to be established in Mombasa, but has not been able to confirm whether such a court has been established yet.

protection or discipline. Conditions in juvenile remand homes vary but they generally suffer from common problems of run-down facilities, inadequate supplies of water and inoperative sanitary installations, inadequate and dirty bedding materials, the frequent use of corporal punishment and no provisions whatsoever for the recreational and educational needs of children. Children spend their days locked into their dorms, except when allowed outside for eating or working. Nairobi juvenile remand home, in particular, suffered from severe overcrowding, with children sleeping two to a bed.

Human Rights Watch found conditions to be particularly disturbing in adult remand prisons. Unlike juvenile remand homes, remand prisons are under the administration of the Prisons Department. Children there face serious problems of overcrowding, unsanitary conditions, hunger, and physical abuse far worse than in juvenile remand homes. Although children are supposed to be kept separate from adults wherever practicable, children are often commingled with adults. Boys detained in remand prisons reported they slept on the floor, without bedding, endured extreme physical abuse, including sexual harassment, usually by older inmates and sometimes by prison guards.

There are no limits under Kenyan law on the period within which an accused must be tried and receive judgement, nor are there limits on the duration of remand detention, even for children. Fully aware of the often lengthy periods of remand which follow a plea of not guilty, children sometimes plead guilty to criminal charges because they know the remand period is likely to be shorter. Six out of 40 children interviewed by Human Rights Watch, who had been brought to court, said they pled guilty to criminal charges because they wished to avoid a lengthy period of remand detention. After a guilty plea is entered, a probation officer is assigned to the case and usually issues a pre-sentencing report within a period of two to four weeks. Upon the admission of guilt, magistrates sometimes even decide sentences on the spot, without the preparation of a presentencing report.

From remand, children may be committed by courts to approved schools (if the child is 15 years old or younger), borstal institutions (for boys at least 15 years old) or adult prisons (if the child is at least 14 years old). Although a wide range of alternatives to custodial treatment are provided for under the Children and Young Persons Act, magistrates still tend to overuse institutionalization as a remedial measure for children. Out of 40 children interviewed by Human Rights Watch who had appeared in court, 22 were ordered to be deprived of their liberty as punishment: 12 were committed to approved schools; three were committed to borstal institutions, and seven were committed to adult prisons. Out of the other 18 children, five were ordered to be repatriated back to their families in their home villages, one was released with a fine, two were caned and released,⁹ and six were awaiting sentence.

⁹ As discussed below, Kenyan courts continue to impose caning as a punishment for a variety of offences. Under section 27 (3) of the Kenyan Penal Code, caning can be substituted, or administered in addition to, any other punishment of a convicted male under the age of 18 years. Many prisoners facing sentences of caning have been convicted in trials which did not conform to international standards for fair trial. Boys are often caned as an alternative to, or in addition to, their custodial sentence.

Conditions in Kenya's eleven approved schools (under the administration of the Children's Department) are generally better than in juvenile remand. A principal criticism of approved schools, however, is that children from many different backgrounds, diverse ages, and for different reasons, are mixed together; serious offenders might negatively influence other children who are there simply because they are homeless, abandoned or orphaned. Although approved schools are supposedly aimed at educating and rehabilitating children for return to society, the schools' reputation for being little more than a children's prison makes it difficult for children to find employment and acceptance when they are released. Children do receive basic education and/or vocational training, although the quality of that education has been much criticized by non-governmental organizations. It is of concern that there is no schooling available in approved schools for girls beyond Standard 8 level. In contrast, boys in approved schools have the option of transferring to a special approved school for boys who wish to study beyond standard eight and receive a high school education.

Kenya's two borstal institutions, Shimolatewa and Shikusa, for boys aged 15 years and above, are under the administration of the Prisons Department. The environment in borstals is noticeably penal and punitive, in comparison with the institutions under the administration of the Children's Department. Borstals are located on larger prison grounds, in close proximity to adult prisons, and are staffed by prison officers who are accustomed to dealing with security for adults. Although separated from adults, boys see and pass adult prisoners while out working in the fields or on the common roads of the prison compound. Boys are provided with one uniform only, upon admission to the borstal. Items such as soap, towels, toothpaste, and underwear are not provided. Boys in Shimolatewa complained that running water is not available and that only prefects are allowed to bathe regularly. Food is limited in quantity and poor in quality, resulting in some boys reportedly trading sexual favors for more food. Most boys receive no academic education at all and are assigned to work teams where they perform hard labor around the prison grounds, and train in tailoring, carpentry, sign writing, brick making, and agricultural work. A very small number are placed in a school section for standards seven and eight only. According to boys interviewed by Human Rights Watch who had been released from the borstals, out of about 300 boys in each borstal, only between 20 and 30 were allowed to study in the school section; the rest worked.

Under Kenyan law, children as young as 14 may also be sentenced to adult prisons by juvenile courts or transferred to adult prisons from approved schools and borstal institutions.¹⁰ As no borstal institutions exist for girls, and admission to approved schools is limited to children under the age of 15, older girls are thus often committed directly to women's prison. When a child is committed to adult prison, the warrant of committal should clearly identify the child as a minor and, where practicable, the child should be confined separately from adults and should not be allowed to associate

¹⁰ Children and Young Persons Act, Article 46(b), Borstal Institutions Act, Article 42. A court order of committal is required for any such transfers.

with adult prisoners.¹¹ In practice, however, this rarely happens.

Conditions in Kenyan prisons are known to be at times life threatening, with severe overcrowding, inadequate water, poor diet, substandard bedding, and deficient health care as the norm.

In the year 2000, the country's prisons reportedly held two to three times their estimated combined capacity of 15,000 inmates and, according to the Kenyan government, 658 prisoners died in jails during the first 10 months of the year.¹² No children should ever be placed into institutions where such substandard conditions are the norm.

In 1996, Human Rights Watch interviewed six adolescents (five girls and one boy) who had been sentenced to adult prisons. All reported that they were commingled with adults. They slept on prison floors, and spent their days laboring under the hot sun on prison farms. All children complained of hunger, and reported that they received no education whatsoever or opportunities for recreation. It is important to note that in all six cases, the children appear to have been tried in regular courts for adults, rather than in Nairobi's juvenile court or in specially convened ad hoc courts for children. Police and magistrates need to make diligent efforts to ascertain the ages of young persons appearing before them, to ensure that children are properly identified and dealt with as children, and not as adults.

In contravention of international juvenile justice standards, Kenyan law continues to authorize corporal punishment of children by judicial authorities and within correctional institutions¹³. In all correctional institution, girls and boys complained uniformly of corporal punishment by staff, and physical abuse by other boys and, where commingled with adults, by adult prisoners. In approved schools, canings, deprivation of home leave, and labor are used as punishments. Punishments in borstal institutions were found to be particularly cruel and severe. Boys reported the use of hard labor (digging), solitary confinement in dark and wet isolation rooms, reductions in diet, and public floggings.

On a positive note, the Kenyan government is currently considering much needed reform of a number of laws relevant to children, including the Children and Young Persons Act, through the passage of a proposed Children Bill. The Children Bill contains some significant proposed reforms concerning the treatment of children within the justice system, including the abolition of corporal punishment as a judicial remedy, and the placing of time limits on the periods children spend in remand detention or

¹¹ Children and Young Persons Act, Article 16. Under Rule 4 of the Prisons Rules, prisoners under the apparent age of seventeen are placed in the Ayoung prisoner class.

¹² See, U.S. Department of State, Kenya Country Report on Human Rights Practices for 2000.

¹³ Article 27(9) of the Penal Code, article 27 of the Children and Young Persons Act, article 33 of the Borstal Institutions Act, and rule 53 of the Borstal Institutions Rules.

awaiting adjudication of their cases. However, the problems concerning children=s treatment in large part have had little to do with the content of the existing laws, but rather on their enforcement. Although the Children and Young Persons Act provides for a wide range of alternatives for children accused of criminal offenses or in need of protection or discipline,= local authorities, police, and magistrates continue to lock children away in large numbers under conditions that do little to rehabilitate them or to provide children with an education. Training and greater support is needed for all law enforcement actors, as well as those supervising children=s care, if laws protecting children are to have any meaning. Greater resources, too, should be dedicated towards meeting children=s needs.

III. Corporal Punishment of Children in Schools

Corporal punishment of children has long been widely practiced in Kenyan schools. Teachers use caning, slapping, and whipping to maintain classroom discipline and to punish children for poor academic performance. The infliction of corporal punishment is routine, arbitrary, and often brutal. Bruises and cuts are regular by-products of school punishments, and more severe injuries (broken bones, knocked-out teeth, internal bleeding) are not infrequent. At times, beatings by teachers leave children permanently disfigured, disabled or dead.

Corporal punishment in Kenyan schools violates international legal standards. Numerous international and regional human rights institutions have declared that some or all forms of school corporal punishment violate the human rights of children. The U.N. Committee on the Rights of the Child, the U.N. Special Rapporteur on Torture, and the European Court of Human Rights have all spoken out against corporal punishment generally, viewing it to be a form of cruel, inhuman or degrading treatment.

In April 2001, the Minister of Education formally banned capital punishment in the schools as a matter of policy. The Minister proposed to Parliament the elimination of the sections of Education Act of 1968 that provided for corporal punishment and its implementation. However, the official notice did not provide penalties for teachers who continue to carry out corporal punishment.¹⁴ Urgent action is needed to make the ban a matter of law as well as policy.

The 1972 Education (School Discipline) Regulations¹⁵ sought to restrict the practice of unrestrained corporal punishment. These Regulations state that corporal punishment may only be inflicted in cases of continued or grave neglect of work, lying, bullying, gross insubordination, indecency, truancy or the like=;¹⁶ and that it may only be imposed by or in the presence of the school=s

¹⁴ See David Aduda, “Minister outlaws caning in schools,” *The Nation* (Nairobi), April 11, 2001.

¹⁵ The Education (School Discipline) Regulations, *The Laws of Kenya*, chapter 21

¹⁶ *Ibid.*, art. 11.

head teacher or principal.¹⁷ Further, it may be inflicted only after a full inquiry, and not in the presence of other pupils;¹⁸ records must be kept of all cases of corporal punishment;¹⁹ and only a cane or smooth light switch to the buttocks or a strap not less than 1 2 inches in breadth to the palm of the hand may be used.²⁰ The regulations stipulate further that punishments must not mistreat or humiliate the student, should relate to the offense and should be adapted to fit the individual child, and that teachers should confer with parents and students where necessary.²¹ The head teacher may give no more than six strokes as punishment, and must keep a written record of all the proceedings.

In practice, the administration of corporal punishment rarely fulfilled the requirements of Kenyan law. Unlawful and severe forms of corporal punishment have been a widespread feature of Kenyan government schools, according to over 200 Kenyan children interviewed by Human Rights Watch in 1999. Of the 20 primary and secondary schools visited by Human Rights Watch, only one school reportedly the best secondary school in Kenya administered corporal punishment in accordance with the guidelines of the Education (School Discipline) Regulations.

The most common method of corporal punishment involves teachers striking students with a cane: generally an uneven wooden stick of two to three feet in length, with a diameter of approximately three-fourths of an inch. Some teachers also punish students by flogging them with whips made of rubber (from strips of old car tires), with heavier canes, or simply by slapping, kicking, or pinching. For the most part, boys are hit on the backside, while girls are hit on the palm of the hand. At times, however, children are beaten on other parts of the body: on the back, the arms, the legs, the soles of the feet, and sometimes even the face and head. Children are generally forced to kneel down (occasionally to lie down) in the front of the classroom before being caned or beaten in front of other students. At other times, teachers simply cane children on the spot, as they sit in their chairs.

Depending on the nature of the misbehavior of the child and the harshness of the teacher and school, a student might receive anywhere from two to twenty or more cane strokes at one time. At some schools, children told Human Rights Watch that they would witness incidents of caning once or twice a week, and that students were generally given only two or three strokes at one time. Other

¹⁷Ibid., art. 12(1).

¹⁸Ibid., art. 12(2).

¹⁹Ibid., art. 14.

²⁰Ibid., art. 13. See also George S. Eshiwani, *Education in Kenya Since Independence* (Nairobi : East African Educational Publishers, 1993), pp. 107-08. It should be noted that the 1972 regulations are closely modeled on earlier colonial period rules on school discipline, dating from 1932.

²¹Kenya Ministry of Education, *A Manual for Heads of Secondary Schools* (Nairobi: Kenya Ministry of Education, 1987), pp. 31-32.

children reported that caning occurred on and off throughout the day, nearly every day, with students routinely receiving five or more strokes each time.

Corporal punishment is used against students for a wide range of disciplinary infractions. Children may receive corporal punishment for coming to school late, missing school without permission (even for unanticipated illnesses), rudeness, graffiti, fighting, stealing, drug use, and any form of disruptive classroom behavior (writing notes to other students, fidgeting, talking to another student, noise making, and so on). Children also reported that students are beaten for wearing dirty or torn uniforms, and occasionally for inability to pay school fee assessments, hardly disciplinary matters for children of poor families.

In addition, corporal punishment is widely used to punish unsatisfactory academic performance: in mathematics classes, for instance, it is not uncommon for teachers to strike children for giving the wrong answer to a problem (sometimes conceptualized by teachers as a disciplinary issue, on the theory that only children who have not paid attention give incorrect answers). In some classes and schools, teachers set target marks that students are supposed to achieve, and students who fail to reach the target are caned. The fact that a student's poverty or home life might contribute to his or her inability to comply with a teacher's wishes is generally not seen as grounds for excusing the child's behavior. Many teachers punish students who fail to complete their homework or learn their lessons, regardless of whether the children had the necessary books or materials, or opportunities to complete their homework.

Group punishments were widely reported: if a school did not perform well on national exams, for instance, an entire class might be caned regardless of the individual performance of each student. Similarly, if graffiti was found in a classroom, the whole class might be caned if the responsible person could not be identified. If many children made noise, a large group of students might be caned simultaneously (with a different teacher caning each child), or many students might be caned in turn by one teacher. Children also may be caned by numerous teachers at once. Students from several different schools reported that the usual punishment for noise making in class was for the child to be brought to the staff room and made to kneel or lie down while being caned or whipped by three to six teachers.

Minor injuries like bruising and swelling are the normal and routine result of corporal punishment. However, more serious injuries (large cuts, sprains, and broken fingers) are not uncommon. Extremely serious injuries (temporary or permanent hearing loss; teeth knocked out; broken wrists or collar bones; internal injuries requiring surgery) are rarer, but do occur; Human Rights Watch interviewed several children who had either received such injuries or knew of others who had. Children occasionally die as a result of corporal punishment. Several such were reported in the Kenyan press in recent years. It is impossible, however, to get accurate statistics on such serious incidents: many severe beatings are never reported to government authorities or journalists, as children and parents fear retaliation from teachers and head teachers. Similarly, poor police and court record-keeping make it

difficult to track down cases that are reported, as police records may simply describe a severe incident of corporal punishment as an assault or murder, without noting that it occurred in school.

Human Rights Watch investigated several cases of serious injuries and deaths reported in the press and to NGOs, and confirmed the details of some of these cases. In the few cases which led to prosecutions, teachers were acquitted or let off with minor fines. In almost all of the documented cases in which students died after being beaten, the teachers were acquitted because it was found that the child suffered from a preexisting medical condition which made the child particularly vulnerable to injury, and of which the teacher was unaware--all the more reason why teachers should never hit children at all.

Awareness-raising campaigns and training for practicing teachers on discipline and alternatives to corporal punishment in schools are virtually nonexistent. Instructors are rarely disciplined by head teachers or by the Ministry of Education, even for inflicting serious injuries on the children under their care. Head teachers who tolerate constant and severe corporal punishment inflicted by teachers are rarely censured, if ever. Most often, incidents of severe corporal punishment are dealt with, if at all, within the school itself, with the teacher or school offering to pay the medical expenses of the injured child. This seems to be viewed as a more than fair arrangement, by teachers and local school authorities. The environment is such that corporal punishment is so well accepted that it is difficult for teachers to view their actions towards children as abusive or in violation of the law.

Human Rights Watch received numerous reports, from children and parents, of serious retaliation against people who dared to challenge severe corporal punishment. According to many interviewees, complaining about excessive punishments may lead to more severe punishments in the future, with punishments being inflicted on siblings or cousins of the child whose parents complained, as well as on the child himself. Some parents reported that they themselves were threatened with violence when they protested the mistreatment of their children. Some children told of being forced to change schools to escape from vengeful teachers, and several head teachers told Human Rights Watch that when parents came in to complain that their children had been caned, they told the parents to remove their children from the school if they were unhappy about the caning. In effect, as several head teachers acknowledged, children raising complaints about corporal punishment faced giving up school altogether, as transferring to another school after departure for disciplinary reasons \cong refusing to accept the imposition of corporal punishment \times can be close to impossible.

The Kenyan Teachers' Services Commission has the power to suspend, transfer, or fire teachers. However, its investigatory branch is lethargic when it comes to looking into abuses related to corporal punishment. Although the Kenyan press has given extensive coverage to incidents of serious injury caused by corporal punishment in the last few years, the deputy director of the Teacher's Services Commission told Human Rights Watch that the Commission receives a complaint about excessive caning only once every few years, and virtually never disciplines teachers for caning.

The judicial system is generally not a practical alternative for redress for school corporal

punishment either. Most families cannot afford attorneys and face poor prospects of prevailing in legal action if they do commence actions, given the bias in favor of corporal punishment as a proper form of instructing children. Furthermore, the judicial system is not strong, with judicial processes slow, and judgments difficult to enforce.

The Minister of Education's decision to propose deletion of provisions of the Education Act that permit corporal punishment in schools is an important step. The Education Ministry must now issue a circular to all educational institutions for the notice to take effect, and Parliament must enact the change into law. But changing the legal regime on corporal punishment is just a first step. Many teachers continue to express strong disagreement with the ban. Widespread in-service training and education is needed for teachers on effective alternative methods of discipline, in order for school corporal punishment to be eliminated. Teachers need to understand that corporal punishment is not a necessary tool for teaching, and that effective alternatives exist for maintaining classroom discipline.

IV. HIV/AIDS-Affected Children

In Kenya, HIV/AIDS is a national emergency. An estimated 2.1 million adults and children live with HIV/AIDS, representing about 14 percent of the population in the 15-49 age group.²² An estimated 70 percent of persons living with AIDS in Kenya are 15-25 years old. UNAIDS estimates that about 500 persons died of AIDS each day in the country in 1999.²³ Over 20 percent of pregnant women in the country are estimated to be HIV-positive, as are one in four persons in the workforce in Nairobi.²⁴

As in many countries, there is controversy over the number of children who have been orphaned by AIDS. Because of stigma and other factors, it is not possible to estimate orphan numbers through sample surveys. They are projected instead based on assumptions about HIV infection rates, AIDS deaths, and the demographic structure of the population, parameters that various experts estimate differently. In 1999, the UN estimated that there were about 730,000 children in Kenya who had lost their mothers or both parents to AIDS since the beginning of the epidemic with about 550,000 of these children still living.²⁵ UNICEF's more recent estimate of almost 1 million AIDS orphans currently living

²² UNAIDS/WHO, Kenya: Epidemiological fact sheet on HIV/AIDS and sexually transmitted infections – 2000 Update (Geneva, 2000).

²³ *Ibid.*

²⁴ National AIDS/STDs Control Programme (NASCO), Ministry of Health, Government of Kenya, *AIDS in Kenya: Background, projections, impact, interventions, policy – Fifth edition* (Nairobi, 1999).

²⁵ UNAIDS/WHO, Kenya epidemiological fact sheet, p. 3.

in the country²⁶ has been widely accepted as has the projection of 1.5 million children orphaned by AIDS by 2005 and about 2 million by 2010.²⁷ In addition to those already orphaned, tens of thousands of children are affected well before there is a death in the family. Once a parent or breadwinner is ill, children are frequently withdrawn from school to care for the sick person or work to make up for income lost because of AIDS in the family.

The “Common Country Assessment” published in 2000 by the UN agencies in Kenya noted that the burgeoning population of children orphaned by AIDS has led to an increase in child-headed households and “inevitably” in child labor.²⁸ The UN agencies estimate that the phenomenon of an historically large population of AIDS orphans is also a significant contributor to increases in the numbers of street children in urban areas and in the number of child prostitutes. They further conclude that the widespread practice of children being pulled out of school when AIDS is in the family is a strong impediment to economic and human development in Kenya in the medium and long term.

The first case of HIV was diagnosed in Kenya in 1984,²⁹ but concrete response on the part of the government came many years later. The first national policy statement on AIDS was Parliament’s adoption of “Sessional Paper no. 4” which made recommendations for advocacy and policy implementation. In 1999, the government established the National AIDS Control Council (NACC) to develop strategies for controlling the spread of the disease. HIV/AIDS remains shrouded in denial and silence in much of Kenya, which complicates discussions of policy and legal measures to address the problem as well as the delivery of services to those affected.

In February and March 2001, Human Rights Watch investigated abuses and violations of the rights of children associated with HIV/AIDS. AIDS-affected children or their guardians in 25 families were interviewed in Nyanza, Central and Nairobi Provinces as well as a number of NGO service providers, legal experts, and researchers. Though our final analysis is not complete, several preliminary findings are as follows:

1. AIDS-affected children and abuse, abandonment, hazardous labor: NGOs serving children in need of special protection have gathered numerous reports of children affected by AIDS being in desperate situations where they are forced to engage in hazardous labor, are abused or neglected, or

²⁶ “UNICEF warns of orphan crisis in Kenya,” UN Wire, December 21, 1999.

²⁷ NASCOP, *AIDS in Kenya*, p.24.

²⁸ United Nations. *Common Country Assessment—Kenya* (Nairobi, 2000).

²⁹ NASCOP, *AIDS in Kenya*, p. 2.

are otherwise in need of special protection. Our interviews corroborate these accounts. AIDS impoverishes families quickly because of the incapacitation of a principal bread-winner or care provider in the family and because of the high costs of caring for someone who is very ill over a long period. Stigma contributes to the social and economic marginalization of families affected by AIDS. In addition, AIDS in many cases claims the lives not only of the parents of the child in question but also of other members of the extended family. Children are often left with elderly grandparents or with distant relatives or friends who do not place a high priority on protecting the interests of orphans in their care. In short, traditional structures for protecting children from abuse and neglect in the extended family and the larger community are not able to protect the hundreds of thousands of children affected by AIDS, necessitating greater protection from state institutions.

Among the children interviewed by Human Rights Watch, there were several girls and young women who were orphaned by AIDS and/or caring for AIDS orphans who saw no option other than engaging in prostitution for their own survival. A 10-year-old girl was sent by her dying mother to steal on the street, and other children sought a living on the street in other ways. A 15-year-old girl was threatened with sexual abuse in the house in which she was sent to be a domestic servant when her mother was dying of AIDS. The NGO service providers interviewed by Human Rights Watch were generally convinced that this kind of abuse and desperation is much more prevalent when children are orphaned by AIDS compared to other causes. AIDS eats through the family's resources because of medical bills associated with long and severe illness; it often affects many others in the extended family, leaving children with few relatives to turn to for protection and care; and the stigma associated with AIDS leads to rejection by family and community members who might otherwise provide protection.

Most of the laws related to child protection in Kenya focus on children in conflict with the law and not those in need of care and protection. One such law, the Children and Young Persons Act, establishes modest legal penalties for anyone who harms a child (up to age 16 years) in their custody.³⁰ There are relatively few explicit provisions in Kenyan law for protection of orphans, possibly because the current law was written before the explosive increase in the number of orphans in the last decade. Extended families or the community traditionally cared for orphans in Kenya, but the unprecedented numbers of orphans in the crisis of the AIDS epidemic renders traditional approaches inadequate.

³⁰ The Children and Young Persons Act, at section 23, encompasses anyone who: wilfully assaults, ill-treats, neglects, abandons or exposes [the child or juvenile] or causes or permits him to be assaulted, ill-treated, neglected, abandoned or exposed, in any manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, hearing, limb or organ of the body, and any mental derangement); or by any act or omission, knowingly or wilfully cause that child or juvenile to become, or conduces to his becoming, in need of protection and discipline.

District children's officers and other structures of the Children's Department remain too focused on the punitive aspect of their work with children in conflict with the law to deal adequately with the growing abuse and neglect in the current situation. NGOs are the main providers of services for children in these difficult circumstances, including through setting up hotlines and crisis centers, but their resources are not commensurate to the enormous need. The director of the Children's Department is proposing a new cadre of volunteer children's officers to help strengthen the "care and protection" (vs. punitive) role of the state's services for children³¹ but the proposal does not ensure that these volunteers will in fact be steered to child protection activities. Orphanages and children's homes run by the state and private organizations, which may in some cases be the best option for protecting children without caring guardians, are few relative to the need for them. In addition, except in the few state-run children's homes, the government does not provide inspection or support to ensure that standards of care and protection are respected or oversight to ensure an equitable process for admission of children.

2. AIDS-affected children and property-grabbing: Illegal appropriation of the property to be inherited by AIDS widows and orphans has been widely reported across Africa since the early years of recognition of the epidemic.³² Experts interviewed by Human Rights Watch in Kenya generally concluded that persons orphaned or widowed by AIDS are much more likely than other survivors and heirs to experience this so-called property-grabbing again because AIDS leaves so few relatives to protect the child's interests and those left may themselves have been impoverished by the effects of AIDS. Based on interviews with orphans and their guardians who had experienced the problem and been unable in most cases to safeguard their property or inheritance rights, Human Rights Watch is concerned that children orphaned by AIDS do not enjoy equal protection of the law in these matters as their voices are not being heard in existing state institutions meant to deal with property and land questions.

The Law of Succession Act of 1981 details procedures for the inheritance of property by surviving children with or without the presence of a surviving parent and provides in section 26 for the right of dependent children or someone acting on their behalf to apply to the court for redress in cases where "reasonable provision" has not been made for those children. It also outlines the need to ensure trusteeship of property of a surviving child until he or she reaches the age of 18 years where the trustee should be "appointed by a court of competent jurisdiction" (subsidiary rules, section 32).

Although traditional chiefs may mediate land and property disputes, many cases in Kenya are decided in the courts. Unfortunately the courts have not played a strong role protecting AIDS orphans

³¹ Children's Department, Ministry of Home Affairs, Government of Kenya. Introduction of the volunteer children's officer (VCO) system in Kenya (unpublished note, 2001).

³² "HIV/AIDS and children," *HIV/AIDS Policy and Law Newsletter* (Toronto), April 1996.

from property-grabbing by relatives or others. Land and property disputes are decided in Kenya only in the courts. The children's court, where the interests of children are most likely to be represented formally, is focused on criminal cases and is not set up to hear land disputes. The state institutions, particularly the district-level public trustees to which children can in theory turn to represent their interests in these cases, are sparse and widely regarded as non-functional, and they do not favor the representation of children's interests. "The public trustee can be an effective mechanism [for children's property cases], but the problem is that it is open to abuse. The principal weakness is like that of any public institution – people are not well paid," said David Otieno, a member of the Kenya Legal and Ethical Network on HIV/AIDS in Kisumu.

Legal assistance for children in these matters is most often unavailable or unaffordable. Legal aid services are provided competently by a few NGOs, but they are highly inadequate in the face of a problem involving literally hundreds of thousands of children. "Communities have an important responsibility in protecting children in cases of property grabbing, but this is still a problem of the state," noted Elizabeth Owuor-Oyugi, CEO of ANPPCAN-Kenya.³³ The draft Children Bill does not adequately address this problem; nor do the government's proposed changes in the structure of children's services at the district level. The newly created Family Division of the High Court of Kenya, a civil court for family disputes, holds some promise as a venue for relatively expeditious treatment of disinheritance cases, but it currently exists only as a pilot effort in Nairobi.

3. Access to HIV/AIDS information The Kenyan government has failed to provide the public with accurate information on HIV/AIDS. The belief that HIV can be transmitted through casual contact appears still to be widespread in Kenya. Human Rights Watch encountered several cases in which that belief partly caused the stigmatization of AIDS-affected children and their families, in some cases contributing to the expulsion of families from their property.

The government recently developed and distributed curricular materials on HIV/AIDS for use in primary and secondary schools, but several teachers noted that the guidelines for lessons are inadequate to put the curriculum into place. Even if the HIV/AIDS curriculum were effectively implemented, Kenya has over 3 million children of school age who are not in school³⁴ and constitute perhaps the most important population to reach with basic information on HIV/AIDS transmission, prevention and care. NGOs provide these services, but their resources do not allow them to reach more than a small percentage of this population. Government information programs on HIV/AIDS for out-of-school children and for the general population are not well developed.

³³ Human Rights Watch interview with Mrs. Elizabeth Owuor-Oyugi, Nairobi, March 9, 2001. ANPPCAN is the African Network for the Prevention and Protection of Children from Abuse and Neglect.

³⁴ UN Kenya Common Country Assessment, 2001.

V. Recommendations for the Kenyan government

Street children, juvenile justice and corporal punishment in schools

- Local authorities, the Children=s Department, and police, together should cease the practice of rounding up street children, detaining them in remand centers, and committing them without due process to institutions for their care.
- Develop guidelines for police on the proper use of regular and lethal force, including in dealing with children, and train all police (including police reserve officers, administration police, city askaris, and CID police) to ensure that such guidelines are enforced. (Current law contains guidelines on the use of firearms only.)
- Ensure that police and magistrates make diligent efforts to properly identify young persons as children and determine their age, to ensure that children are accorded the special protections they are entitled to before the law; including separation from adults in detention, and the right to appear in special juvenile courts, rather than in regular courts.
- Devote resources for the training of magistrates on how to handle children=s cases and establish additional permanent juvenile courts in Kenya (at the moment only one exists, in Nairobi). At present, children=s cases are often heard in ad hoc juvenile courts where magistrates have little experience or training on how to handle children=s cases.
- Ensure that the Children Bill (the bill which seeks to reform, among other laws, the Children and Young Persons Act) clearly separates criminal from A protection or discipline cases= for children, and that children receive all due process protections required by international law when deprivation of liberty is at issue.
- Eliminate from all existing laws and regulations all provisions authorizing corporal punishment, reduction in diet, and solitary confinement as punishment for children in courts, regular schools, correctional institutions and other institutions for their care. Train all caretakers of children, including school teachers, on the use of alternative methods of teaching and disciplining children.
- Remove borstal institutions from the administration of the Prisons Department, and place under the administration under the Children=s Department.
- Existing laws should be amended to ensure that no one under 18 years be sent to an adult prison.
- Ensure that all children deprived of their liberty receive an education suited to their needs and abilities, and designed to prepare them for return to society. For girls deprived of their liberty in approved schools, provide access to secondary level education, as is provided for boys. For boys in borstal institutions, primary level education should be provided for all boys, not just for boys in

Standards 7 and 8.

- Ensure that government officials who work with children are specially educated and trained on how to handle children's cases. Law enforcement personnel, the judiciary (and officers associated with juvenile court proceedings, children's officers and probation officers), and staff at correctional institutions should be sensitized to the special needs and rights of children.
- All relevant government departments (including the Police Department, the Children's Department, the Prisons Department, the Attorney General's Office, and the Ministry of Education) should initiate prompt investigations into allegations of abuse of children by police, institutional staff, and teachers, and should undertake disciplinary or criminal proceedings where appropriate to ensure accountability of all for their actions.
- The new volunteer children's officers should be adequately oriented to "care and protection" activities to ensure protection for all children in difficult circumstances who may be in need of it. District commissioners should be responsible for ensuring that the work of district health, social service and education officers include attention to AIDS-affected children.

Children affected by HIV/AIDS

- The government of Kenya as a high priority should ensure in every district an adequate mechanism to safeguard the legitimate inheritance of property by children orphaned by AIDS. This may include strengthening and making more "user-friendly" the existing public trustee offices at district level. An acceleration of the planned expansion of family courts to all provinces may also help if the family court continues to be a useful venue for settlement of intra-family property disputes.
- The government of Kenya should on an emergency basis conduct or support others to conduct widespread information campaigns on the basics of HIV/AIDS transmission, prevention and care and the importance of tolerance and support for persons living with or otherwise affected by HIV/AIDS.