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The Equal Rights Trust

Parallel report submitted to the 79th session of the Committee on the Elimination of Racial Discrimination (CERD) in relation to the combined initial to fourth periodic reports submitted by:

The Republic of Kenya

July 2011

Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on the Elimination of Racial Discrimination (the Committee) commenting on the combined initial to fourth periodic reports by the Republic of Kenya (Kenya) under Article 9 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination (the Convention).
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. ERT has been actively involved in the promotion of improved protection from discrimination in Kenya since 2009. ERT is currently managing four projects in partnership with Kenyan Non-Government Organisations (principally, the Federation of Women Lawyers Kenya, the Kenya Human Rights Commission and the Gay and Lesbian Coalition of Kenya) which are focussed on developing protection from discrimination on all grounds. In the course of these projects, ERT has undertaken research on patterns of discrimination which prevail in Kenya and on the legal and policy framework designed to provide protection from discrimination, including in particular on the basis of race and ethnicity.

Executive Summary

4. The present parallel report draws on ERT's experience and research on discrimination in Kenya. In the light of this information, it seeks to assess the adequacy, effectiveness, enforcement and implementation of legal provisions designed to provide protection from discrimination on grounds of race and ethnicity.
5. ERT welcomes the progress made by the Kenyan authorities in improving the legal protections from discrimination on grounds of race and ethnicity since the ethnic violence which followed the 2007 presidential and parliamentary elections. In 2008, Kenya adopted a National Cohesion and Integration Act which defines and prohibits discrimination on ethnic grounds in a number of areas of life, criminalises hate speech and establishes a National Cohesion and Integration Commission.¹ ERT believes the Act represents an important step forward in Kenya's ability to meet its obligations under Article 2 and provides a strong framework for the achievement of its obligations under Article 5.
6. ERT also welcomes the adoption of the Constitution of Kenya, in August 2010 – after more than 20 years of attempted constitutional reform – reflecting a strong commitment to the principles of equality and non-discrimination. The Constitution *inter alia* prohibits discrimination on a wide range of grounds, removes limitations to the right to non-discrimination which had existed under the previous Constitution, and provides a range of particular rights for marginalised groups. In addition, through the establishment of powerful, well-resourced County governments, and the creation of an “Equalisation Fund” aimed at addressing regional disparities in income and development, the Constitution provides a good platform for addressing many of the root causes of disadvantage and discrimination based on ethnicity which prevail in the country. ERT is therefore surprised that the government's report to the Committee does not refer to the new Constitution, despite having been submitted to the Committee in January 2011, six months after its adoption.
7. However, while ERT welcomes the recent introduction of both the National Cohesion and Integration Act and the Constitution, this report seeks to highlight some areas of concern and to make recommendations to inform the effective implementation of the Convention. In this respect, this report focuses on two types of problem which ERT believes should be addressed: (i) Gaps, inconsistencies and exceptions in the legal and policy framework (in respect of Articles 1, 2, 3 and 4); (ii) Failures of implementation and enforcement of those laws which exist, and the consequent failures to ensure equal enjoyment of rights and freedoms without distinction as to race (in respect of Article 5).
8. In respect of this second point, the report highlights apparent incidences of direct and indirect discrimination against particular ethnic groups in access to public resources and public services. ERT's research in Kenya in 2010 and 2011 indicates that there are strong links between particular ethnic groups and certain regions of the country; as such, the substantial differences in levels of income, development and infrastructure which exist between the different regions are simultaneously ethnic differences. ERT is concerned by compelling evidence that the government's development policy – which has long focused resources on areas with the highest levels of development – indirectly discriminates against those ethnic groups living in marginalized areas. Further, ERT is concerned by testimony collected from certain marginalised groups whose members have been victims of direct discrimination by local and national politicians and government officials in resource allocation as a result of their ethnicity.

¹ National Cohesion and Integration Act, 2008, 12/2008.

9. The report recommends that the government must take steps to review and amend the law – in particular the National Cohesion and Integration Act – in order to fulfil its obligations under Article 2. It also recommends that the government must ensure the effective implementation of provisions designed to prohibit discrimination in allocation of public resources, and the new Constitutional provisions designed to redress long-standing regional imbalances in access to resources. Finally, the report recommends that in order to adequately address these two problems, and to provide effective protection from multiple discrimination, the government consider the adoption of a comprehensive equality law, in line with principles developed by civil society.

Article 1

Definition of discrimination

10. ERT welcomes the introduction - in the National Cohesion and Integration Act 2008 - of a definition of racial discrimination in line with that provided in Article 1 (1) of the Convention. The Act prohibits both direct and indirect discrimination on ethnic grounds, which include colour, race, religion, nationality or ethnic or national origins.² The Act also explicitly prohibits segregation, harassment on ethnic grounds and victimisation by reason of action taken against the discriminator. Similarly, we welcome the inclusion of race, ethnic or social origin, colour and birth as prohibited grounds of discrimination in the cof Kenya 2010.³

Collection of data on ethnic groups

11. As the Committee has stressed in its General Recommendation 24, “it is essential that States parties provide as far as possible the Committee with information on the presence within their territory of [races, national or ethnic groups or indigenous peoples].”⁴ ERT is concerned by the manner in which the government of Kenya collects data on the ethnicity of persons within its territory and the accuracy of data provided in the state’s report to the Committee. As stated in that report, in 2009, it was decided that data on ethnicity should be included in the national census. However, the data collected has been called into question after a number of inconsistencies were identified, and the government agreed to void results from 8 districts in the north east of the country, with the result that there is at present little clarity about the country’s ethnic makeup.⁵
12. Furthermore, ERT is of the view that in order to effectively tackle discrimination and inequality, states must collect statistical data “in order to identify inequalities, discriminatory practices and

² See above, note 1, section 3.

³ Constitution of Kenya, 2010, Art 27 (4).

⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation 24: Reporting of persons belonging to different races, national/ethnic groups or indigenous peoples (Art. 1)*, CERD 08/27/1999, para. 1 (available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9ce4cbfde77a452a8025684a0055a2d0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9ce4cbfde77a452a8025684a0055a2d0?Opendocument)).

⁵ See Ministry for Planning, National Development and Vision 2030, 2009 Population & Housing Census Results, 2010, No longer available online. (Following disputes about the annulment of results in 8 northern districts and questions over veracity of the statistics for certain ethnic groups in the 2010 Census (see, for example: Muchangi, J., Kenya: Anger As Census Results Cancelled, 1 September 2010, available at: <http://allafrica.com/stories/201009020398.html>), the government of Kenya announced it would re-run the census in part of the country. As a result, a full set of statistics from the 2010 Census originally published on the Kenya National Bureau of Statistics website has recently been withdrawn.)

patterns of disadvantage”.⁶ We believe it is incumbent upon states to collect data not only on the ethnic makeup of their population, but also on the outcomes achieved by different groups in areas such as health, education or income to bring to light any discriminatory disadvantage in respect of the rights enumerated in Article 5 of the Convention. In common with the Committee, we also believe that, in order to expose patterns of multiple discrimination, such data should be disaggregated by gender⁷ and other grounds of discrimination. As such, we are concerned that the government’s mechanisms for collecting data on the outcomes of different racial or ethnic groups are inadequate to ensure that patterns of inequality and discrimination are adequately addressed.

Article 2

Measures to respect the right to non-discrimination

13. The Constitution of Kenya 2010 (Constitution) is the primary means by which the state meets its obligations to respect the right to non-discrimination, and in this respect it represents a significant improvement on its predecessor. A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution and the preamble lists equality as one of six essential values upon which governance should be based. This expression of principle is given legal force in Article 10, which includes equity, social justice, equality, non-discrimination and “protection of the marginalised” among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions. This is further emphasized in Article 20 (4)(a) which lists equality and equity as values to be promoted in interpreting the Bill of Rights and Article 21 (3) which creates a duty on state actors to address the needs of vulnerable groups in society.
14. Article 27 of the Constitution provides for equality and freedom from discrimination. Article 27 (1) provides that equality entails equality before the law, and to equal protection and benefit of the law, while 27 (2) states that “equality includes the full and equal enjoyment of all rights and fundamental freedoms”. Article 27 (4) prohibits discrimination on an extensive list of specified grounds (“race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”). The Constitution prohibits both direct and indirect discrimination, but does not cover segregation, harassment, or victimisation, despite the fact that some of these forms of discrimination are covered in other Kenyan legislation governing specific areas of life.⁸ Article 27 (5) extends the prohibition on discrimination beyond the scope of the state to include natural and legal persons. Article 27 (6) creates a duty of affirmative action, a concept which is defined in Article 260, which states that “[...] the State shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.”

⁶ *Declaration of Principles on Equality*, The Equal Rights Trust, London 2008, Principle 24: “To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. States must not use such information in a manner that violates human rights.”

⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation 25: Gender related dimensions of racial discrimination*, CERD 03/20/2000, para. 6 (available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/76a293e49a88bd23802568bd00538d83?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83?Opendocument)).

⁸ The National Cohesion and Integration Act 2008 prohibits segregation, harassment and victimisation. The Sexual Offences Act creates a criminal offence for sexual harassment.

Measures to prohibit discrimination

15. As discussed in brief above, Article 27 (5) of the Constitution extends the prohibition on discrimination beyond the scope of the state to include natural and legal persons. However, the National Cohesion and Integration Act is the principal legislation through which the government of Kenya meets its obligations to prohibit racial discrimination under Article 2 (d), and more widely, the means for it guarantee the enjoyment of the rights set out in Article 5. In general, ERT welcomes the Act as an attempt to provide protection across a range of areas of life. In particular, we welcome section 11 of the Act, which introduces important provisions for the “ethnically equitable” distribution of public resources – a critical issue given Kenya’s history of ethnic influence over political decision making and public expenditure⁹ – and section 12 which prohibits discrimination on ethnic grounds in the acquisition, management or disposal of public property. Section 11 stipulates that distribution of public resources should take into account Kenya’s diverse population and poverty index.
16. However, as we argue below, the Act contains a number of gaps, exceptions and inconsistencies which limit the state’s ability to meet its obligations under Article 2. As such, our analysis in this section of the parallel report will focus on those areas where ERT has identified problems which limit the scope of the protection provided under the legislation.
17. Section 7 of the National Cohesion and Integration Act contains broad protection against discrimination in employment, both during recruitment (in respect of the recruitment process, the terms of employment and the appointment process) and in the course of employment (in respect of the terms of employment, opportunities for promotion, transfer, training or other benefits, and dismissal).¹⁰ However, subsection 7 (6) limits the application of a number of the provisions found in section 7 to employment in the public sector; the subsection states that the provisions prohibiting discrimination in the course of employment (7(4)) and harassment (7(5)) “do not apply to employment for the purposes of a private enterprise”. ERT believes that the exclusion of private sector employers from the important protections provided in section 7 is a serious cause for concern.
18. To some extent this defect is remedied by the provisions of the Employment Act 2007, which provides important additional protection from discrimination in employment on a range of grounds which include race, colour, nationality and ethnic or social origin. The Act prohibits both direct and indirect discrimination in both public and private sector employment and applies to all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. However, the Employment Act also contains a number of broad exceptions, which limit its application for reasons of state security and in respect of employment in the armed forces or police. Section 3 (5) specifically exempts the Export Processing Zone from the application of the Act, raising concerns that employees in this area may suffer discrimination, where these are not addressed in the additional provision of the Export Processing Zones Act of 1990.
19. The Equal Rights Trust urges the Committee to recommend that the government review and remove any exceptions which are not justified as a proportionate means of achieving a legitimate aim, including in particular: (a) amending sub-section 7 (6) National Cohesion and Integration Act to bring it into line with the provisions of the Employment Act; and (b) amending sub-section 3 (5) of

⁹ For further discussion of the role of ethnicity in Kenyan politics and its impact on decisions about public expenditure, see below paras. 44-48.

¹⁰ See above, note 1, section 7 (3) and (4).

the Employment Act to remove to ensure that the prohibition on discrimination also applies in respect of the Export Processing Zone.

20. The National Cohesion and Integration Act also prohibits discrimination against members of organisations and against those applying for membership.¹¹ Section 9 (4) provides an exception to this provision in cases where membership is limited to religious persuasion or profession. ERT is concerned that this definition provides scope for restrictive interpretations of the prohibition contained in section 9 (1), with the effect of permitting racial discrimination in professional bodies, and other organisations. ERT is not aware of any justification for this exception, and believes that it falls outside the scope of permitted differentiation set out by the Committee.¹²
21. Section 10 of the Act prohibits discrimination in the provision of services by any “qualifying body, licensing authority, planning authority, public authority, employment agency, educational establishment or body offering training”. Notably, there is no protection against discrimination by non-state providers of services other than in the fields of employment, education or training. Those private entities which provide goods and services for sale are not prohibited from discriminating in doing so by section 10 of the Act. Similarly acts involving land, property and housing transactions or services in the private sphere are not covered by the Act. ERT is concerned that this gives broad scope for discrimination in a range of settings, limiting the government’s ability to meet its obligations under Article 2 (d), and under Article 5(f), which requires the state to guarantee the right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks, without discrimination.
22. The Equal Rights Trust urges the Committee to recommend that the government amend the National Cohesion and Integration Act, section 10, to include all provision of goods and services by non-state actors.
23. Furthermore, ERT is concerned by section 10 (2) which provides a broad exception in respect of discrimination in the exercise of immigration functions. It states:

Subsection (1) shall not apply [...]
iii. An action undertaken by the Minister for Immigration under the Immigration Act, in relation to cases relating to immigration and nationality.
24. ERT is concerned that paragraph (iii) may permit discrimination in the administration of the immigration and nationality system beyond the scope of permitted differentiation between citizens and non-citizens provided in Article 1 (2). As the Committee has stated, “among non-citizens, states may not discriminate against any particular nationality”¹³; Nor should discrimination on the basis of colour or race be permissible in the exercise of immigration functions. ERT is concerned that subsection (iii) provides scope for such discrimination to occur, a concern which is further heightened by evidence that certain ethnic groups within Kenya are subject to discrimination in the process of acquiring citizenship documents.

¹¹ See above, note 1, section 9 (1) and (2).

¹² Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of discrimination (Art. 1.1)*, CERD 03/22/1993, para. 2 (available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d7bd5d2bf71258aac12563ee004b639e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d7bd5d2bf71258aac12563ee004b639e?Opendocument)).

¹³ Committee on the Elimination of Racial Discrimination, *General Recommendation 11: Non-citizens (Art. 1)*, CERD 03/19/1993, para. 1 (available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/7b38ac12b0986d86c12563ee004a8af0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/7b38ac12b0986d86c12563ee004a8af0?Opendocument)).

25. The Equal Rights Trust urges the Committee to recommend that the government amend the National Cohesion and Integration Act to amend sub-section 10 (2), in line with its obligation under the Convention to ensure that public bodies do not engage in acts or practices of discrimination.

Measures to ensure full and equal enjoyment of rights and freedoms

26. In respect of the state's obligations under Article 2 (2) of the Convention, Article 27 (6) of the Constitution creates a duty of affirmative action, a concept which is defined in Article 260, which states that "[...] the State shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination." In addition, Part Three of the Bill of Rights makes specific provision for particular vulnerable groups and persons, with the aim of ensuring "greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons".¹⁴ Of particular relevance in respect of the Convention are the provisions in Article 56, which provides additional rights and protections for "Minorities and Marginalised Groups", a classification which potentially encompasses all those vulnerable to discrimination. The term "Minority" is not defined by the Constitution but Article 260 defines "Marginalised Groups" as all those disadvantaged by discrimination on one or more of the grounds provided in Article 27 (4).¹⁵ The article provides for the State to undertake measures – including affirmative action – to ensure the participation of these groups in governance, education and employment, to have access to water, health services and infrastructure and to develop their cultural values, languages and practices. As such, the article guarantees significant additional rights on all prohibited grounds and may form a useful guide to the interpretation of Article 27 (6) in specific areas of life.
27. A further set of Constitutional provisions which could have a significant impact on the equal enjoyment of rights and freedoms – in particular economic and social rights – are those which concern the devolution of power and the establishment of an "Equalisation Fund" designed to address the significant imbalances which have built up between regions. While not presented as positive action measures in the Constitution, these measures – which will be discussed in respect of Article 5 below – are potentially significant because of the strong links between particular ethnic groups and certain regions of the country and the role which regional patronage has played in national politics.

Institutions to facilitate implementation of the Convention

28. In line with the Committee's General Recommendation 17, the Act establishes the National Cohesion and Integration Commission with a key mandate to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between different ethnic and racial communities of Kenya.¹⁶ In addition to having the powers to promote respect for the enjoyment of human rights without discrimination, review government policy, monitor legislative compliance, undertake public education and assist in the preparation of reports to the Committee, as recommended for such

¹⁴ See above, note 3, Article 52 (2).

¹⁵ See above, note 3, Article 260: "[...] 'marginalised group' means a group of people who, because of law or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4);".

¹⁶ See above, note 1, section 25 (1).

bodies in General Recommendation 17,¹⁷ the Commission has a range of other powers. These power include, *inter alia*, promote equal access and enjoyment by persons of all ethnic communities and racial groups to public services, investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority, determine strategic priorities in all the socio-economic political and development policies of the Government impacting on ethnic relations and advise on their implementation, and initiate policy, legal or administrative reforms on issues affecting ethnic relations.¹⁸

29. Section 43 of the Act makes provision for any aggrieved person to lodge a complaint regarding contravention of the Act to the Commission. In such cases, the Commission has the power to refer the case for conciliation,¹⁹ or issue a notice of compliance setting out duties on the responsible party.²⁰ Section 59 creates a power for the Commission to investigate instances of discrimination on its own initiative. ERT welcomes the broad scope of the Commission’s powers to receive complaints and undertake investigations, which represent an important avenue for the state to meet its obligations under Article 6, as well as Article 2.

Article 3

30. ERT commends the steps taken by the government of Kenya to effectively prohibit segregation, in accordance with Article 3. Section 3 (3) of the National Cohesion and Integration Act defines segregation as a form of prohibited discrimination.

Article 4

31. ERT commends the steps taken by the government of Kenya to effectively prohibit hate speech, in accordance with Article 4. Section 13 of the National Cohesion and Integration Act creates a criminal penalty for the use of words, publication of written material, publication of images and presentation of public performance which “which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.”. “Ethnic” is defined in section 13 (3) as any “group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”, and section 13 (2) provides a maximum punishment for the criminalised acts of either or both a fine of Kshs 1 million or 3 years imprisonment.
32. In addition to the provisions in the National Cohesion and Integration Act, Article 33 of the Constitution explicitly excludes hate speech and advocacy of hatred that either “constitutes ethnic incitement, vilification of others or incitement to cause harm “or is based on any of the grounds of discrimination specified in Article 27 (4), in line with the Committee’s General Recommendation on this matter.²¹ The Constitution also requires that political parties have a “national character” and

¹⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation 17: Establishment of national institutions to facilitate implementation of the Convention*, CERD 03/25/1993, para. 1 (available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/4872085cc3178e3bc12563ee004beb99?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/4872085cc3178e3bc12563ee004beb99?Opendocument)).

¹⁸ See above, note 1, section 25 (2).

¹⁹ See above, note 1, section 49.

²⁰ See above, note 1, sections 56 and 57.

²¹ Committee on the Elimination of Racial Discrimination, *General Recommendation 15: Organised violence based on ethnic origin (Art. 4)*, CERD 03/23/1993, para. 4 (available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument)).

prohibits the creation of political parties founded on “on a religious, linguistic, racial, ethnic, gender or regional basis or [which] seek to engage in advocacy of hatred on any such basis”,²² in line with Article 4 (b) of the Convention. However, neither the National Cohesion and Integration Act, nor the Constitution, prohibit the creation of non-political organizations which promote or incite racial discrimination.

Article 5

Civil and political rights

33. ERT’s global research work on statelessness has revealed that two ethnic groups - Kenyan Nubians and Somalis - suffer “ineffective nationality” to a greater or lesser degree.²³ According to a 2006 report by the group Minorities at Risk, Kenyan Somalis are required to produce two forms of identity when applying for citizenship,²⁴ while Refugees International reported in 2008 that Somalis were subjected to “vetting” before obtaining proof of citizenship and that bribes are often needed to complete the process.²⁵ Testimony collected by ERT supports indicates that these groups face barriers to registering their citizenship - in terms of the production of additional evidence, “vetting” procedures and bureaucratic obstacles - which render many de facto stateless. ERT’s field research has confirmed that these practices continue.
34. ERT considers this situation to constitute a direct violation of the state’s obligation to guarantee the right to nationality without distinction as to race. Furthermore, ERT is concerned that the denial of citizenship documents restricts the ability of those affected to enjoy a range of other civil and political rights guaranteed by the Convention, including in particular the right to participate in elections, the right to freedom of movement within the state, and the right to leave and return to the country.²⁶
35. The application of different criteria and conditions to those applying for identification documents – and the consequences on the enjoyment of other rights – was confirmed by ERT during interviews conducted with Kenyan Somalis in Isiolo, Eastern Province and in Wajir, North Eastern Province. In Isiolo, ERT interviewed a Kenyan Somali man, C who testified:

“They say bring the title deeds, or birth certificate [...] They ask us, who is Chief here, who is the colonial ruler here, who is the D.O here - many hard questions. [...] We have the birth certificate in Isiolo and our parents’ ID here in Isiolo and they didn’t look.”²⁷

²² See above, note 3, Article 91 (2)(a)

²³ For a detailed discussion of the situation of stateless communities in Kenya, see: The Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, pp. 75-76 (available at: <http://www.equalrightstrust.org/view-subdocument/index.htm?id=748>).

²⁴ Minorities at Risk, *Assessment for Somalis in Kenya*, 2006, available at: <http://www.cidcm.umd.edu/mar/assessment.asp?groupId=50106>

²⁵ See Refugees International, *National Registration Process leaves Minorities on Edge of Statelessness*, 2008, available at: <http://www.refugeesinternational.org/policy/field-report/kenya-national-registration-processes-leave-minorities-edge-statelessness>

²⁶ Convention on the Elimination of Racial Discrimination, Article 5 (c), (d)(i) and (d)(ii).

²⁷ Interview conducted by Jim Fitzgerald with C, 21 March 2011, Isiolo, Eastern Province, Kenya. Name withheld at request of interviewee (record on file with the author).

36. C suggested that the use of tests and the requirement that Kenyan Somalis produce additional documentation are part of a deliberate policy designed to deny Kenyan Somalis identity cards and thereby reduce their representation in the census, something which has far-reaching political consequences.

“We are discriminated even politically [...] When we are [properly registered] they fear that we can beat them politically... because we will have a majority [...] We can't get any seats, any government representative, even on the CDF (Community Development Fund).”

37. Kenyan Somalis and KNCHR officials interviewed by ERT in Wajir confirmed that Somalis were subjected to differential criteria when applying for identity cards and passports. In both instances, applicants are required to produce their parents' and grandparents' identification documentation. Further, in order to obtain a passport, persons who appear to be of Somali or Arab origin have to further go through a vetting interview process by the National Security Intelligence Service in Nairobi. ERT interviewed local officials who justify these practices by stating that as the region lies on Kenya's "porous" border part additional procedures are required to identify foreign citizens masquerading as Kenyan citizens and curb the registration of illegal immigrants.

Conclusions

38. ERT is concerned by the compelling evidence of discrimination against particular ethnic groups in respect of access to citizenship documents, and the impact which this has on the ability of those ethnic groups to enjoy a range of other civil and political rights. Further, we are concerned by the exception provided in section 10 (2) (iii) permits discrimination in the administration of the immigration and nationality system, effectively denying these groups a means of redress.
39. The Equal Rights Trust urges the Committee to recommend that the government:
- a. amend the National Cohesion and Integration Act to remove sub-section 10 (2), in line with its obligation under the Convention to ensure that public bodies do not engage in acts or practices of discrimination;
 - b. investigates the extent to which the Kenyan Nubian and Somali populations have been subject to unfavorable treatment in respect of conditions to acquire citizenship documents;
 - c. takes urgent steps to amend, rescind or nullify and immigration, nationality or citizenship regulations or policies which have the effect of discriminating on grounds of race or ethnicity;
 - d. takes effective, proportionate and dissuasive action against public agents found to have discriminated against individuals in respect of immigration, nationality or citizenship; and
 - e. takes urgent steps to ensure that such individuals as have been denied access to citizenship documents as a result of regulations, policies or practices which discriminate on grounds of race are able to acquire such documents under the same conditions as other persons in Kenya.

Economic and social rights

40. As the government has noted in its report to the Committee, political life in Kenya is highly ethnicised and the "public images of the political leaders are closely associated with their ethnic backgrounds and not the soundness of their policies".²⁸ Equally, there is a strong perception – particularly in more marginalised, underdeveloped areas of the country – that ethnicity plays a critical role in the decisions which politicians make, in particular with regards to resource

²⁸ Committee on the Elimination of Racial Discrimination, 1st-4th *Periodic State Reports: Kenya*, CERD/C/KEN/1-4, 13 January 2011 at para 9 (available at: <http://www2.ohchr.org/english/bodies/cerd/cerds79.htm>).

allocation.²⁹ Substantiating the perception among some ethnic groups that they receive different treatment is difficult, as government and other data sources measuring economic, educational or other outcomes are rarely disaggregated by ethnic group. However, ERT research indicates that there is a strong link in Kenya between region and ethnic identity – with particular areas dominated by persons of a particular tribe or ethnic group. As a consequence, regional variations in income, resources or access to services often correlate to inequalities between ethnic groups. As the Society for International Development (SID) has stated: “regional or geographic differences in well-being may mean ethnic differences in wellbeing as ethnic groups often reside in given geographical regions.”³⁰

41. ERT’s field research has confirmed the presence of significant regional imbalances in wealth, coupled with significant inequality in infrastructure and access to public services. Where – as is often the case – these regions are dominated by a particular ethnic group, this would indicate possible violations of the state’s obligations under Article 5. In 2010 and 2011, ERT undertook field research in three of Kenya’s most marginalized areas, all of which are classified as among the 8 most arid districts in the country: Isiolo, Lodwar and Wajir.³¹ ERT’s research indicates that the link between particular regions and particular ethnic groups gives rise to both direct and indirect discrimination on grounds of ethnicity. Communities interviewed by ERT testified to *direct discrimination* on grounds of ethnicity by public officials – both at the national and district level – seeking to favour their own ethnic group, or to punish those of an ethnic group perceived to be politically opposed to them. Further, these communities testified to indirect discrimination in development policy – arising as a result of the “concentration by policy makers on “high productive” areas [...] in provision of infrastructure such as schools, roads, health centres, etc” – which further disadvantages those ethnic groups in the poorest areas of the country.³²
42. ERT found evidence of direct and indirect discrimination at both the national and district levels. Members of the Turkana Youth Council (TYC), interviewed by ERT in 2010 in Lodwar, Turkana district spoke of the many and various ways in which the Turkana community is disadvantaged, largely because of the lack of employment, infrastructure and public services in the area.³³ When asked the root causes of the disadvantage they suffer, the TYC representatives cited a combination of pre- and post-independence government development policy and direct ethnic discrimination by those in positions of political power. ERT also found evidence of the link between corruption, ethnic discrimination and poverty at a local level. ERT visited Burat sub-location, on the outskirts of Isiolo, Eastern Province, where a small Turkana population, the descendents of labourers who began migrating to the area in 1912, suffer profound discrimination from the local authorities.³⁴ Seen as outsiders by the dominant Borana population, the Turkana population in Burat is in a significant

²⁹ Kimenyi, M., and Bratton, M., “Voting in Kenya: Putting Ethnicity in Perspective”, *AfroBarometer Working Paper 95*, 2008, p.7 (available at: <http://www.afrobarometer.org/papers/AfropaperNo95.pdf>).

³⁰ Society for International Development, *Pulling Apart: Facts and Figures on Inequality in Kenya*, 2004, p.8, (available at: <http://www.sidint.net/docs/pullingapart-mini.pdf>).

³¹ Oxfam, *Delivering the agenda: Addressing chronic under-development in Kenya’s arid lands*, 2006, p6, available at: http://www.oxfam.org.uk/what_we_do/issues/livelihoods/downloads/bp88_kenya.pdf, using statistics from: Government of Kenya, *Arid and Semi Arid Land development policy*, 1992.

³² Society for International Development, *Kenya’s Vision 2030: An Audit From An Income And Gender Inequalities Perspective*, 2010, p. 22, available at: <http://www.sidint.net/docs/Kenya%20Vision%202030%20ToC.pdf>.

³³ Focus Group conducted by Dimitrina Petrova with Turkana Youth Council, 1 December 2010, Lodwar, Rift Valley Province, Kenya, (record on file with the author).

³⁴ Focus Group conducted by Jim Fitzgerald and Joy Matara with members of the local community, 22 March 2011, Burat sub-location, Isiolo District, Eastern Province, Kenya, (record on file with the author).

minority in the Isiolo district, meaning that their political power is limited. In the wake of attempts by the British to remove the population to Turkana district in the 1950s, the community has suffered significantly since the Kenyan army gazetted its land for the construction of a military base, denying them the ability to farm the fertile land. According to those interviewed, the situation has been exacerbated in recent years by the deliberate policies of the local Member of Parliament, who has sought to “reward” those from areas which supported his election, at the expense of those living in Burat.

The right to work

43. Data presented in the aforementioned report by SID, “Pulling Apart: Facts and Figures on Inequality in Kenya”, reveals substantial regional disparities across a range of economic and infrastructure indicators, which have a direct impact on access to employment.³⁵ According to the report, North Eastern Province has the highest rate of unemployment at 35%, a rate which is almost six times higher than that in Central Province (6%). In 2011, ERT interviewed residents, local government officials and staff from the Kenya National Commission on Human Rights in Wajir, North Eastern Province.³⁶ ERT spoke with a number of key local figures who complained of lack of government support for the area’s economic development.³⁷ These individuals claim that while other parts of the country have their main agricultural products supported by the government through the establishment of government funded boards,³⁸ there are no such boards for beef or camel milk, the main agricultural produce of their region. ERT is concerned that regional imbalances in enjoyment of the right to work place those ethnic groups who predominate in the most disadvantaged regions at a particular disadvantage when compared with others.

The right to education and training

44. A 2010 study by the Uwezo organisation, a non-government organisation focused on improving educational outcomes in east Africa, reveals a stark regional variation in school attendance, with a consequential impact on outcomes.³⁹ The study identified a “Red Strip” covering North Eastern Province and the arid districts of Rift Valley and Eastern Provinces, where high proportions of children are out of school: 16% of all children aged 6-16 years are out of school in North Eastern Province, and 22% of children were out of school in the aforementioned arid districts. The report found that these areas consistently performed worse across the indicators identified by the study:

“[These areas also had low literacy and numeracy rates, low schooling levels of mothers, wide gender gaps in favour of boys and other key indicators captured by this assessment [...]]What is evident is that, beyond the most publicized aspects of access and equity, North East Province and other arid districts are lagging behind the rest of the country, in terms of literacy and numeracy [...].”⁴⁰

45. ERT’s research in Turkana indicated that one of the principal reasons for low attendance rates in the

³⁵ See above, note 30.

³⁶ Interview conducted by Joy Matara with staff at Kenya National Commission on Human Rights Field Office, Wajir on 29 March, 2011, Wajir, Kenya. Names withheld at request of interviewees (transcript on file with the author).

³⁷ Field report on visit to Wajir, Joy Matara and Monicah Kareithi, 28-30 March 2011 (report on file with the author).

³⁸ For example: the Coffee, Tea, Sugar and Pyrethrum Boards.

³⁹ Uwezo, *Kenya Kenya National Learning Assessment report 2010*, May 2010, available at:

[http://uwezo.net/uploads/files/Introduction_1_1\(2\).pdf](http://uwezo.net/uploads/files/Introduction_1_1(2).pdf)

⁴⁰ *Ibid.*

Arid and Semi Arid areas is lack of resources, staff and infrastructure.⁴¹ Those interviewed by ERT indicated that although free primary education is available, lack of staff, facilities and infrastructure have led to overcrowding and classes with children of varying ages; the activists stated that in some cases one teacher can have a class of 120 students at varying academic stages. Though enrolment at primary level is high, this drops significantly at the secondary level.

46. ERT's research in Burat provided evidence of direct discrimination in the allocation of resources for education.⁴² A number of individuals told ERT that the local primary school is in a state of disrepair and children from the area cannot attend secondary school as the nearest one is on the other side of Isiolo. The group testified that funds intended for a school in Burat had been diverted to the Gamera sub-location, which is populated by the Borana, a group known to support the local MP.

The right to public health and medical care

47. The findings of the Uwezo study, and its identification of a "Red Strip" covering North Eastern Province and parts of Rift Valley and Eastern Provinces are in common with other data on access to health services. Data from the Kenya Integrated Household Budget Survey shows that the proportion of people living more than 5 kilometres from the nearest health facility is substantially higher in North Eastern Province – where 85.7% of the population falls within this category – and Eastern and Coast Provinces.⁴³ Other data confirms a pattern of deprivation which corresponds to the presence of arid districts: UNICEF statistics on the proportion of children under-five who are malnourished also indicates a significant variation, with rates of malnourishment in Eastern and Rift Valley Provinces double those in Central Province and Nairobi
48. During a focus group in Lodwar, representatives of the Turkana Youth Council stated that there are significant problems with access to healthcare in the region.⁴⁴ There is only one surgeon in the county, and only one gynecologist who visits from time to time, and several medical officers and volunteers who are not doctors (the two doctors and most other health professionals are not locals). The activists stated that people are dying from curable diseases such as malaria and the flu because there is a shortage of medical facilities, personnel and medicines. The lack of local health facilities means that travel times and cost play a critical factor in health outcomes. ERT was told of two cases from recent days where members of the community had died in transit to the nearest hospital: a man had died because he was unable to pay the price of transport to the nearest hospital or chemist while a pregnant woman died on the road to the hospital after being bitten by a scorpion. ERT is concerned that regional variations in health care create discriminatory disadvantage for those ethnic groups who live in the most disadvantaged areas.

Positive Developments

49. Two sets of measures introduced in the Constitution offer possibilities to address the patterns of ethno-regional discrimination described in the preceding paragraphs. First, the Constitution sets out that state power will be executed at both the national and county level⁴⁵ and establishes 47

⁴¹ See above, note 33.

⁴² See above, note 44.

⁴³ Government of Kenya, *The 7th Periodic Report of The Government of the Republic of Kenya on Implementation of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, 24 March 2011, available at: <http://daccess-ods.un.org/TMP/4774609.50613022.html>, table 24.

⁴⁴ See above, note 33.

⁴⁵ See above, note 3, Article 1 (4).

powerful counties, with the objects of “fostering national unity by recognising diversity” and ensuring equitable sharing of resources.⁴⁶ Counties are given a wide range of functions,⁴⁷ though arguably many of these functions are either heavily regulated by central government or already performed at a local level. The Constitution contains a number of guarantees that counties should be properly resourced to undertake their functions. Article 202 states that revenue will be shared “equitably” among national and county governments, and Article 203 establishes a detailed list of criteria for determining these equitable shares, including the need to ensure that county governments have adequate resources to perform their functions, economic disparities within and between counties and the need for affirmative action for disadvantaged areas and groups.⁴⁸ Article 203 (2) provides a minimum guarantee that 15% of annual national revenue should be allocated to county governments.

50. Second, in recognition of the disparities in the provision of basic services between different regions, the new Constitution establishes an Equalisation Fund to accelerate progress towards equality in marginalised areas. The Fund is established as 0.5% of annual national revenue and is established for twenty years from the Constitution coming into effect, though this period may be extended if parliament enacts legislation which achieves the support of half the members of the National Assembly and half the members of the Senate.⁴⁹ The Equalisation Fund is therefore a particularly important development for the country’s most marginalised regions. Two other provisions provide potential avenues to address inequality in the enjoyment of economic and social rights: Article 6 (3) creates a duty on the state to ensure reasonable access to government services throughout the country, while Article 60 (1) lists equitable access to land as the first principle of land policy.⁵⁰
51. While ERT welcomes these developments, we are concerned by evidence that the law alone may be insufficient to ensure full and equal enjoyment of economic and social rights as guaranteed under the Convention unless more is done to ensure their effective implementation. As the preceding paragraphs make clear, measures introduced in the National Cohesion and Integration Act to prohibit discrimination in the allocation of public resources (sections 11 and 12) are clearly not adequately enforced, and discrimination by public officials remains widespread. As such, ERT believes that the government must prioritise both the enforcement of sections 11 and 12 of the National Cohesion and Integration Act and the implementation of the measures to devolve power and establish an Equalisation Fund introduced by the Constitution.

Conclusions

52. ERT’s research provides strong evidence that the patterns of regional disadvantage which prevail in Kenya are not simply a function of variations in natural resources, climate or environment, but arise through a combination of government policy which indirectly discriminates against those ethnic groups living in the least developed areas and direct discrimination by those in positions of power. As a result, the distribution of public resources in Kenya is significantly distorted, with the effect that vulnerable ethnic communities are denied the enjoyment of their fundamental rights. As discussed above, there have been a number of positive developments in respect of legal measures to ensure full and equal enjoyment of rights and freedoms. The introduction of prohibitions on racial and ethnic discrimination in respect of public resources and public property in the National

⁴⁶ See above, note 3, Article 174 (b) and (g).

⁴⁷ See above, note 3, Schedule 4, Part 2.

⁴⁸ See above, note 3, Article 203 (1)(d), (g) and (h).

⁴⁹ See above, note 3, Article 204.

⁵⁰ See above, note 3, Article 60 (1)(a).

Cohesion and Integration Act are welcome, as are the provisions for the devolution of power and establishment of an Equalisation Fund in the Constitution. However, while these developments are to be commended, ERT is concerned that to date they have not been effectively implemented. ERT's research was collected in late 2010 and early 2011, two years after the National Cohesion and Integration Act was enacted, and evidence of direct discrimination by public officials was clear. As such, ERT is concerned that these provisions, together with those in the Constitution, will not be enforced, and that measures to address the patterns of discrimination cited above will be ineffective.

53. The Equal Rights Trust urges the Committee to recommend that the government ensure proper investigation of potential violations of sections 11 and 12 of the National Cohesion and Integration Act, by:
 - a. ensuring that the mechanisms under section 49 of the Act for individuals complaints to the National Cohesion and Integration Commission are effective, and accessible to all wishing to complain of violations of sections 11 and 12 of the Act;
 - b. requesting the National Cohesion and Integration Commission to undertake a proactive investigation, under section 59 of the Act, into violations of sections 11 and 12 of the Act, and to invite the submission of complaints by those claiming to have suffered violations of these sections;
 - c. taking steps to raise public awareness, through a programme of civic education, of the rights and obligations arising under sections 11 and 12 of the Act and the complaints mechanism available under section 49; and
 - d. taking effective, proportionate and dissuasive action against public bodies and agents found to have engaged in discrimination;

54. The Equal Rights Trust urges the Committee to recommend that the government puts in place measures to effectively prevent discrimination in access to positions of public power and in the allocation of public resources, by :
 - a. reviewing employment policies and practices in the national civil service and in devolved administrations to ensure that these do not directly or indirectly discriminate against members of a particular ethnic group;
 - b. developing guidelines to ensure that employment policies and practices in the national civil service and in devolved administrations do not directly or indirectly discriminate against members of a particular ethnic group;
 - c. reviewing guidelines, policies and practices governing the allocation of public resources to ensure that they do not directly or indirectly discriminate against members of a particular ethnic group;
 - d. developing guidelines to ensure that policies and practices governing the allocation of public resources do not directly or indirectly discriminate against members of a particular ethnic group;
 - e. taking steps to educate public officials and other agents of the state as to their obligations under sections 11 and 12 of the Act and relevant sections of the Constitution;

55. The Equal Rights Trust urges the Committee to recommend that the government ensure the full and effective implementation of those sections of the Constitution which seek to address regional imbalances in income, services and resources, by:
 - a. taking steps to ensure the implementation of Article 6 and Chapter 11 of the Constitution of Kenya, regarding the devolution of power and in so doing ensures that due regard is paid to Article 202, regarding equitable sharing of revenue;
 - b. taking steps to ensure the implementation of Article 204, regarding the establishment of an Equalisation Fund, to bring the quality of services in marginalized areas "to the level generally enjoyed by the rest of the nation".

Concluding Recommendations

56. In the preceding sections, ERT has sought to assess the adequacy of Kenya's legal and policy framework to address racial discrimination, in line with the Articles of the Convention. This analysis has revealed problems both with the law itself – in terms of gaps, inconsistencies and exceptions – and with the implementation of the law. As such, ERT has made specific recommendations related to amendment of legislation or its enforcement at various points in this report.
57. However, ERT believes that in order to effectively meet its obligations under the Convention, the state party must go beyond these immediate measures and ensure that a comprehensive and coherent system of law is in place. In particular, ERT is concerned that at present, the Kenyan law in this area can be unclear, that levels of protection are inconsistent regarding different aspects of race and in respect of different areas of life, and that this has the potential to create problems for rights holders, duty bearers and law enforcement agencies. Furthermore, we are concerned that the specificity of current legislation on ethnic and racial discrimination means that multiple discrimination is inadequately regulated, with the effect that those experiencing specific forms of racial discrimination or deeper disadvantage, because of other characteristics, are not effectively protected. ERT would therefore urge the adoption of a single, comprehensive, anti-discrimination law, as the Committee has previously recommended in other states where such inconsistencies of law are present.⁵¹
58. ERT is currently facilitating a process through which a broad coalition of civil society actors in Kenya has sought to identify the necessary content of comprehensive anti-discrimination legislation. The participating organisations have produced a *Statement of Principles for Equality Law* and a *Legislative Map* for such legislation and have presented the same to key stakeholders across government.⁵² These documents have provided the basis for discussions with various agencies, including the Kenya National Commission on Human Rights, the Kenya Law Reform Commission and the Commission for the Implementation of the Constitution, about the content of legislation which the government is required to bring forward to establish a new Kenya National Human Rights and Equality Commission under Article 59 of the Constitution.
59. The Equal Rights Trust urges the Committee to recommend that the government engages with this process, with a view to adopting a single comprehensive anti-discrimination law, in line with the enclosed Statement of Principles for Equality Law produced by the Federation of Women Lawyers, Kenyan Human Rights Commission and other participating organisations.

⁵¹ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee: United Kingdom of Great Britain and Northern Ireland*, CERD/C/63/CO/11, 10 December 2003, para. 15. (available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/457/09/PDF/G0345709.pdf?OpenElement>).

⁵² See Annex 1 below.

ANNEX 1

Statement of Principles for Equality Law

We the undersigned believe that legal reform on discrimination and inequality is a pressing need. We believe that guaranteeing the right to equality before the law and protection of persons from all forms of discrimination should be the basis of building a new culture of respecting, protecting and promoting human rights.

We believe that the Constitution of Kenya, adopted in August 2010, provides the foundation for the construction of such new culture, while recognizing that it also necessitates further action to embed the rights to equality and non-discrimination.

We therefore believe that the Government of Kenya should take steps to introduce a new comprehensive equality law, reflecting the following core principles:

Structure

- 1) The law should set out both the substantive elements of anti-discrimination law and establish the Kenya Human Rights and Equality Commission as envisaged by Article 59 of the Constitution of Kenya
- 2) The provisions of the law when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.

Prohibited Conduct

- 3) The law should prohibit all forms of discrimination, including: Direct discrimination; Indirect discrimination; Multiple discrimination; Harassment; Failure to make reasonable provision or accommodation for people with particular special needs; Protection from adverse treatment as a consequence of raising a complaint of discrimination

Protected Grounds

- 4) The law should have a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in Article 27 of the Proposed Constitution of Kenya:
 - a) “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”
- 5) The law should further state that discrimination on other grounds must be prohibited where such discrimination:
 - a) Causes or perpetuates systemic disadvantage;
 - b) Undermines human dignity; or
 - c) Adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the specified protected grounds.

Scope

- 6) The law should cover all areas of life regulated by law (e.g. education, housing, access to services, employment etc) in the private and public sectors.

Exceptions

- 7) The starting point of any legislation should be that all forms of discrimination are prohibited. As such, exceptions should be limited. Any exception, permitting discrimination on one or more grounds, must be *reasonable* and *justifiable*.
- 8) An exception will be justifiable only if it can be shown to be *necessary for the achievement of a legitimate purpose* and *where there is no alternative which is less discriminatory*.

Affirmative action

- 9) The law should permit affirmative action, applying the following principles:
 - a) It should be clear, targeted and specific.
 - b) It should be time bound and subject to periodic review to assess its impact.
 - c) It should be designed to address past disadvantage and accelerate progress towards equality.
 - d) It should not disproportionately disadvantage others
 - e) It should be targetted in areas of life where participation is low.
 - f) It should also be used to meet particular needs of disadvantaged groups.

Burden of proof

- 10) The burden of proof should be such that once the complainant establishes a prima facie case for discrimination (i.e. that discrimination could have been one of the reasons for their less favourable treatment), the burden of proof shifts to the respondent to prove that discrimination did not form any part of their treatment of the complainant.

Sanctions and remedies

- 11) The law should provide for civil remedies which should be effective, proportionate and dissuasive.

Establishment of a Commission

- 12) The law should provide for the establishment an independent and well-funded National Human Rights and Equality Commission.
- 13) The Commission should have the power to hear complaints of discrimination or abuse of human rights, undertake investigations and make findings and require remedial action.
- 14) The Commission should have the powers of a court and should be the first point for potential redress for victims of discrimination or abuse of human rights.

We therefore call on the Government of Kenya to take such steps as are necessary – in consultation with civil society – to develop, draft and introduce such a law, in order to give effect to the aspirations embodied in the new Constitution of Kenya.