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Parallel Report on the Rights of LGBTI Citizens and Non-Citizens in Kenya

to be considered in connection with the Fourth periodic report of Kenya (CCPR/C/KEN/4) on its compliance with the International Covenant on Civil and Political Rights

Submitted by

Kisii University Human Rights Club, is a student-led organization conducting activities to help nurture a culture for respect and protection of human rights under the auspices of the Kisii University School of Law. The Kisii University Human Rights Club organizes activities to create awareness around human rights issues including violations of human rights, steps taken to ensure full realization of protection of human rights in Kenya. It also undertakes research on contemporary issues pertinent to global human rights advocacy.

University of Minnesota Law School Human Rights Litigation and International Advocacy Clinic

The Human Rights Litigation and International Advocacy Clinic was founded in 2010 with the goals of teaching students client-centered advocacy and providing legal and advocacy assistance on international human rights issues in the United States and around the world. Since August 2019, the Clinic has worked with LGBTI refugees and citizens in Kenya and their advocates, the University's Human Rights Initiative, and NGOs around the world to support Kenyan advocates' goals of increasing respect for LGBTI rights, including through advocacy before the United Nations human rights system.

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INTRODUCTION

This report focuses on the pervasive human rights violations based on sexual orientation and gender identity in Kenya. To comply with its obligations under the International Covenant on Civil and Political Rights (the Covenant), the Kenyan Government (the Government) must take decisive action to improve the human rights situation of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, including Kenyan citizens, people living inside refugee camps, and non-citizens residing in urban areas. LGBTI Kenyans and non-citizens face laws criminalizing same-sex conduct, heightened levels of sexual and gender-based violence, threats and extortion by authorities, and inadequate or non-existent remedies for violence and discrimination perpetrated by state and non-state actors. LGBTI persons face discrimination when seeking healthcare, housing, and employment. In this generalized context of discrimination, LGBTI refugees have additional vulnerabilities caused by their insecure status, the encampment policy that limits freedom of movement, and delays in accessing adequate documentation and other legal issues.

In the previous review of Kenya in 2012, this Committee offered important recommendations relating to the rights of LGBTI persons as well as people living in refugee camps. Major developments since then argue for increased attention to sexual orientation and gender identity and expression (SOGIE) in the 2021 review. These developments include a dramatic influx of LGBTI refugees from neighboring countries as well as legal advances and setbacks. Since its last country review before this Committee, the international human rights system has

strengthened attention to and codification of LGBTI rights¹ and the Government has continued to host refugees from neighboring countries in the face of diminishing support from the international community. In reviewing Kenya's compliance with its human rights obligations, it is critical to note the external pressure caused by decreasing options for refugee resettlement and the need for the international community with UNHCR to support the Government under the principle of burden sharing.

This report has been prepared in consultation with a diverse coalition seeking to ensure that the rights of LGBTI Kenyans and non-citizens are duly considered in the current review. Because of fears of retaliation including physical harm, many remain anonymous.

I. EQUAL PROTECTION OF THE LAW, NON-DISCRIMINATION, AND RIGHT TO REMEDY (Articles 2, 17, 26)

Under the Covenant, States Parties are required to adopt legislative, judicial, administrative, educative, and other measures to protect individuals from discrimination.² The Committee has interpreted Articles 2 and 26 of the Covenant as prohibiting discrimination of persons on the basis of sexual orientation and gender identity.³ Other particularly relevant rights under the Covenant are those included in Article 17 (privacy) and Article 23 (family).

We urge the Committee to pay special attention to the discriminatory human rights impacts perpetuated in Kenya in the areas of criminalization of same-sex conduct; discrimination in access to the highest standards of physical and mental health, adequate housing, and work; and access to effective remedy for violations.

A. Criminalization of same-sex conduct (Articles 2, 17, 26)

The continued criminalization of same-sex conduct is a stark violation of Kenya's human rights obligations that has been denounced consistently by this Committee as well as other UN treaty

¹ See Protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/RES/32/2.

² Art. 2; General comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 7 [hereinafter General Comment 31]. Article 26 requires state parties to ensure "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Specifically, Article 26 mandates that the "law ... prohibit[s] any discrimination and guarantee[s] to all persons equal and effective protection against discrimination on any ground."

³ See, e.g., *Toonen v. Australia*, CCPR/C/50/D/488/1992; *Young v. Australia*, CCPR/C/78/D/941/2000, para. 10.4; *X v. Colombia*, CCPR/C/89/D/1361/2005, para. 9; Concluding Observations on Mexico, CCPR/C/MEX/CO/5, para. 21; Concluding Observations on Uzbekistan, CCPR/C/UZB/CO/3, para. 22.

bodies and special procedures and is included in the List of Issues.⁴ Additionally, criminalization fuels the systemic violence, discrimination, and deprivations described below.

The Committee's 2012 Concluding Observations recalled and renewed previous recommendations for the decriminalization of consensual sexual conduct between adults of the same sex.⁵ This call focused on both criminalization and the related "social stigmatization ... harassment, discrimination, [and] violence" against people "based on their sexual orientation or gender identity."⁶

The List of Issues called for the Government to report on measures taken to decriminalize sexual relations between consenting adults of the same sex, including information on the 2019 High Court ruling, which upheld sections 162 and 165 of the Penal Code criminalizing same sex sexual relations.⁷

The Government's Replies to the List of Issues acknowledged that consensual sexual relations between same sex persons remains expressly prohibited by national law.⁸ The Government assured the Committee that equality and non-discrimination principles are respected and enforced through legislation, policies, and other interventions. However, despite the express ban on direct and indirect discrimination enshrined in article 27 of the Kenyan Constitution, in May 2019 the Kenyan High Court at Nairobi upheld as valid sections 162 and 165 of the Penal Code.⁹ The National Gay and Lesbian Human Rights Commission, the Gay and Lesbian Coalition of Kenya, and the Nyanza, Rift Valley and Western Kenyan LGBT Coalition stated they would appeal this ruling.¹⁰

⁴ *E.g.*, Concluding Observations on Kenya, CCPR/C/KEN/CO/3 [hereinafter 2012 Concluding Observations]; Concluding Observations of the Committee on Economic, Social, and Cultural Rights on Kenya, E/C.12/KEN/CO/2-5, paras. 21–22. The Committee called on the State to decriminalize same-sex acts and to "take the steps necessary to put an end to the social stigmatization of homosexuality." See Concluding Observations of the Committee on the Elimination of Discrimination against Women on Kenya, CEDAW/C/KEN/CO/7, para. 11 (calling upon Kenya to facilitate legislative reform by repealing discriminatory laws). See also submissions for Kenya's recent Universal Periodic Review where civil society echoed the call for decriminalization and also urged the government of Kenya to protect persons in the LGBT+ community and take action against violence and hate speech against the LGBT+ community. United Nations Human Rights Council, "Universal Periodic Review Third Cycle – Kenya Contributions for the Summary of Stakeholder's Information", available at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRKEStakeholdersInfoS35.aspx>.

⁵ 2012 Concluding Observations, para. 8.

⁶ *Ibid.*

⁷ List of Issues in Relation to the Fourth Periodic Report of Kenya, CCPR/C/KEN/Q/4, para. 5.

⁸ Replies of Kenya to the List of Issues in Relation to its Fourth Periodic Report, CCPR/C/KEN/RQ/4, para 30.

⁹ *Ibid.*; High Court of Kenya, *EG & 7 Others v. Attorney General*, Petition Nos. 150 & 234 of 2016, Judgment, 24 May 2019.

¹⁰ Global Philanthropy Project, "Webinar: Challenging the Criminalization of "Homosexuality" in Kenya: An Update on Movement Litigation", 30 January 2020, available at <https://globalphilanthropyproject.org/Events/kenya-decrim-litigation/>.

The Committee has previously noted that criminalization of same-sex sexual conduct has a chilling effect on the enjoyment of other human rights in Kenya, and this remains true. Fear of arrest and prosecution has led LGBTI individuals to avoid seeking medical care for injuries or diseases that could expose their sexual orientation.¹¹ The criminalization of same-sex conduct discourages LGBTI people from seeking mental health care necessary to alleviate traumatizing experiences such as the psychological trauma of remaining “closeted” in a discriminatory environment.¹² Additionally, studies have found higher levels of substance abuse among this population to cope with these mental health struggles.¹³

The Government’s reply explicitly stated that “stigma is one of the greatest barriers in accessing services” for LGBTI people. Despite this acknowledgment, continued criminalization aids in perpetuating stigma and is used as a justification for police, health care providers, and local services to discriminate against members of the LGBTI+ community.¹⁴ The Government excused this state of affairs on the basis of “Kenyan values,” as it stated: “[s]exual relations between same sex persons is expressly prohibited by the national law and is deemed unacceptable to the Kenyan culture and values.”¹⁵ However, cultural or national sensitivities are not acceptable grounds for subjecting LGBTI Kenyans to discrimination and stigma. The Committee has previously rejected, in explicit terms, cultural or moral justifications for discrimination against LGBTI persons:

While acknowledging the diversity of morality and cultures internationally, the Committee recalls that *all States parties are always subject* to the principles of universality of human rights and non-discrimination.¹⁶

Kenya Penal Code § 162 prohibits “unnatural offences.”¹⁷ Though § 162 does not only criminalize consensual same-sex sexual conduct, subsections a and c are commonly used to prosecute consensual same-sex sexual conduct between men and could be used to prosecute consensual same-sex sexual conduct between women.¹⁸ The ambiguity of the statutory language

¹¹ Coalition of African Lesbians and Gay and Lesbian Coalition of Kenya, *Research on the Lived Experiences of Lesbian, Bisexual and Queer Women in Kenya*, p. 29 (2016), available at https://issuu.com/galckkenya/docs/research_on_the_lived_experiences_o.

¹² *Ibid.*, pp. 28–31.

¹³ *Ibid.*

¹⁴ See, e.g., Eric Mawira Gitari, “The Gay Debate: Decriminalising Homosexuality in Kenya”, *The Elephant*, 28 February 2019, available at <https://www.theelephant.info/features/2019/02/28/the-gay-debate-decriminalising-homosexuality-in-kenya/>.

¹⁵ CCPR/C/KEN/RQ/4, para. 30.

¹⁶ Report of the Human Rights Committee to the General Assembly, A/69/40 (Vol. I), para. 127(10) (emphasis added); see also Report of the Special Rapporteur in the Field of Cultural Rights, A/73/227, para. 5.

¹⁷ CCPR/C/KEN/RQ/4, para. 57.

¹⁸ Adriaan van Klinken, “Explainer: What’s at Stake in Kenyan Court Case on Gay Rights”, *The Conversation*, 22 February 2019, available at <https://theconversation.com/explainer-whats-at-stake-in-kenyan-court-case-on-gay-rights-112317>; High Court of Kenya, *EG & 7 Others v. Attorney General*, Petition Nos. 150 & 234 of 2016, Judgment, 24 May 2019, para. 58.

in § 162 (criminalizing “unnatural carnal knowledge against the order of nature”) further enables its application to consensual same-sex sexual activity, allowing broad discretion to police and other governmental authorities.¹⁹

In a 2019 report demonstrating the evidence of harm and discrimination in Kenya against the LGBTI community, a number of startling statistics were unveiled. For example, 35% of LGBTI people had been called names or been insulted by a healthcare provider due to their SOGIE.²⁰ The same study found that roughly one third of LGBTI people had been denied healthcare services because of their SOGIE.²¹ 59% of LGBTI people had been verbally harassed because of their SOGIE.²² 44% of LGBTI people had been sexually assaulted in their lifetime,²³ and one in four lesbian women and gay men had been sexually assaulted in the preceding year.²⁴ Finally, the study found that 53% of LGBTI people had been physically assaulted in their lifetimes.²⁵ These statistics illuminate the hardships faced by the LGBTI population in Kenya,

We respectfully urge the Committee to ask the Government:

1. Please provide updated information on the State’s efforts to decriminalize same-sex conduct to comply with international standards on LGBTI human rights.
2. Has the State assessed the negative implications to the LGBTI community resulting from the criminalization of same-sex conduct such as: harassment, extortion, a fear of seeking healthcare and medical attention, limited access to legal remedies, and undermining commitments under international asylum law? If so, please provide this information as well as details about what the State doing to combat these grave harms.

B. Discrimination in access to the highest standards of physical and mental health, housing, and work (Articles 2, 26)

LGBTI Kenyans and refugees face ongoing discrimination due to the Kenyan Penal Code’s criminalization of same-sex conduct and the failure of the Government to enforce prohibitions against discrimination in healthcare, housing, and employment.²⁶ Stigmatization results in

¹⁹ *EG & 7 Others v. Attorney General*, para. 134; see also *ibid.*, paras. 222–24.

²⁰ Alex Müller, Kristen Daskilewicz and the Southern and East African Research Collective on Health, *Are We Doing Alright? Realities of Violence, Mental Health, and Access to Healthcare Related to Sexual Orientation and Gender Identity and Expression in Kenya* (Amsterdam, 2019), p. 37.

²¹ *Ibid.*

²² *Ibid.*, p. 38.

²³ *Ibid.*, p. 39.

²⁴ *Ibid.*, p. 40.

²⁵ *Ibid.*, p. 38.

²⁶ Gay and Lesbian Coalition of Kenya, “Know Your Rights”, 2016, available at <https://www.galck.org/know-your-rights/>.

LGBTI people avoiding the procurement of critical services out of fear that their sexual orientation may be exposed.

The Committee requested that the Government elaborate on measures taken to protect LGBTI individuals against harassment, discrimination, and violence, including in relation to housing, the provision of goods and services, education, and health care.²⁷ As mentioned above, the Government acknowledged that stigma is one of the greatest barriers to accessing services, and it listed measures taken to address the situation without elaborating on the success of these measures in decreasing stigmatization and increasing access.²⁸

In Kenya's 2012 Review, the Committee expressed its concern about unequal access to medical care and treatment and addressed the high rates of HIV among the LGBTI community.²⁹ The Committee also noted that criminalization laws were in part responsible for the prevalence of HIV/AIDS because of resulting fear to seek medical care. While much of the focus on this area has been on gay men, this phenomenon also disparately impacts transgender women.³⁰

The most recent review by the Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that "lesbian, gay, bisexual, transgender and intersex persons are stigmatized and socially excluded, as well as discriminated [against] in gaining access to social services, particularly health-care services."³¹ The CESCR called on the State to decriminalize same-sex sexual acts and to "take the steps necessary to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity."³²

In its Fourth Periodic Report to the Committee (2019 State Report), the Government reiterated that it "does not sanction or condone discrimination against any persons on the basis of their sexual orientation in terms of access to basic fundamental human rights such as health, education and housing."³³ The Government asserted that "laws and policies are being amended to ensure that they fully conform to the constitutional imperative on non-discrimination."³⁴

The 2019 State Report described efforts to sensitize police officers³⁵ and health care workers for interactions with persons living with HIV/AIDS.³⁶ The Government also highlighted efforts in Mombasa that included a 2008 survey of gay men and several programs related to the prevention

²⁷ CCPR/C/KEN/Q/4, para. 5.

²⁸ CCPR/C/KEN/RQ/4, para. 33.

²⁹ 2012 Concluding Observations, para. 9.

³⁰ Ibid.

³¹ E/C.12/KEN/CO/2-5, para. 21.

³² Ibid., para. 22.

³³ Fourth Periodic Report Submitted by Kenya, CCPR/C/KEN/4, para. 19 [hereinafter "2019 State Report"].

³⁴ Ibid., para. 8.

³⁵ Ibid., para. 20.

³⁶ Ibid., paras. 21–24.

and detection of HIV/AIDS.³⁷ Nonetheless, the 2019 State-Sponsored Homophobia report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) highlighted “an alarmingly high incidence of HIV among men who have sex with men and trans women in Kenya.”³⁸ Because of the context of criminalization and stigmatization, privacy concerns are particularly grave in regards to health concerns of the LGBTI community.

In addition to continuing stigma and issues of LGBTI access to HIV/AIDS programs, the LGBTI communities face many other issues in access to healthcare, adequate housing, and employment. Research by the Gay and Lesbian Coalition of Kenya (GALCK) shows that LBQ women were “discriminated against by health care providers or were refused services in government hospitals. The participants stated that their main concerns were confidentiality and disclosure.”³⁹ The same study notes that many LBQ women “avoid seeking medical services at all [rather] than risk having their privacy breached by medical professionals.”⁴⁰ A recent study with LBQ women refugees in Nairobi further documented stigmatization by health professionals.⁴¹ A 2019 study found that of LGBTI+ people in Kenya, a third reported being denied health care and 35% called names or insulted by healthcare providers.⁴² LGBTI refugees and asylum-seekers in Kenya face additional obstacles to access to health care because they often lack the necessary legal documentation to access services. A number of studies have documented delays and bureaucratic inefficiencies in processing these necessary documents so that refugees can access health care. Interviews with leaders of community-based organizations confirmed that a central issue for LGBTI individuals was that they would avoid treatment or seeking access to medication in order to protect themselves from potential physical harm and harassment.

Interviews have also revealed that LGBTI persons face discrimination in employment by both current and prospective employers. One recent academic study of LBQ women refugees reported job losses when their employers learned of their nationality and the refugees reported that because of this type of discrimination “retaining employment is nearly impossible.”⁴³

Throughout Kenya, LGBTI refugees have extreme difficulty locating legal housing outside refugee camps. Given the pervasive homophobia in Kenya, LGBTI Kenyans also report arbitrary evictions if their landlord would discover their status.⁴⁴ One recent study of reported on the forced eviction of LBQ women refugees by Kenyan landlords. The study found that these

³⁷ Ibid., para. 25.

³⁸ Lucas Ramón Mendos, *State-Sponsored Homophobia*, 13th ed. (International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2019), p. 335.

³⁹ CAL & GALCK, *Lived Experiences*, p. 29.

⁴⁰ Ibid.

⁴¹ Hester K.V. Moore, ““The Atmosphere is Oppressive”: Investigating the Intersection of Violence with the Cisgender Lesbian, Bisexual, and Queer Women Refugee Community in Nairobi, Kenya”, in *LGBTI Asylum Seekers and Refugees from a Legal and Political Perspective: Persecution, Asylum and Integration*, Arzu Güler, Maryna Shevtsova and Denise Venturi, eds. (Springer, 2019).

⁴² Müller, Daskilewicz and SEARCH, *Are We Doing Alright?*, p. 37.

⁴³ Moore, p. 328.

⁴⁴ CAL & GALCK, *Lived Experiences*, p. 25.

evictions frequently came about after the landlord or neighbors learned of LBQ refugees' nationality and private lives.⁴⁵ A Reuters' report provides examples of the hardships LGBTI Kenyans face when trying to find and keep housing, stating, "[s]cores of LGBT+ refugees are in desperate need of emergency shelter after facing homophobic threats, violence and eviction warnings from community members in a Nairobi slum ..."⁴⁶ In the same article, the interviewees recounted harrowing personal interactions: "[t]he people here threaten and insult us. They say we are spreading disease and teaching their children to be homosexuals" and "[t]hey said either we go, or they will kill us. We are so scared to leave our rooms. At night, we take turns to stand guard."⁴⁷

We respectfully urge the Committee to ask the Government:

1. Please provide information on enacted or proposed legislative and administrative measures to combat all forms of discrimination based on sexual orientation and gender identity.
2. Please provide information on HIV/AIDS prevention, detection, and care measures, including access to medication for HIV/AIDS. What protections are in place for LGBTI persons seeking medical care? What efforts are being made to ensure that refugees can access health services, with special attention to the particular needs and obstacles for LGBTI individuals?
3. Please provide information on the sensitization training provided to healthcare workers described in the Government's Replies to the List of Issues as they affect LGBTI persons.
4. How does SOGIE impact housing options and eviction rates of LGBTI individuals?
5. What affirmative actions is the government taking to ensure employment discrimination is effectively, not just nominally, prohibited?

C. Effective Remedies (Article 2(3)(a))

Access to effective remedies is an individual's last resort in protecting their rights under the Covenant. Article 2(3)(a) requires state parties to ensure that any person whose rights or freedoms are violated under the Covenant shall have an effective remedy.⁴⁸ General Comment 31 states "[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy."⁴⁹ The access to remedy requirement is vital because "the purposes of the Covenant would be defeated without an obligation integral to article 2 to

⁴⁵ Ibid.

⁴⁶ Nita Bhalla, "Scores of LGBT+ Refugees in Kenya Slum Face Homophobic Attacks, Eviction", Reuters, 11 June 2019, available at <https://www.reuters.com/article/kenya-lgbt-refugees-idINKCN1TC2RC>.

⁴⁷ Ibid.

⁴⁸ Art. 2.

⁴⁹ General Comment 31, para. 15

take measures to prevent a recurrence of a violation of the Covenant.”⁵⁰ Rampant impunity for violence and discrimination against LGBTI individuals, and against refugees in particular, contravenes the Covenant and undermines efforts to protect and promote related rights.

The 2012 Concluding Observations recommended investigation of violence by law enforcement and adequate compensation to asylum seekers at the Dadaab refugee camp who were subjected to physical and sexual violence.⁵¹ In its 2019 State Report, the Government alluded to potential investigations but did not confirm, stating that “any allegation of crime by law enforcement officers is promptly investigated[,] and where found liable[,] prosecuted.”⁵²

Nonetheless, both public and state-administered violence against LGBTI Kenyans and refugees continues without redress. Our interviews confirm that this violence continues to occur in the Kakuma camp and in other parts of Kenya, and LGBTI persons report a failure of the government to investigate. The Penal Code’s criminalization of same-sex conduct makes LGBTI Kenyans and non-citizens more vulnerable to violence and extortion by the police and the general public.⁵³

A lack of action once violence is reported is only one aspect of the problem, as a lack of reporting is often prevalent as well. As one researcher has described, “LBQ [women who are] refugees experience violence on interrelated physical, psychological, and structural platforms. Because violence is also entrenched in legal structures, LBQ refugees do not consistently report instances of violence.”⁵⁴ Interviews with community leaders indicate that refugees fear going to the police to report crimes because of abuse by police and security officials when they seek help. LGBTI refugees have reported harassment, including extortion, where authorities seek bribes in exchange for not reporting those who do not have proper documentation of their legal status. An example from a recent GALCK report shows the issues LGBTI people face when trying to report crimes to the police. There are “incidents where individuals go to the police seeking help only to have the police attack them. In one such case where [an individual] tried to report a robbery, he was pushed into a cell by police officers, forcibly undressed, beaten, choked and had his hair shaved and burnt off because he ‘was dressed very gay.’”⁵⁵ In another example, one woman summarized, “[o]f course I cannot go to the police, first I am a woman, and then I am a lesbian and a refugee! They will not listen to me. They will rape me again and throw me in jail. I am nobody here ... I know that and they know that too.”⁵⁶

The government’s response to this ongoing problem is both unclear and problematic. In the Government’s Replies to the List of Issues, it noted that sensitization training has been provided

⁵⁰ Ibid., para. 17.

⁵¹ 2012 Concluding Observations, para. 12.

⁵² 2019 State Report, para. 79.

⁵³ CAL & GALCK, *Lived Experiences*, pp. 20–21, 24–26.

⁵⁴ Moore, p. 16.

⁵⁵ Gay and Lesbian Coalition of Kenya, *Decriminalisation of Consensual Same Sex Sexual Conduct in Kenya* (2018), available at <https://www.galck.org/repeal162/>.

⁵⁶ CAL & GALCK, *Lived Experiences*, p. 25.

to prosecutors in regard to sexual- and gender-based crimes, yet the training is not described. The Government should provide details of its educational strategy and concrete examples of its implementation and effect.

The Government also noted the implementation of the Alternative Justice System (AJS). AJS policy is aimed at providing alternative forms of dispute resolution mechanisms, including culture and customary law approaches, as long as they do not contravene the Bill of Rights, are not repugnant to justice or morality, or inconsistent with the Constitution or any written law.⁵⁷ Nevertheless, Government's Replies included a discussion of culture and stigma as a justification for the Penal Code provisions criminalizing same-sex sexual conduct, and this justification raises questions about whether LGBTI people would be able to obtain fair results through the AJS. Our interviews confirm that the use of cultural law to settle infringement of rights raises problems for LGBTI persons.

Additional examples of obstacles to accessing justice are discussed below in the sections on sexual and gender-based violence; the right to life; torture and cruel, inhuman or degrading treatment; arbitrary arrest and detention; and freedom of movement.

We respectfully urge the Committee to ask the Government:

1. Please provide information about investigations and/or prosecutions of alleged law enforcement violence or threats against LGBTI Kenyans or refugees in Kenya. Please include information about findings and compensation provided, if any.

II. SEXUAL AND GENDER-BASED VIOLENCE (Articles 2, 3, 6, 7, 26)

LGBTI persons in Kenya face high rates of sexual and gender-based violence and face obstacles accessing justice and rehabilitative mental health services. This is especially true for LGBTI refugees.

In the 2012 Concluding Observations, the Committee expressed concern about the rates of sexual and gender-based violence throughout Kenya.⁵⁸ The Committee recommended finalizing the Prosecution Guidelines on Sexual Offences and Gender Based Violence and enacting legislation against domestic violence in response.⁵⁹

Likewise, in 2017 the Committee for the Elimination of Discrimination against Women (CEDAW) called on the Government to protect all women from violence, including lesbian,

⁵⁷ CCPR/C/KEN/RQ/4, para. 17.

⁵⁸ 2012 Concluding Observations, para. 15.

⁵⁹ Ibid.

bisexual, and transgender women.⁶⁰ The Committee expressed concern that there is not full legislative protection against intersectional discrimination and that homosexual acts remain criminalized.⁶¹ The Committee urged the State to adopt a comprehensive anti-discrimination law and reminded the Government the expectation that homosexuality be included in that.⁶² CEDAW also recommended that the Government “[i]ncrease the investigation, prosecution and conviction rates in cases of sexual and gender-based violence throughout the State party, including in informal settlements and in camps for internally displaced persons and refugees.”⁶³

The List of Issues asked the Government to provide an update on measures to tackle gender-based violence against women, including the investigation, prosecution, and conviction of perpetrators, and remedies provided to victims.⁶⁴ The Government was also asked to provide information about steps taken to develop comprehensive anti-discrimination legislation, and protect LGBTI individuals against violence perpetrated by both state officials and private individuals.⁶⁵

The Government reported on the development of the prosecution guidelines, amendments to the Sexual Offences Act, and a number of other mechanisms and programs.⁶⁶ A study and analysis by the Women’s Refugee Commission (WRC) cites several other positive developments, such as: “the development of national guidelines and protocols; legislation mandating free post-sexual violence care at government health facilities; the lack of mandatory reporting for service providers; and an inclusive definition of sexual assault under the Sexual Offences Act (2006).”⁶⁷ To ensure tangible progress for LGBTI individuals, these measures need to include explicit consideration of diverse sexual orientation and gender identity or expression.

LGBTI refugees in Kenya continue to face high rates of sexual and gender-based violence.⁶⁸ In its recent study the Women’s Refugee Commission reported that every refugee research participant of diverse sexual orientation and gender identity reported having suffered sexual or other gender-based violence upon their arrival in Kenya and many on more than one occasion.⁶⁹ Violence against LBQ women has been particularly high. Where 14% of women in Kenya faced sexual violence, 51% of lesbian women and 52% of bisexual women experienced sexual violence

⁶⁰ CEDAW/C/KEN/CO/8, para. 11; *see* Convention on the Elimination of all forms of Discrimination Against Women, arts. 10–11, 18 December 1979, U.N.T.S. 1249.

⁶¹ CEDAW/C/KEN/CO/8, para. 10.

⁶² *Ibid.*

⁶³ *Ibid.*, para. 23.

⁶⁴ CCPR/C/KEN/Q/4, para. 9.

⁶⁵ *Ibid.*, para 5.

⁶⁶ 2019 State Report, paras. 80–82.

⁶⁷ Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), p. 2.

⁶⁸ *Ibid.* *See also* Hebrew Immigration Aid Society, *Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel and Kenya* (2013).

⁶⁹ WRC, “*We Have a Broken Heart*”, p. 2.

in their lifetime.⁷⁰ In another study, 42% of LBQ women refugees interviewed indicated that they had experienced sexual violence, and an additional 16% indicated they had been the victim of intimate partner or domestic violence.⁷¹

The WRC report confirmed that trans women, trans men, LGBTI adolescents, unaccompanied boys and young men, refugees selling sex, and detainees appear particularly vulnerable to sexual violence, exploitation, and abuse.⁷² The study documents how dire living conditions, discrimination, and deprivations in social and economic rights, including housing and health, increase the vulnerability among refugee youth and refugees with diverse sexual orientation and gender identity to sexual exploitation.⁷³

In the Government's Replies to the List of Issues, the Government listed several measures to tackle gender-based violence. These measures include the establishment of a specialized SGBV division and increased sensitization and training to prosecutors.⁷⁴ These measures are largely focused on prosecution, rather than the prevention of violence. They also fail to account for the fear of many women, particularly LBQ women, that reporting incidents of violence may lead to discrimination, harassment, or further violence.⁷⁵

The experience of members of this coalition and interviews carried out for this report also suggest a troubling level of sexual and gender-based violence deserving of the Committees attention. Many LGBTI refugees fleeing to Kenya go to local police stations upon arrival to get transportation and help. Several interviewees recounted that refugees are often met with extortion and violence during these interactions. Violence by State actors is discussed further below in the section on torture.

In addition to the prevalence of sexual and gender-based violence, rehabilitative services are limited and there are numerous obstacles which diminish access. In Nairobi, there are examples of highly regarded mental health care service providers who are specially trained to care for female and male refugee survivors of sexual violence, including LGBTQTI+ survivors.⁷⁶ Unfortunately, community members report that there is not nearly enough coverage in Nairobi given the significant need of the large urban refugee population. Additionally, the services available in the Kakuma camp are also very limited and the challenges for LGBTI survivors seeking care are even greater.

⁷⁰ Müller, Daskilewicz and SEARCH, *Are We Doing Alright?*, p. 40.

⁷¹ Moore, p. 328.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ CCPR/C/KEN/RQ/4, para. 57.

⁷⁵ CAL & GALCK, *Lived Experiences*, p. 24.

⁷⁶ One excellent example is the Minnesota-based Center for Victims of Torture, See generally The Center for Victims of Torture, "Innovative New Aftercare Program Helps LGBTI Survivors in Nairobi", 2018, available at <https://www.cvt.org/sites/default/files/documents/newsletters/CVT18%20NC%20NL%20web%20-%20FINAL%20-%2005.18.2018.pdf>.

The discrimination faced by the LGBTI community in Kenya has only been further exacerbated by the COVID-19 pandemic. A UN-supported helpline for victims of gender-based violence has seen an increase in calls since the start of the pandemic. The hotline heard 86 cases in February 2020, and the number rose to 1,100 in June.⁷⁷ COVID-19 restrictions also make it more difficult for survivors to report abuse and seek help.⁷⁸ Many rescue centers have to turn away survivors because they do not have the resources to quarantine new arrivals.⁷⁹

Several significant barriers remain for LGBTI refugees that make them vulnerable to sexual and gender-based violence and keep them from accessing care. The Women’s Refugee Commission concisely summarized these barriers: “limited access to urban refugee documentation (particularly for refugees with camp-based documents); economic hardship and scarce livelihood opportunities (especially for refugees with diverse SOGIE and unaccompanied adolescents); legislative barriers, particularly the criminalization of same-sex sexual activities; negative provider attitudes and practices; poor awareness of service availability among the studied refugee communities; and socio-cultural barriers.”⁸⁰

We respectfully urge the Committee to ask the Government:

1. What measures are the Government taking to eradicate violence against LGBTI Kenyans and non-citizens?
2. Please provide information about the number of reports of sexual or gender-based violence against LGBTI individuals, investigation and prosecution efforts, and relevant remedies provided.
3. What measures is the Government taking to streamline the process for LGBQI+ refugees to obtain the documentation that will allow them to access critical rehabilitative physical and mental health care?

III. RIGHT TO LIFE (Article 6)

LGBTI persons have faced violence by State actors and private individuals and are often revictimized if and when they attempt to report crimes committed against them. Article 6 of the Covenant imposes duties on the State to refrain from violence and to protect individuals from violence committed by private, non-state actors. As this Committee has clarified, this right does not permit derogation, concerns acts and omissions, and includes the right “to enjoy a life with

⁷⁷ UN News, “‘We want justice for these girls’: the Kenyan helpline for victims of gender violence”, 17 October 2020, available at <https://news.un.org/en/story/2020/10/1075522>.

⁷⁸ Agnes Odhiambo, “Tackling Kenya’s Domestic Violence Amid COVID-19 Crisis”, Human Rights Watch, 8 April 2020, <https://www.hrw.org/news/2020/04/08/tackling-kenyas-domestic-violence-amid-covid-19-crisis>.

⁷⁹ UN News, “We Want Justice for these Girls”.

⁸⁰ WRC, “*We Have a Broken Heart*”.

dignity.”⁸¹ General Comment 36 emphasized that it is the duty of the state to “take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence”⁸² and gave as examples “victims of domestic and gender-based violence ... lesbian, gay, bisexual, transgender and intersex persons,⁸³ asylum seekers, [and] refugees.”⁸⁴

In its Concluding Observations from 2012, the Committee recognized that Kenyan security forces have used excessive and unlawful force and recommended training programs.⁸⁵ Additionally, in regard to refugee camps, the Committee expressed its concern over reports of physical and sexual violence against asylum seekers.⁸⁶ To combat such violence, the Committee recommended diligent investigation of violence by law enforcement and adequate compensation to victims.⁸⁷

The List of Issues requested information on “unlawful use of force by State and non-State actors.” The Government’s Replies included information about recommendations and practices, but no information. The statistics provided in the Annex includes ongoing cases at different stages of court proceedings, but unfortunately reflects the slow conclusion of cases and a resulting indication of slow delivery of justice for the victims of police violence.

LGBTI refugees are particularly vulnerable to abuse by both the police and private individuals. “The rate of [sexual and gender-based violence] toward sexual minority refugees and asylum seekers [in Nairobi] is high.”⁸⁸ A 2013 study documented how LGBTI refugees in Kenya are in a vicious cycle of violence and vulnerability as LGBTI refugees are accused of “corrupting”⁸⁹ others and one consequence may be police arrest; refugees seeking housing may seek shelter in exchange for sexual favors and there are cases of sexual slavery.⁹⁰

Our interviews confirm this cycle of private and State-inflicted violence. Violence and discrimination forces LGBTI refugees into precarious conditions, which in turn increases their vulnerability to further violence and exploitation. Among their fellow immigrant and refugee population, LGBTI individuals are frequently rejected and attacked by groups who are fiercely homophobic and emboldened by anti-gay laws and sentiment in their countries of origin. Instead of serving as a protection for these vulnerable individuals, there are reports that LGBTI refugees have been victimized by Kenyan police.

⁸¹ General Comment 36, CCPR/C/GC/36, para. 3.

⁸² CCPR/C/GC/36, para. 23 (citing Inter-American Court of Human Rights, *Barrios Family v. Venezuela*, Judgment, 24 November 2011, para. 124).

⁸³ CCPR/C/GC/36, para. 23 (citing CCPR/C/COL/CO/6, para. 12).

⁸⁴ CCPR/C/GC/36, para. 23 (citing CCPR/C/KEN/CO/3, para. 12).

⁸⁵ 2012 Concluding Observations, para. 11.

⁸⁶ *Ibid.*, para. 12.

⁸⁷ *Ibid.*

⁸⁸ HIAS, *Invisible in the City*, p. 17.

⁸⁹ *Ibid.*, p. 10.

⁹⁰ *Ibid.*

We respectfully urge the Committee to ask the Government:

1. Please provide information about incidents of physical violence against LGBTI refugees that have been reported to the Government, along with the status of any government investigation and the result if completed.

**IV. TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT
(Article 7)**

In the 2012 Concluding Observations, the Committee expressed concern about the use of excessive and unlawful force by law enforcement.⁹¹ As described above, this includes a high incidence of sexual and gender-based violence.⁹² These concerns remain particularly acute for LGBTI refugees in Kenya who are vulnerable to physical and sexual violence from law enforcement because of their insecure status. LGBTI refugees and Kenyans report fear or experience of rape, physical abuse, and arbitrary imprisonment by law enforcement if they report being victims of crimes.⁹³

The Committee requested the Government to describe efforts that have been made to expand protections against torture and ill-treatment.⁹⁴ The Government's reply referenced a task force to train and sensitize police officers on the need to adhere to human rights, but did not give specifics about what this training entails or its effectiveness.⁹⁵ The Government's Reply also stated that this task force ensures that complaints against human rights abusers are investigated and prosecuted, but this is contradicted by the statistics provided by the Government.⁹⁶ For physical assault/injuries, 2603 complaints were received while 943 investigations were conducted and finalized.⁹⁷ Similarly, 176 complaints of sexual assaults were received and 35 investigations were conducted and finalized.⁹⁸

As the Independent Expert on Sexual Orientation and Gender Identity has explained regarding much of the violence suffered by LGBTI individuals, “[c]onsidering the pain and suffering caused and the implicit discriminatory purpose and intent of these acts, they may constitute

⁹¹ 2012 Concluding Observations, paras. 11, 12, 15.

⁹² *Ibid.*

⁹³ CAL & GALCK, *Lived Experiences*, p. 24.

⁹⁴ CCPR/C/KEN/Q/4, para. 14.

⁹⁵ CCPR/C/KEN/RQ/4, para. 78. *See infra* notes 99–100.

⁹⁶ *Ibid.*

⁹⁷ CCPR/C/KEN/RQ/4, para. 79.

⁹⁸ *Ibid.*

torture or other cruel, inhuman, or degrading treatment or punishment in situation where a State official is involved, at least by acquiescence.”⁹⁹

There are continued reports of serious violence committed by law enforcement, and LGBTI persons and especially non-citizens face particular vulnerabilities and obstacles for accessing justice.

Treatment in detention is an important concern. In one incident that garnered the attention of international media, 20 LGBTI refugees were arrested near the UNHCR headquarters in an upscale Nairobi neighborhood on 22 February 2019.¹⁰⁰ Those arrested said that they were falsely charged with public nuisance, trespassing, and defecating in public. Their detention was reported after nearly a month. During their detention, it was alleged that they were subjected to sexual assault and other abuse. Six trans women detainees were held in a men’s prison. One, Lutaya Benon, recounted to a journalist that guards ripped out her earrings and that other prisoners came at night and sexually assaulted her and other prisoners.¹⁰¹ Another prisoner, Sabam Kimbugwe, showed a reporter that at least four teeth were knocked out; he said this occurred in an attack by a prison guard. Other prisoners reported that HIV-positive detainees could not access antiretroviral medication.¹⁰²

We respectfully urge the Committee to ask the Government:

1. Please provide information on the measures, including specific training the Government has implemented to combat torture and CIDT and on what independent review mechanisms are in place to investigate reports of malfeasance and provide compensation for victims.

V. RIGHT TO LIBERTY AND SECURITY; NO ARBITRARY ARREST (Article 9)

Article 9 of the Covenant protects all individuals’ rights to liberty and security and prohibits arbitrary detention and arrest. The Committee has explained that while liberty concerns freedom from physical confinement, security of persons concerns freedom from injury to the body and the mind, or bodily and mental integrity.¹⁰³ The Committee has noted that Article 9 extends

⁹⁹ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/38/43, para. 28.

¹⁰⁰ Max Bearak, “These LGBT refugees came to Kenya seeking freedom. Now they say they’ve been imprisoned and abused.”, Washington Post, 19 March 2019, available at <https://www.washingtonpost.com/world/2019/03/19/these-lgbt-refugees-came-kenya-seeking-freedom-now-theyve-been-imprisoned-abused/>.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ General Comment No. 35 on Article 9, w (citing *Wackenheim v. France*, CCPR/C/75/D/854/1999, para. 6.3).

protections to “lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers.”¹⁰⁴ The Committee further explained that “[t]he term ‘arrest’ refers to any apprehension of a person that commences a deprivation of liberty, and the term ‘detention’ refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.”¹⁰⁵

The Committee requested information on any “reports of xenophobia and repressive policies against undocumented migrants, including house raids following the introduction of a hotline for citizens to report such individuals.”¹⁰⁶ The Government replied that it has received no reports of house raids, repressive policies, or xenophobia targeted toward noncitizens.¹⁰⁷

Further, the List of Issues included a request for the Government to report on anti-discrimination efforts, particularly those which include protections against extortion and arbitrary arrest and detention by law enforcement officials.¹⁰⁸ The Government replied that it does not encourage arbitrary arrests, harassment, extortion, ill-treatment, forcible relocation, and expulsion of any person, and that due process is strictly followed if a law enforcement officer is suspected of mistreatment of suspects.¹⁰⁹

However, a disturbing pattern of arbitrary arrests and detention of noncitizens and LGBTI individuals contradicts these assertions.¹¹⁰ Reports from local community members indicate instances of LGBTI refugees being arbitrarily arrested and extorted for sexual acts and financial payments. There are also reports of cases where individuals have been arrested and subsequently prevented from contacting anyone outside the detention facility and people who have been routinely held longer than the 24-hour maximum.

The COVID-19 pandemic has demonstrated police targeting of LGBTI refugees.¹¹¹ Many LGBTQTI+ refugees live together to lower costs and to preserve a sense of family, but police raids on LGBTI safehouses have become increasingly prevalent.¹¹² In compliance with COVID-19 restrictions, a safe house in Nairobi suburbs sheltering 30 refugees split into two houses of 15 each. Despite abiding by restrictions, the safe-houses were still subjected to police raids.¹¹³

¹⁰⁴ Ibid., para. 3.

¹⁰⁵ Ibid., para. 13.

¹⁰⁶ CCPR/C/KEN/Q/4, para. 18.

¹⁰⁷ CCPR/C/KEN/RQ/4, para. 92.

¹⁰⁸ CCPR/C/KEN/Q/4, para. 5.

¹⁰⁹ CCPR/C/KEN/RQ/4, para. 52.

¹¹⁰ Amnesty International, “Kenya: Global Compact on Refugees must be quickly anchored in national policy”, 24 December 2018, available at <https://www.amnesty.org/en/latest/news/2018/12/kenya-global-compact-on-refugees-must-be-quickly-anchored-in-national-policy/>.

¹¹¹ Max Bearak, “‘We Were So Ready’: LGBT Refugees in Kenya Live in Fear as Global Resettlement is Put on Hold”, Washington Post, 26 May 2020, available https://www.washingtonpost.com/world/africa/kenya-coronavirus-lgbt-refugees-resettlement/2020/05/26/3550cd0c-83ef-11ea-81a3-9690c9881111_story.html.

¹¹² Ibid.

¹¹³ Ibid.

Caitlyn Lubega detailed a raid of her home by police where police searched her bedroom drawers and discovered lubricant.¹¹⁴ The police then arrested Lubega and her roommate and gave them the option to either “buy their freedom” or be charged with sex crimes, using the lubricant as evidence.¹¹⁵ While the Covenant allows the derogation from state parties’ obligations during public emergencies, such derogations must satisfy the requirements of Article 4. In particular, COVID-19 restrictions cannot be enforced in a manner which violates the principle of non-discrimination.¹¹⁶ However, the aforementioned reports indicate that the restrictions have been used to target and extort LGBTI refugees.

On this basis, the evaluation of Kenya’s efforts to protect the rights to liberty and security must explicitly consider the experience of LGBTI individuals in Kenya, with particular consideration of especially marginalized groups such as LGBTI non-citizens. These groups are especially vulnerable to arbitrary arrest and other violations of the right to liberty. Due to the credible reports of abuse against LGBTI noncitizens, the Government must do more to facilitate the safe reporting of violations and the pursuit of adequate remedy.

We respectfully urge the Committee to ask the Government:

1. Please describe measures taken to prevent unlawful or arbitrary arrest of LGBTI people by the police, as well as related abuses such as violence and extortion. Please identify the remedies that have been provided to victims in specific cases of unlawful or arbitrary arrest and cases where arrested persons were brought before a judge.
2. What safeguards, policies, and practices has the Government implemented to create a non-discriminatory and anonymized system for reporting instances of arbitrary arrest, extortion, and police violence targeted against LGBTI people. Please provide measures taken to prevent formal and informal reprisals against those who report such violations to the authorities.
3. What safeguards, policies, and practices has the Government implemented to create a non-discriminatory and anonymized system for reporting violations of noncitizens’ rights, including instances of xenophobia, harassment, violence, and repressive policies against undocumented migrants such as house raids. Please provide measures taken to prevent formal and informal reprisals against those who report such violations to the authorities.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2, para. 2.

VI. RIGHT OF LIBERTY OF MOVEMENT AND FREEDOM TO CHOOSE RESIDENCE (Article 12)

The Covenant guarantees the right to liberty of movement and freedom to choose a residence; this right can be restricted only for reasons of national security, public order, public health or morals, or the rights and freedoms of others.¹¹⁷ General Comment 27 on freedom of movement explains that Article 12 must be read in conjunction with other provisions of the Covenant, such as Article 2, which reaffirms the principle of non-discrimination.¹¹⁸ General Comment 27 further articulates that no one shall be forced to overcome obstacles to move and that the Covenant restricts excessive applications for permission to seek alternative residence.¹¹⁹

The Committee requested information about the status of the Refugee Bill of 2019 and whether it will repeal the encampment provisions in the Refugees Act of 2006, which restrict refugees' and asylum seekers' right to freedom of movement.¹²⁰ The Government reported that the Refugee Bill of 2019 was referred back to the "relevant Ministry to undertake further public participation and consultation."¹²¹ However, the Government did not give a clear answer as to the likelihood of the bill becoming law, nor did the Government adequately respond to the Committee's questions on the effect of the bill on the protection of LGBTI individuals in the refugee camps. In fact, the Refugees Bill of 2019 remains under consideration,¹²² meaning that the strict limitations on freedom of movement in the Refugees Act of 2006 are still in effect¹²³— and the Government has not indicated that it has instituted measures to specifically and sensitively increase protections for LGBTI refugees.¹²⁴ A further concern is that the bill also sets forth reasons why asylum applications could be denied and applicants removed from Kenya for violation of Kenyan law,¹²⁵ which could impact LGBTI+ refugees, if they were found to be in violation of the laws criminalizing same sex sexual conduct.

Kenya's 2010 Constitution provides for freedom for all refugees to enter, remain, and reside anywhere in the country.¹²⁶ However, Kenya's current encampment policy "effectively prohibits

¹¹⁷ Art. 12.

¹¹⁸ See General Comment No. 27 on Freedom of Movement, CCPR/C/21/Rev.1/Add.9, para. 18 (reaffirming that the implementation of Article 12 must be consistent with the entire Covenant especially on the grounds of non-discrimination).

¹¹⁹ Ibid., para. 4.

¹²⁰ CCPR/C/KEN/Q/4, para. 18.

¹²¹ CCPR/C/KEN/RQ/4, para. 92.

¹²² Karen Hargrave and Irina Mosel, *Public Narratives and Attitudes toward Refugees and other Migrants: Kenya Country Profile* (Overseas Development Institute, 2020), p. 12 n. 7.

¹²³ Ibid., p. 3.

¹²⁴ CCPR/C/KEN/RQ/4, para. 92.

¹²⁵ The Refugees Bill 2019, cl. 23(5) ("A person who has submitted an application for refugee status shall be under obligation to abide by all the laws of Kenya . . . failure to which the Commissioner shall have powers to strike them out of the asylum process and advi[s]e the Cabinet Secretary to remove them from Kenya subject to the applicable immigration laws.").

¹²⁶ Constitution of Kenya (2010), chap. 4, art. 39.

refugees from leaving the camps.”¹²⁷ In contravention of international and national protections for the freedom of movement, Kenya's encampment policy requires refugees to have a movement pass to move beyond certain designated areas.¹²⁸ This policy makes those who do flee the camps especially vulnerable to harassment, exploitation, and violence by police or private individuals. The Humanitarian Policy Group has observed that refugees’ “ability to access employment and higher education,” as well as their access to justice, are substantially curtailed by these provisions.¹²⁹

The Government stated in its 2019 Report that “[t]here is no impediment for foreigners who have obtained all necessary documentation to be in the country, to move and reside anywhere in Kenya.”¹³⁰ However, like other refugees, LGBTI refugees face long and cumbersome hurdles when they attempt to obtain the necessary documentation to allow them the freedom to move. This impediment is especially grave for this population given the particular difficulties faced by people living in camps who identify or are identified as LGBTI. An extensive study by the Norwegian Refugee Council and the Harvard International Human Rights Clinic has documented that refugees in Kenya have had increasing problems obtaining documentation for internal travel since 2014.¹³¹ This report found four key factors in the process conducted by the Government’s Refugee Affairs Secretariat that ought to be addressed: 1) stalled or suspended registration and registration processes; 2) process inconsistencies; 3) lack of clear information; and 4) burdensome administrative issues and travel costs associated with registration processes.¹³²

NRC and IHRC-HLS reported that over the previous five years, Kenyan authorities had added layers of complexity to the process, making it more difficult for refugees to access documentation. Bureaucratic inefficiencies in assessing refugee claims result in unnecessary delays in resettlement.¹³³ Civil society leaders have reported that UNHCR and Government officials formerly consulted a working committee to coordinate these processes. Unfortunately, the Government has added bureaucratic steps—the current procedure is that UNCHR submit requests for resettlement, and multiple Government agencies need to approve various statuses.

¹²⁷ Sorcha O’Callaghan and Georgina Sturge, “Against the odds: refugee integration in Kenya”, Humanitarian Policy Group (London, Overseas Development Institute, 2018), p. 6; *see also* Robert Doya Nanima, “An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of Their Rights”, *Law Democracy and Development*, vol. 21, 2017, p. 54 (“The refugees are obliged to remain in areas, which have traditionally been insecure, where the rule of law is weak, and where the perpetrators of violence can act with a high degree of impunity.”).

¹²⁸ For additional information, see ACMS & Hall, *Free and Safe Movement in East Africa*, pp. 40–41.

¹²⁹ O’Callaghan & Sturge, p. 6.

¹³⁰ Kenya State Report, para. 100.

¹³¹ Norwegian Refugee Council and International Human Rights Clinic–Harvard Law School, *Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status* (2017), available at <https://www.nrc.no/globalassets/pdf/reports/refugees-in-nairobi/recognising-nairobi-refugees.pdf>.

¹³² *Ibid.*, p. 2.

¹³³ *Ibid.*, pp. 13–19.

LGBTI refugees face unique and additional obstacles within a refugee camp. For example, in the Kakuma camp there is a separate physical space for LGBTI refugees. This partition is due to the inability of officials to guarantee the safety of LGBTIQI refugees from attacks within the camp. In some cases, LGBTI refugees in Kakuma have been relocated outside of the camp due to safety concerns. In December 2018, for example, LGBTI individuals were attacked following a pride parade in Kakuma. Following the attacks, UNHCR transported individuals to Nairobi with the intention of keeping them safe. However, living conditions in Nairobi are also very difficult for LGBTI non-citizens. In its October 2019 report, the Women’s Commission on Refugees concluded, “[a]lthough Nairobi is comparatively more tolerant than Kakuma or Kampala, refugees still grapple with homophobia and transphobia, insecurity, exploitation, harassment, and violence.”¹³⁴

For refugees who are not safe in the camp, the lack of freedom of movement guaranteed by an urban refugee policy seriously endangers their safety. Under current limits on travel, a refugee must have approval to travel more than 25 km outside of the camp; this approval is difficult to obtain. Our interviews suggest that there are only three common reasons why permission is granted: if medical attention is not available at camp; if education not available at camp; or at the prerogative of UNHCR. Security concerns inside the camp fall under the third and the most common request by LGBTI refugees is to move to Nairobi or other urban centers.

The strict limitations of the Refugee Act of 2006 remain in effect, but if the Refugees Bill of 2019 were passed, it would continue to impose limitations on noncitizens’ freedom of movement. Clause 31 allows the Commissioner for Refugee Affairs to order, under penalty of law, the mandatory resettlement of refugees to another camp.¹³⁵ Amnesty International has raised concerns that this provision contravenes the freedom of movement guarantees in the Kenyan Constitution of 2010.¹³⁶ Further, this provision does not set out clear limits on the use of this authority, opening up the possibility that Clause 31 could be used to limit the freedom of movement in a manner which disproportionately targets LGBTI noncitizens in violation of the principles of non-discrimination and necessity.

As such, the Government has not yet adequately addressed the Committee’s inquiries on freedom of movement and the Refugees Bill of 2019, and the troubling encampment provisions codified in the Refugee Act of 2006 remain in effect. Furthermore, the Government’s expansion of “community policing” and deployment of “more police units”¹³⁷ does not necessarily translate into increased protection for LGBTI refugees. As noted above, same-sex sexual conduct remains criminalized, and this criminalization leads to the harassment, violence, arbitrary arrest, and extortion of LGBTI people at the hands of police. LGBTI refugees are especially vulnerable to

¹³⁴ WRC, “*We Have a Broken Heart*”.

¹³⁵ The Refugees Bill 2019, cl. 31(1)–(2) (“The Commissioner may require any refugee is (sic) within a designated area[] to move to or reside in any other designated area. A refugee to whom an order has been made under this section; fails to comply with such an order will be guilty of an offence under this Act.”).

¹³⁶ Amnesty International, *Memorandum on Refugees Bill 2019 Presented to the Departmental Committee on Administration and National Security* (17 October 2019), available at <https://www.amnestykenya.org/wp-content/uploads/2019/11/MEMORANDUM-ON-REFUGEES-BILL-2019-PRESENTED-TO-THE-DEPARTMENTAL-COMMITTEE-ON-ADMINISTRATION-AND-NATIONAL-SECURITY.pdf>.

¹³⁷ CCPR/C/KEN/RQ/4, para. 92.

these violations, and so increased policing without the other measures outlined above is an inadequate measure for protecting the rights guaranteed LGBTI refugees under the Covenant. The passage of a robust Refugee Bill would be an important step in advancing refugee rights, but it is critical that a gender and sexual orientation lens is prominent and cross-cutting.

We respectfully urge the Committee to ask the Government:

1. Please provide information on the number of travel passes the Government has issued for LGBTQI refugees and the criteria for issuing the passes.
2. What steps will the Government take to restore urban refugee policy and, where advisable, facilitate movement from Kakuma to urban areas for security, employment and mental health reasons?
3. What policies will the Government implement in the near future to repeal the encampment provisions of the Refugee Act of 2006? Please provide information on how the Government will codify protections for LGBTI refugees that will address harassment and violence from both the police and the public.

CONCLUSION

We urge the Committee to take into special consideration the particular human rights situation of diverse groups of LGBTI individuals in Kenya, including both native Kenyans and non-citizens. An explicit inclusion of a sexual orientation and gender identity lens will facilitate a robust and constructive review and open the dialogue to marginalized sectors.