

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)



***Alternative Report to the United Nations Committee on
Economic, Social and Cultural Rights***

Kenya National Commission on Human Rights

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS	4
INTRODUCTION	6
REPORTING ON THE SUBSTANTIVE PROVISIONS	6
ARTICLE 1 – RIGHT TO SELF-DETERMINATION	7
Legislation	7
Internal and external challenges on self-determination	8
Proposed Recommendations	9
ARTICLE 2 – PROGRESSIVE REALIZATION OF RIGHTS	9
Proposed Recommendations	10
ARTICLE 3 – NON-DISCRIMINATION AND EQUALITY	11
Non-Discrimination on Various Grounds	11
Rights of Indigenous Groups	11
Proposed Recommendations	12
Discrimination Based on Sex	12
Proposed Recommendations	13
Representation of Women	14
Proposed Recommendations	14
Refugees	15
Proposed Recommendations	16
Citizenship and National Documentation	16
Proposed Recommendations	17
Internally Displaced Persons (IDPs)	17
Proposed Recommendations	18
Recognition of The Youth	19
Proposed Recommendations	20
Sexual Orientation and Gender Identity	20
Proposed Recommendations	21
ECONOMIC RIGHTS	22
Business and Human Rights	22

Communities in Extractives Areas	22
Proposed Recommendations	23
Combating Corruption	24
Proposed Recommendations	25
Access to Land	25
Proposed Recommendations	26
ARTICLE 6 – RIGHT TO WORK	27
Proposed Recommendations	28
ARTICLE 7 – RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK	29
Proposed Recommendations	30
ARTICLE 8 – RIGHT TO FORM AND JOIN TRADE UNIONS	30
Proposed Recommendations	31
ARTICLE 9 – RIGHT TO SOCIAL SECURITY	31
Rights of Persons with Disability	32
Proposed Recommendations	32
Protection for Elderly Persons.....	33
NSSF & NHIF	33
Proposed Recommendations	34
ARTICLE 10 – PROTECTION OF THE FAMILY	34
Protecting the Rights of Women	34
Combating Under Age Marriage and Female Genital Mutilation (FGM).....	35
Counter Trafficking Measures.....	35
Protection of Vulnerable Children.....	36
Proposed Recommendations	36
ARTICLE 11 – RIGHT TO ADEQUATE STANDARD OF LIVING.....	37
Tackling Poverty	37
Right to Food & Food Security	38
Right to Water and Sanitation.....	39
Proposed Recommendations	40
Right to Housing	41
Proposed Recommendations	42
Land Ownership and Forced Evictions.....	42

Proposed Recommendations	44
ARTICLE 12 – RIGHT TO HEALTH	45
Proposed Recommendations	47
ARTICLE 13 – RIGHT TO EDUCATION	47
Quality of Education	47
Proposed Recommendations	49

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples Rights
AIDS	Acquired Immune Deficiency Syndrome
ASAL	Arid and Semi-Arid Regions
CDF	Constituency Development Fund
EACC	Ethics and Anti-Corruption Commission
ESP	Economic Stimulus Program
FGM	Female Genital Mutilation
HIV	Human Immunodeficiency Virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
ILO	International Labour Organization
KAPEA	Kenya Association of Private Employment Agencies
KENSUP	Kenya Slum Upgrading Project
KFSSG	Kenya Food Security Steering Group
KHRC	Kenya Human Rights Commission
KISIP	Kenya Informal Settlement Improvement Programme
KNCHR	Kenya National Commission on Human Rights
KUPPET	Kenya Union of Post Primary Education Teachers
LAPSSET	Lamu Port and South Sudan Ethiopia Transport
LATF	Local Authority Transfer Fund
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MARP	Most At Risk Persons
MDGs	Millennium Development Goals

MOU	Memorandum of Understanding
MRC	Mombasa Republican Council
MSM	Men having Sex with Men
NAAIAP	National Accelerated Agricultural Input Access Programme
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organizations
NHIF	National Hospital Insurance Fund
NYS	National Youth Service
OVCs	Orphans and Vulnerable Children
PEV	Post-Election Violence
PWDs	Persons with Disabilities
STIs	Sexually Transmitted Infections
TJRC	Truth Justice and Reconciliation Commission
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
WEF	Women Enterprise Fund
WHO	World Health Organization

INTRODUCTION

1. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with ~~A~~ status accreditation. It was established in 2003 by statute with the mandate of protecting, promoting and monitoring the exercise of human rights in Kenya. The commission was subsequently re-established Pursuant to the provisions of Article 59 of the Constitution and Act No. 9 of 2011
2. KNCHR, present this submission for consideration as part of the reports that the committee could rely on during the session. The submission includes recommendations of some key steps which in our view the State should take to further ensure respect for, protection and promotion of human rights
3. The Submission is drawn largely from reports and studies which KNCHR has undertaken. This includes investigative reports on violations, advisories made to State organs, assessments of the extent to which the State is fulfilling its human rights obligations, reports and briefings to international human rights mechanisms and the National Assembly and other mechanisms.
4. Below are the key issues that the commission considers key in ensuring that the rights of Kenyan~~s~~ are promoted and protected;

REPORTING ON THE SUBSTANTIVE PROVISIONS

5. Kenya ratified the United Nations Covenant on Economic, Social and Cultural Rights on 1st of May 1972; the state was last reviewed by the ECSR Committee during its 41st session in 2008. Between the last review and the current review Kenya underwent through Constitutional Reform and Legislative reform with the Promulgation of a new Constitution on 27th August 2010.
6. The New Constitution ushered in a new era in terms of the protection and promotion of rights; The Constitution in Article 2(5) and 2(6) Provides that all the Conventions and treaties that had been ratified by the state before the coming into force of the Constitution would be applicable in Kenya

7. Article 2(5) of the Constitution on the other hand recognizes that the Conventions and Treaties that have been ratified by the state will form part of the Kenyan law and will be applicable in Kenya as long as it does not run contrary to the Constitution.
8. The Constitution of Kenya in Chapter Four entitled the bill of rights makes provision for the Economic, Social and Cultural rights in Articles 43 and 44 of the Constitution; the effect of these provisions is that these rights are now Justiciable.

ARTICLE 1 – RIGHT TO SELF-DETERMINATION

Legislation

9. Kenya is a democratic sovereign state. The Kenyan Constitution affirms fundamental national principles and values of unity, participation of the people, equality, equity, inclusiveness, human dignity, sustainable development, and protection of fundamental freedoms, non-discrimination and protection of the marginalised and vulnerable people¹.
10. The Constitution of Kenya sets various timelines for the enactment of various legislations to achieve the various facets of Article 43 of the Constitution.
11. The Fifth Schedule of the Constitution 2010 provides for particular laws to be enacted within set timelines. It is worth noting that some of the proposed timelines have been postponed for various reasons, the timeline for enactment of all the legislations under schedule 5 of the Constitution has been extended to 27th of August 2016.
12. The process of developing specific legislation and policies and the implementation program to give effect to the Constitution is underway at national and county levels by the National Assembly, County Assemblies and Ministries.
13. The Constitution in Article 6(1) and 6(2) Provides for the establishment of governments at national and county governments in order to devolve services closer to the people. The devolved governance aims at giving Kenyans a greater say in determining the development initiatives in their local areas. Kenya is yet to realize this object, as little effort is being demonstrated at national and county levels
14. The system of devolution is aimed at providing greater citizen involvement in how development, economic, social and cultural rights as well as political engagements are

¹See Article 10 of the Constitution of Kenya

undertaken. Unfortunately, there have been challenges in respect to fiscal accountability regarding allocation of funds and the duplication of roles of various funding initiatives at national and county levels.

Internal and External Challenges on Self-Determination

15. In the period under review Kenya faced a challenge from a group known as the Mombasa Republican Council (MRC) seeking secession of parts of the Coastal region from the rest of the country. In seeking to secede from Kenya the Members of MRC used violence in pursuing their objectives; the violence resulted in the loss of lives and property.
16. In response to the threat caused by the MRC the state applied the provisions of the Prevention of Organised Crimes Act (No. 6 of 2010) to ban² the MRC claiming that it was an organized group seeking to cause chaos and destruction of property. The MRC responded to the ban by the state by challenging the ban³. Although the High Court reversed the order banning MRC, finding that it was a political group, it also clarified that the Constitution did not contemplate secession and instead asserted the unitary and indivisible sovereignty of Kenya.
17. Despite the court victory for the MRC, there have been reports on the use of excess force by the Government in its response to the MRC's insurgence due to the notion held by the state that MRC was linked to the Al-Shabab terror network; This notion was however dispelled when the Courts⁴ overturned the Government's designation of the group as a "terror group" since the group was registered as per Kenyan law.
18. The Government's reaction should be aimed at addressing the genuine concerns raised by the MRC which include marginalisation, economic development, education and infrastructure development. Some of the key complaints raised by the MRC were political and economic discrimination, land allocation, land tenure and rampant forced evictions in the area.
19. Further, in its final report, the Truth Justice and Reconciliation Commission⁵ found out that land-related injustices at the Coast are one of the key reasons for under-development in the area, that caused the emergence of the Mombasa Republican Council, thus

² Gazette Notice No. 12585 of 18 October 2010.

³ *Randu Nzai Ruwa and 2 Others v. the Internal Security Minister and Another*, Misc. Application No. 468 of 2010

⁴ Note 3 above

⁵ See the Truth Justice and Reconciliation final Report

recommended for investigations into and recovery of illegally or irregularly acquired land, its adjudication and registration by the National Land Commission.

Proposed Recommendations

- a. The State should address the concerns raised by members of Mombasa Republican Council.
- b. The State should fully implement the TJRC Report that will address the concerns of the Mombasa Republican Council
- c. The State in dealing with the insurgent group must do so within the confines of the law and must ensure that their Constitutional rights are safeguarded
- d. The State must pursue a programme of inclusion that will ensure that all citizens will participate in and be part of all the processes targeting them

ARTICLE 2 – PROGRESSIVE REALIZATION OF RIGHTS

20. The Constitution provides that the right to adequate standard of health, accessible and adequate housing, adequate food, clean and safe water, social security and education are subject to progressive realization requiring the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43.

21. On two different occasions, the court pronounced itself on this issue noting that right to housing is, by consensus, amenable to progressive realization.⁶ The High Court however stated that:

“...the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet constitutional obligations. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights implying that the State must begin to take steps, and I might add, be seen to take steps towards realization of these rights.”⁷

22. And on a different occasion it said:

⁶ Mitubell Welfare Society v AG [2013] eKLR

⁷ Ibid

“...three years after the promulgation of the Constitution the right to adequate housing cannot be aspirational and merely speculative.”⁸

23. The above position illustrates the state’s position in respect to allocation of resources to the obligations set by the Convention; the levels of allocation of funds has slightly improved over years but at a rate that is not in consonance with the Committee’s position on the allocation of the maximum available resources to these rights. To give effect to Article 43 of the Constitution, the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill 2015 has been drafted by the Senate which seeks to establish a framework for monitoring and enforcement of economic and social rights to ensure county governments adhere to Article 43 of the Constitution.
24. The bill among other things requires county governments to undertake baseline surveys, prepare strategic plans and periodically report on progress made in the realization of economic and social rights. Due to the absence of a comprehensive legal framework, the rights guaranteed in Article 43 of the constitution are unlikely to be realized fully.

Proposed Recommendations

- a. The state should adopt rights based indicators and benchmarks to monitor the Progressive realization of the rights recognized in ICESCR.
- b. The state should increase national and county budgetary allocation and spending on social services such as housing, health and education so as to achieve, in accordance with article 2, paragraph 1, of ICESCR.
- c. The state should prioritize development of policies and laws that will facilitate the national and county governments to comprehensively meet their obligations to respect, protect and fulfil economic, social and cultural rights.

⁸ *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* [2013] eKLR - See more at: <http://kenyalaw.org/kenyalawblog/gender-rights-and-wrongs-critique-of-the-supreme-court-decision/#sthash.B3HZXUH8.dpuf>

ARTICLE 3 – NON-DISCRIMINATION AND EQUALITY

Non-Discrimination on Various Grounds

25. Article 27 of the Constitution 2010 guarantees that a person may not be discriminated on grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Kenya 2030 Vision has outlined strategies aimed at moving the country towards substantive equality measures to support regions and groups which have been historically disadvantaged on account of region or status.

Rights of Indigenous Groups

26. The Constitution makes specific mention of groups which are liable to be discriminated on account of their vulnerability, including children, women, persons with disabilities, minorities and marginalised groups.
27. The African Commission on Human and Peoples' Rights (ACHPR) made a ruling against the State in 2010 (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya). The African Commission recommended that Kenya recognises the rights of ownership and ensure restitution of ancestral land to the Endorois community. The state was further asked to ensure unrestricted access for the community to Lake Bogoria for religious, cultural and grazing purposes, and pay adequate compensation and royalties.
28. The ACHPR in April 2013 held an implementation hearing with the State and the community, resulting in further direction on the implementation of the case. The Truth Justice and Reconciliation Commission (TJRC) in its final recommendations also called for the implementation of decisions relating to minority and indigenous communities of which is the Endorois case.⁹
29. The state in an attempt to implement the Endorois decision has put in place a task force on the implementation of the judgement, which include relevant state and non-state actors. The task force is currently compiling its report to present to the president for further action.

⁹(2013), Universal Periodic Report: *An Assessment by Stakeholders of Government's Performance in Implementing the Universal Periodic Report*, Kenya National Commission on Human Rights, Kenya, p.45

Proposed Recommendations

- a. The state should put in place an Anti-Discrimination Legislation to ensure that no one in Kenya is discriminated on the basis of the prohibited grounds provided for under the Convention and amplified by the Constitution.
- b. The state should put in place measures to ensure the decision of the African Commission on Human and people's rights in Centre Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya) for is implemented.

Discrimination Based on Sex

30. The Constitution also offers better clarity on matters of personal law such as marriage, divorce and inheritance. Specifically, it provides that: *“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”*¹⁰
31. While Parliament may still legislate for marriages in terms of different religious or customary traditions, such marriages have to abide by the provision relating to equal rights. Some of the key legislations meant to protect women against violence within the context of marriage, gender based violence and the rights of women during and after the dissolution of marriages are the Protection Against Domestic Violence Act, (No 2 of 2015), Marriage Act, (No. 4 of 2014), Matrimonial Property Act, (No. 49 of 2013).
32. However the fact that the law in Kenya allows polygamy is an affront to the principles of equality between men and women especially due to the fact that upon the demise of a man the woman and children are left vulnerable.
33. Protecting the right to equality for both women and men has also been enhanced following the establishment of the National Gender and Equality Commission (NGEC) by the National Gender and Equality Commission Act (No. 15 of 2011). This constitutional Commission's mandate includes ensuring that the State puts in place policies, programmes and measures for gender equality and freedom from discrimination in private and government institution, and further, to audit realisation of the equality and non-discrimination principles.

¹⁰ Article 45 (3) of the Constitution

34. The greatest challenge to attainment of equity is the aspect of one's culture. Most Kenyan cultures do not equate women to men, thus promulgating the vices of a patriarchal society at the expense of women. The Constitution aims at transforming the culture to an understanding where all persons are equal as regards the realisation of their human rights.
35. The Prohibition of Female Genital Mutilation (FGM) Act was enacted in 2011 and a national policy and action plan on FGM was developed. However, the law is still weak in protecting girls and young women against FGM as it is yet to be aggressively applied. Unless the perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM.¹¹
36. Despite the fact that Anti-Female Genital Mutilation Board has been set up and it has been trying to address the vice; the Board lacks capacity to discharge its mandate due to limited resource allocation and inadequate support from the key players such as the county governments, politicians and religious leaders.
37. Access to medical care, psychosocial support and justice for women victims of the 2007/8 PEV has also remained a challenge. A report by the Kenya Human Rights Commission (KHRC), reveals that the Government has failed in its obligation to survivors of sexual violence in ensuring that perpetrators of sexual based violence are punished and that adequate support is afforded to survivors of sexual violence in the form of medical and psychosocial care.¹²

Proposed Recommendations

- a. The state should put in-place appropriate measures to ensure that the harmful traditional practices of female Genital Mutilation is eradicate; it should also increase budget allocation to the Anti-Female Genital Mutilation Board.
- b. The state should increase public education and advocacy around the subject of Female Genital Mutilation with the aim of changing public belief on Female Genital Mutilation
- c. The state should increase its support to the National Gender and Equality Commission to enable it discharge its functions as enshrined in the Constitution

¹¹(2012), Universal Periodic Report: *An Assessment by Stakeholders of Government's Performance in Implementing the Universal Periodic Report*, Kenya National Commission on Human Rights, Kenya, p. 31

¹²(2012) *Elusive Justice: A Status Report on Victims of 2007-2008 Post Election Violence in Kenya*, Kenya Human Rights Commission, Kenya)

- d. The state should consider supporting and establishing Gender Recovery Centres across the Country that will provide comprehensive support to the victims of Sexual and Gender based Violence Victims.

Representation of Women

38. The Constitution directs that not more than two-thirds of any elected body should be made up of more than one gender, has faced some challenges. Kenya's 10th Parliament was unable to pass legislation to determine how that rule would be realised. The Attorney General sought an interpretation by the court of the law In the matter of the Principle of Gender Representation in the National Assembly (2012) Advisory Opinions Application 2 of 2012, the Supreme Court ruled that the gender rule is progressive and can only be achieved by August 27, 2015.
39. The Political Parties Act, 2011 provides that the registrar of political parties should only register political parties that have complied with the gender rule. However this has not automatically translated to enhanced women participation in political parties as the registrar did not do much to ensure that the Constitutional threshold was met.¹³
40. It is important to note that there was no woman who was elected as a governor or senator in the March 4th, 2013 Elections. Although 160 women vied for parliamentary seats, only 16 were elected. The total number of women in the 11th Parliament now is 86-16 elected, 47 women county seats and 23 nominated.¹⁴

Proposed Recommendations

- a. The government should ensure that there is equitable representation of both genders in both elective and appointive positions in particular with regard to the Supreme Court directive In the matter of the Principle of Gender Representation in the National Assembly (2012) Advisory Opinions Application 2 of 2012.
- b. The state should ensure that in appointive position there is parity between men and women in compliance to the Convention and the spirit of the Constitution.

¹³UPR 2012-2013, op.cit., p. 42

¹⁴*Rapid Gender Audit of Political Parties and Electoral Processes in Kenya*, A Survey, carried out by Women Shadow Parliament-Kenya, See http://womenshadowparliament.org/downloads/Elusive_Quest_for_Women%27s_Empowerment_in_Electoral_Politics.pdf)

Refugees

41. Due to the proximity of Kenya to various countries and the fact that for a very long time Kenya has been a haven of peace; it has received a huge influx of refugees from its neighbouring countries. As at June 2015 the total refugee population in Kenya stood at 552,272.¹⁵
42. Refugees due to their status face serious challenges such as Lack of documents for refugees and asylum seekers; this has had the effect of preventing them from accessing registration essential services including medical care, enrolling their children in schools, accessing livelihood opportunities, contracting marriage, obtaining employment, housing and or requesting the issuance of official documents and permits thus forces them to remain in camps.
43. Due to heightened insecurity situation in Kenya the state through the Department of Refugee Affairs issued a directive on 18th December, 2012 instituting a strict encampment policy and ordered the relocation of all the refugees living in urban areas to the already congested refugee camps in Dadaab and Kakuma.
44. In *Kituo Cha Sheria v. Attorney General* (2013), a petition was filed before the High Court on 22 January 2013 challenging the government encampment policy. The judgment was delivered on July 26, 2013 in which the directive was quashed on the grounds of unconstitutionality.
45. Despite the fact The Refugee Act 2014 elaborates the rights of refugee women and children and the government's responsibilities to them. Which responsibilities include the provision of appropriate protection and assistance to refugee children or children in need of refugee status; facilitation for family tracing and reunification; and the protection of children whose family members cannot be found in the same way as children who are temporarily or permanently deprived of family.
46. Minimal progress has been made by the government on setting up mechanisms for family tracing and reunification of children in displacement situations as provided for in the Children Act 2001 and the Refugee Act 2014.
47. Kenya enacted the Basic Education Act 2013 which regulates primary education in Kenya. The Act states that non-Kenyan citizens have to pay tuition fees. Education

¹⁵ <http://www.unhcr.org/pages/49e483a16.html>

therefore for the refugee children outside refugee camps may be inaccessible due to prohibitive costs violating their right to education.

Proposed Recommendations

- a. The state should not issue inflammatory statements alluding to the fact that the refugee camps are training camp for the militant organizations
- b. The State should enhance security in the refugee camps while respecting the human rights of refugees and the general public
- c. The State should promote an inclusive approach to the development of any repatriation plans for refugees; desist from promoting involuntary return whether through the suspension of registration or other forms of coerced return and should promote the recognition of alternative legal statuses for refugees in Kenya
- d. The state with the help of UNHCR should ensure that refugee children access basic education in the camps that is relevant and quality
- e. The state should respect the international norm of non refoulement and also the high court decision on encampment policy of refugees.
- f. The state should upscale its efforts to ensure that the tracking and reunification programme takes root; this will enable families to be re united.

Citizenship and National Documentation

48. Accessing the National identity document in Kenya has been a historical challenge since there are a lot of bureaucratic procedures to be followed before one obtains a National Identification; in some instances Registration of persons was suspended in the Northern part of Kenya to guard against non-Kenyans registering as such. These acts by the state has led to many Kenyan citizens who have come of age not being registered; this has had the effect of denying them other rights such as the right to vote among other rights
49. Communities such as the Nubian Community have been treated as stateless persons because they have been denied identity cards on the guise that they are not Kenyans. The Kenya Citizenship and Immigration Act (No. 12 of 2011) was enacted in 2011 with the hope of resolving Kenya's statelessness problem by providing for mechanisms to ensure that persons who for one reason or another did not take up citizenship following the country's independence may do that now.

50. Unfortunately, the process of obtaining identification documents by persons of Somali origin and other minority groups such as the waata has been strenuous on the individuals as the vetting procedure is long and technical, there are allegation of bribery and corruption in the process.
51. The situation was made worse during the recent security threat relation to Operation Linda Nchi 2014. The security initiative profiled specific communities, prejudiced some individuals who did not have proper identification and subjected to grave human rights violations.

Proposed Recommendations

- a. The state should put in place measures to ensure no one in Kenya is discriminated on the basis of prohibited grounds provided for under the convention and amplified by the constitution.
- b. The state should put in place mechanisms to ensure full implementation of the Kenya Citizenship and Immigration Act (No. 12 of 2011)

Internally Displaced Persons (IDPs)

52. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012) establishes a rights-based response to internal displacement.
53. This law stresses Kenya's international human rights obligations by explicitly giving effect to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Great Lakes Protocol on the Protection of and Assistance to Internally Displaced Persons, as well as the United Nations Guiding Principles on Internal Displacement.
54. The Draft National IDP Policy aimed at dealing with issues affecting displaced persons and affected communities was approved by cabinet in October 2012 but is yet to be tabled in parliament for debate and approval.
55. The Great Lakes Protocol on the Property Rights of Returning Persons specifies that Kenya has an obligation to assist IDPs and/or resettled IDPs to recover, to the extent

possible, their property and possessions which they left behind or were disposed of upon their displacement. The minimal funds (ex gratia payments) that were being issued to the victims through *Operation Rudi Nyumbani* were too meagre to be considered as a comprehensive compensation.¹⁶

56. The State established an initiative to support displaced persons and affected communities either to return or resettle indifferent locations. Currently there are more than twenty IDP resettlement sites across the country majority concentrated in the Rift Valley region.
57. As much as the government has tried to address the protection needs of IDPs and affected communities, still there exist about thirty satellite IDP camps across the country and unaddressed needs of the integrated IDPs Slightly more than 500 families several who sought refuge in Uganda as a result of the 2007/8 post-election violence have been repatriated, although there still remain some who are yet to return.
58. The major impediment is the lack of political will to comprehensively address internal displacement in the Kenya; with likely increased displacements as a result of development based projects such as the Lamu Port and South Sudan Ethiopia Transport (LAPSSET) Corridor project, Coal mining in Kitui among others.
59. Lack of comprehensive consultative processes on issues affecting displaced persons and affected communities are evident on government led programmes in achieving durable solutions to displacement in Kenya. Such example is the IDP resettlement/or relocation programing that affect the IDPs and host communities directly whereby most families were relocated, returned or resettled without consultations. In most IDP settlement sites, the houses constructed by the government remain unoccupied citing insecurity and lack of infrastructure such like health facilities, schools, water, electricity and markets.

Proposed Recommendations

- a. There is need to adopt the national policy on IDPs to address accountability on assistance to IDPs by the multi-national companies related displacement and complementary procedures as may be caused by their activities which the legislation does not address.

¹⁶ UPR 2011-2012, op.cit., p.32

- b. The state should also ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa to enhance its partnership with the African Union to ensure that in case the government of Kenya is not able to deal with arising political instability or any other event causing displacement, there is option of receiving assistance from the African Union member states an issue not explicitly provided by the national legislation The state should adopts a broader and more flexible approach to durable solutions which includes but not limited to land based solutions with a greater emphasis on livelihoods, documentation and access to basic services.¹⁷
- c. The state should establish an IDP compensation fund for purposes to facilitate compensation to deserving cases¹⁸
- d. The state should undertake a comprehensive audit on all government implemented programmes to ascertain the level of durable solution realized on internal displacement and also collect high-quality data on the number of IDPs and their situation as a prerequisite for promoting a common understanding of displacement and effective responses.

Recognition of the Youth

- 60. The Youth have a vital role in shaping the present and future of the country's social, economic and political development. The formulation of the National Youth Policy and the establishment of the Youth Council are important advances towards enhancing youth development in Kenya.
- 61. The National Youth policy spells out the strategic areas that must be addressed in order for Kenya's young people to effectively play their role in nation building. These strategic areas are: employment creation, health, education and training, sports and recreation, the environment, art and culture, the media and participation and empowerment.
- 62. Perhaps one of the greatest challenges that the youth face is unemployment which the state has tried to address by establishing a revolving Youth Fund and the reservation of 30% tenders in state institution for youth, Persons with disabilities and Women. Whereas the ideas as conceptualized by the state are noble the challenges in the implementation of

¹⁷ Ibid, p. 48

¹⁸ Ibid, p. 49

these initiatives are enormous and has had a negative effect of denying the would be recipients access to the funds; the challenges include corruption, nepotism and pilferage of funds meant for the youth and women.

63. There have been allegations that the tenders reserved for youth, Women and the disabled are awarded to businesses that do not necessarily belong to these special interest group the awarding of the tenders has been linked to due to corruption and nepotism therefore making the initiative counterproductive to its intended purpose.

Proposed Recommendations

- a. The state should streamline its programmes on the Youth fund, Women Fund and the reservation of tenders for special groups so that they may benefit the intended beneficiaries
- b. The state should address the rampant corruption in the programmes that it has initiated targeting the youth, women and special interest groups
- c. The state should re look at its educational curriculum in order to make it responsive to the market demands and make it relevant to the skill set demanded by the market

Sexual Orientation and Gender Identity

64. The KNCHR report on the Inquiry on Sexual and Reproductive Health Rights in Kenya (2012) revealed that lesbians, gays and bisexual people still suffer human rights violations including discrimination and stigma, exclusion from decision making processes, limited access to sexual reproductive health services, lack of protection from STIs and HIV and AIDS as well as lack of recognition from the society of their existence.¹⁹ The State is in the process of preparing the 4th National Health Action Plan for 2014. The Plan seeks to pay particular focus on MARPø (Most at Risk Persons) population which include the MSM community. The State has embraced public participation in the process and engaged organisations working on MSM populations in the consultative process.²⁰

¹⁹ UPR 2011-2012, op.cit., p. 36

²⁰ UPR 2012-2013, op.cit., p. 55

65. On 17th June 2011, a Resolution was submitted to the United Nations by South Africa requesting a study on discrimination and sexual orientation passed, 23 to 19 with 3 abstentions. The resolution called on the UN High Commissioner on Human Rights to draw up the first UN report on challenges faced by LGBTI people worldwide. Kenya was one of the countries that opposed the resolution.

Proposed Recommendations

- a. The state should consider the enactment of legislation on equality and non-discrimination with provisions on sexual orientation and gender identity as protected grounds;
- b. The state should develop of comprehensive policy guidelines on the health rights of LGBTI persons and their access to HIV/AIDS prevention, care and treatment measures, well informed and unbiased mental health services, and provision of reproductive health services;
- c. The state should develop a policy on treatment of transgender and intersex conditions.²¹

²¹ UPR 2010-2011,op.cit., p.23

ECONOMIC RIGHTS

Business and Human Rights

66. This role of business has also been recognized by the Government through Kenya Vision 2030 which commits to ensuring that a conducive environment for business is created, maintained and continuously improved; further the Vision has committed to support the growth of infrastructure for Small-Medium Enterprises given that they are Kenya's main employment sector.
67. The UN protect, Respect, Remedy Framework which clarifies the roles and responsibilities of governments and business in relation to human rights under three pillars: the State duty to protect; the corporate responsibility to respect and access to remedial mechanisms for victims of corporate related human rights violations.
68. The Guiding principles are grounded in recognition of: State's existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.
69. These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.²²

Communities in Extractives Areas

70. Minerals, oil, gas and other precious stones continue to be discovered in Kenya. In some areas prospecting is still at the initial stages; in some Companies have finished prospecting and are awaiting the go ahead from the state to start the extraction activities. Companies such as Titanium base have already started mining the Minerals and have already processed and exported them.

²² (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Human Rights Office of the High Commissioner, New York and Geneva, p.6

71. For a very long time due to the fact that Minerals and other natural resources had not been discovered the legal regime governing the extractive industry remained outdated and did not for example provide for means of protecting local communities in the face of extractive activities; due to this realization the state proposed to enact the Mining Bill 2014 to give effect to Articles 60, 62 (1) (f), 66(2), 69 and 71 of the Constitution in so far as they apply to minerals. .
72. The Bill has been passed by Parliament and is awaiting Presidential Assent. As Kenya's mining sector expands, the Government is tasked with developing measures that protect the welfare of communities and the people of Kenya as a whole.
73. The Government has commenced consultations to put in place a policy and legislative frameworks and National Action Plan on Business and Human Rights that allow for adoption of good practices that ensure local communities are not disadvantaged in terms of revenue sharing, employment, compensation and relocation.
74. However the Government rarely consults the communities in mining areas and in particular the indigenous people living in the mining areas. Further, the laws are not clear on revenue sharing agreements and how the community will benefit from the natural resource. The media has, on numerous occasions highlighted how the inhabitants of a region rich in resources may not benefit directly due to corruption and economic exploitation by private mining companies.
75. It would be important for the state to enact the Access to Information Legislation to ensure that communities can access information held by the companies and the state in respect to the extractive activities in their areas and that might affect them; this will also help in clarifying to the communities the kind of benefits secured for them in the mining agreements and leases.

Proposed Recommendations

- a. The state to fast track the enactment of the Access to information Legislation
- b. The state should put in place a public participation policy
- c. The government should develop national policy, legislative frameworks and National Action Plan on Business and Human Rights to govern business in the country in line with the United Nations guiding principles on Business and human rights.

- d. The state should ensure that the Communities are Consulted and that they consent to the extractive activities being conducted
- e. The state should ensure that there guidelines on compensation of communities that are likely to be affected by the extractive activities

Combating Corruption

- 76. The ICESCR Committee in the last review recommended that the State party intensifies its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences. It also recommended that the State party train the police and other law enforcement officers, prosecutors and judges on the strict application of anti-corruption laws, conduct awareness-raising campaigns, and ensure the transparency of the conduct of public authorities, in law and in practice.
- 77. The state has made certain steps towards effecting the recommendation: introduction of the Anti-Corruption and Economic Crimes Act 2003 and Amended in 2011, establishment of the Ethics and Anti-Corruption Commission (EACC), training of Anti-Corruption Prosecutors; Increase in budgetary allocation to the Ethics and Anti-Corruption Commission among other Measure aimed at tackling Corruption.
- 78. Despite the robust measures that have been put in place Corruption cases and allegations continue to rise; One of the main reason for this is that there seems to be an effort to tackle low level corruption while the high level corruption is glorified and the suspects not charged in courts as the low level perpetrators; this has created a culture of impunity around the Corruption Question.
- 79. The interference with the Ethics and Anti-corruption commission by the executive has also contributed significantly in the continued corruption; in many instances the members of the Ethics and Anti-Corruption Commission have been edged out of office in the guise that they lack the passion and will to fight and deal with corruption.
- 80. The members of the EACC are often edged out especially when the commission has starts tackling high level corruption; the Process of appointment to the commission takes inordinately long time therefore slackening the pace of dealing with corruption.

81. Despite the fact that most corruption cases have been investigated in Kenya; the outcomes of the investigations have largely remained unknown; the case in point is the Triton Case, Anglo leasing, Goldenberg Scandal, NYS Scandal and many others. The state and Ethics and Anti-Corruption Commission will need to ensure that the cases that have been investigated are concluded and the suspects arraigned in court to face charges.
82. In March 2005, during the address of the state of the nation, the president read and handed over the names of alleged corrupt state officials including the cabinet secretaries for investigations and prosecution. Since then several cases have been investigated, and files forwarded to courts for prosecution while others have been dropped due to lack of sufficient evidence.

Proposed Recommendations

- a. The state needs to increase budgetary allocation to Ethics and Anti-Corruption Commission to enable it improve the capacity of its staff in terms of the staffing and training levels.
- b. The state needs to restate its position and commitment to fighting corruption.
- c. The state should not interfere with the affairs of the EACC.
- d. The state should ensure that all cases of corruption are fully investigated and action taken on Perpetrators.
- e. The government should conduct widespread public awareness campaigns for the citizens to understand that corruption undermines the effective protection and promotion of human rights and therefore develop a culture that discourages corrupt practices.

Access to Land

83. The land policy and legislative framework has in the past been managed within multiple laws and regulations. Kenya also has a new land policy, which together with the Constitution forms the bedrock of new land laws that have been passed since 2010. These new laws include: the Land Act (No. 12 of 2012) and the Land Registration Act (No. 3 of 2012).

84. In February 2013, the National Land Commission was made operational. The Commission is tasked with various duties, but faces various challenges. Kenyans may not be conversant with the operations of the Commission which poses a threat to how citizens may access to the services offered by the institution. Secondly, there has been recent strife between the Commission and the Ministry of Lands. The contention relates to understanding the mandates and the supremacy of the two institutions.
85. Finally, a key aspect in the judicial arena involves the establishment of the Land and Environment Court to focus specifically on land and environmental issues by the Environment Land and Court Act (No. 19 of 2011). This avenue has offered redress for various land matters between citizens. Unfortunately the judicial system is faulted for being expensive and too technical for the ordinary citizen. Further, the judiciary is weighed down by a backlog of cases thus cases take several years to conclusion. The deeply entrenched vested individualistic interests have denied the much needed political and business support for land reforms to take place. Most powerful people in this arena, especially the recipients of the past land regime see the reforms as a hindrance to personal power and wealth.

Proposed Recommendations

- a. The state should fully implement the developed five-year National Strategic Plan to guide implementation of the National Land Policy that focuses, the devolution of land management , land registration, natural resource management, national land information management system and resolution of land-related disputes.
- b. The state should increase the Number of Judicial officers manning the Land and Environmental Courts to ensure that the land disputes are expeditiously concluded
- c. Fast track the enactment of Community Land Bill.
- d. The state should fully implement the recommendations of the Truth Justice and Reconciliation Commission as it relates to the land question.

ARTICLE 6 – RIGHT TO WORK

86. It is estimated that youths aged 15-19 and 20-24 years have unemployment rates of 25 percent and 24 percent, respectively. This is about double the overall unemployment of 12.7 percent for the entire working-age group. Based on the 2009 census, the open unemployment rates declined for youth, but among youth aged 15-19 and 20-24 years these rates were about 15.8 percent and 13.1 percent, respectively; relative to a total unemployment rate of 8.6 percent²³.
87. The importance of this right is affirmed by the fact that Kenya has ratified 49 International Labour Organization (ILO) Conventions, including seven of the eight Fundamental Conventions; three of four Governance Conventions (Priority); and 39 of the 177 Technical Conventions.
88. The country's long-term development blueprint, the Kenya Vision 2030, identifies work as a critical component of the economic pillar, stressing that social cohesion may not be attained when significant segments of the population remain in abject poverty. Vision 2030 includes equity as a recurrent principle in economic, social and political programmes. Special attention has been given to investment in arid and semi-arid (ASAL) regions, communities with high incidence of poverty, unemployed youth, women and all vulnerable groups.
89. The increase in the generation of jobs is attributed to improved economic performance coupled with increased access to cheaper credit from financial institutions, and from the Women Enterprise Fund and the Youth Development Fund. The main challenges at the Women Enterprise Fund level included: inadequate WEF field personnel, inadequate field facilitation, low loan amounts, delays in disbursements and a multi-layered Fund structure.
90. At the lender level, high cost of loan administration, competition with commercial bank products, poor dissemination of information, misconception about the purpose of the Fund, high default rates, high density and/limited scope of coverage, lack of distinct product branding, bureaucratic processes.

²³The Standard Digital, *Unemployment and hopelessness among youth bad for the economy*, May 5th 2013, Kenya

91. Limited business monitoring and delays in funds disbursement from the central government, were the main challenges. Lastly at the borrower level the challenges included: inadequate loan amounts, limited and shrinking markets/competition, lack of business knowledge, diversion of the funds, low literacy among segments of women borrowers, lack of loan securities, lack of individual choices in group lending and domestic interference.²⁴
92. Formal and informal employment can provide a mechanism of ensuring that the youths are empowered so that they are engaged and involved in developing the economy. The government conceived the idea of institutional financing as a way of addressing
93. The concept is based on the premise that micro, small and medium enterprise development initiatives are likely to have the biggest impact on job creation. The Youth Enterprise Fund has been met with a lot of criticism as to the mechanism of how the funds are being disbursed. There is a growing demand from interested youths that the Government should devise some mechanism to ensure adequate, fair and effective distribution of the funds right to the grass root level.²⁵
94. The Government alone cannot ensure creation of 500, 000 jobs every year hence there is a need to involve development partners and the private sector in the process of resource mobilization for the implementation of youth employment Marshall Plan.

Proposed Recommendations

- a. The state should adopt effective measures to reduce unemployment. Furthermore, it should ensure that the economic, social and cultural rights of temporary workers are effectively respected.
- b. The State should take effective measures to increase the rate of employment, particularly in rural areas, and to overcome the difficulties in framing and implementing its employment policies.

²⁴K.N. Ruth, K. Margaret & K.M. Allan, (2013), *Micro, Small and Medium Enterprise Growth and Innovation in Kenya: A Case Study on the Women Enterprise Fund*, Nairobi Kenya, 2013.

²⁵K. Stanley & P. K. Chepkuto, (2014), *The Role of Youth Empowerment in Fostering Peace in Kenya*, The International Journal of Humanities and Social Studies, ISSN 2321-9203), Kenya.

ARTICLE 7 – RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

95. The Constitution of Kenya establishes every worker's rights to: fair remuneration; reasonable working conditions; membership of a trade union; and to strike. The Employment Act (No. 11 of 2007) complements the Constitution by detailing the fundamental rights of employees as well as providing for basic conditions of employment. It forbids forced labour; provides for equality of opportunity in employment; outlaws discrimination; legislates for equal remuneration for work of equal value; and protects against sexual harassment.
96. Due to unemployment and poverty, there has been migration of Kenyan citizens to foreign countries in search of a means of livelihood. Migrant workers have travelled to various countries, but of interest are the Kenyans who travel to the Middle East to work as domestic workers.
97. There have been numerous media reports of cases where the Kenyan citizens are either ill-treated, denied medical attention, physically, verbally and sexually assaulted, receive no or unreasonable compensation or killed in the Middle East. One of the key factors leading to situation is the presence of fake recruitment agencies that are not concerned with the welfare of the Kenyan worker but with their own economic benefit.
98. KNCHR receives complaints from relatives of migrant workers alleging that the latter are being ill-treated and seek the Commission's intervention to protect the person's welfare. In order to protect its citizens, the Ministry of Foreign Affairs is discouraging Kenyans from such migration and has engaged the Government of the Kingdom of Saudi Arabia over the issues.
99. In September 2014, the Labour Cabinet Secretary suspended the recruitment and movement of domestic workers to the Gulf Region and Middle East.²⁶ The minister said the move would enable the government put in place adequate structures for the effective management of labour migration and protection of migrant workers. The ban on migration has been criticized by the Kenya Association of Private Employment Agencies (KAPEA) stating that the government should have given notice of the same and that genuine agencies should not be prejudiced in the government's response to the case situation.

²⁶The Daily Nation, *Permits for Saudi Jobs Cancelled*, 30th September 2014, Kenya

100. There is an on-going battle between the Government and other concerned parties at an attempt to balance the interests of the migrant workers, diplomatic relations and legitimate recruitment companies. The Government is negotiating bilateral agreements with various countries in the Middle East and considering establishment of vibrant consular offices in the countries so as to provide access to justice and protection of the rights of migrant workers in the respective countries.

Proposed Recommendations

- a. The Government should ensure that the development partners enhance and continue to support the various youth unemployment intervention measures already established to ensure that they become sustainable.
- b. The state should review all relevant legislation to ensure just and favourable conditions of work for all workers, including the minimum wage, working hours and rest days, and improve data collection, particularly on zero-hour contracts.
- c. The state should take the necessary steps to ensure that the minimum wage applies to all employees and ensures a decent living for workers and their families
- d. The State should ensure that employees are guaranteed and paid a salary at least at the level of the national minimum wage and take urgent steps to strengthen the capacity of

ARTICLE 8 – RIGHT TO FORM AND JOIN TRADE UNIONS

101. The Constitution of Kenya, complemented by the Labour Relations Act (No. 14) of 2007, guarantees workers the right to industrial actions. In September 2012, teachers in public Primary and Secondary Schools went on strike.

102. The strike was over a memorandum of understanding (MOU) that the teachers reached with the then Ministry of Education representatives in 1997, involving salary increment and other allowances to harmonise their salaries with those offered to civil servants.²⁷ However 15 years down the line, the State is yet to harmonize teachers' salaries or make good the contents of the said MOU.²⁸

²⁷UPR 2011-2012, op.cit., p. 32

²⁸Ibid

103. The Registrar of Trade Unions has on several occasions declined to register trade unions where the substantial interests of members of the proposed unions were already represented by already existing unions.

Proposed Recommendations

- a. The state should allow the Workers unions to operate without interference with their operations
- b. The State should take legislative and other measures to ensure that all workers, including foreign and migrant workers, can join trade unions.
- c. The State Should take effective measures to ensure that workers are protected from any retaliatory actions following their involvement in trade unions

ARTICLE 9 – RIGHT TO SOCIAL SECURITY

104. This refers to a variety of public-spending programs designed to provide income and services to individuals in the event of retirement, sickness, unemployment, or disability; these are generally designed for basic poverty alleviation for the most vulnerable members of the society. The State recognises how essential it is to ensure vulnerable groups like children, older persons and persons with disabilities do access amenities of life such as food and shelter.

105. The Constitution in particular identifies persons who are vulnerable as ones that should receive social protection from the State on a priority basis. The National Social Protection Policy has sought to respond to this constitutional imperative through the use of various instruments to deliver social protection to the poor and vulnerable. Government should allow a multi-faceted approach that encourages the private, public and civil sectors to contribute towards the realisation of the right to social security.²⁹

²⁹K. Edigah, *A commentary on the Right to Social Protection*, Rule of Law Report 2012-2013: Towards Progressive Implementation of Economic, Social and Cultural Rights, Kenyan Section of the ICJ p.116

Rights of Persons with Disability

106. Article 54 (1) (c) of the Constitution 2010 provides that a person with any disability is entitled to reasonable access to all places, public transport and information. Persons with disabilities face numerous challenges in accessing essential services such as buildings, communication and transport facilities.³⁰
107. The Persons with Disabilities Act 2003 establishes the National Development Fund for Persons with Disabilities. The Fund was operationalized in 2010. The Government has used the project to disburse funds to persons with disabilities, organisations and institutions that provide services to persons with disabilities.
108. In 2010, the Ministry of Gender, Children and Social Development began an Economic Empowerment Project which disburses funds to groups of persons with disabilities for promoting the economic independence of persons with disabilities. In April 2011, the Ministry began a cash transfer system for persons with severe disability for ten households in every electoral constituency.
109. In 2012, the system was expanded to target seventy (70) households per constituency. Despite the resources made by the Government, the challenge remains as the amounts are inadequate to meet the needs of PWDs, especially for women whose children have severe disabilities.
110. The Special Needs Education Policy 2010 makes provision and proposals for inclusive education for children with disabilities in Kenya.
111. The Government should ensure the representation of PWDs particularly in the Senate, Legislature and County Assemblies, as it is only through political and economic participation that PWDs can secure their rights.³¹

Proposed Recommendations

- a. The state should Complete as a matter of priority and within a specific time frame the process to review the Persons with Disabilities Act 2003 and bring it into line with the human rights-based approach to disability;

³⁰Ibid, p. 38

³¹Ibid, p. 38-39

- b. The state should take steps to promote the employment of persons with disabilities, as well as to protect them from discrimination in the workplace. The Committee also recommends that the State party ensure effective compliance by public institutions with the 5 per cent quota accorded to persons with disabilities

Protection for Elderly Persons

112. One of the Key mechanisms through which the government can prepare Kenyan for old age is through appropriate policy interventions.³² In its Policy Framework and Plan for Action on Aging, the African Union observes the need for Governments, NGOs, private sector and the society in general to be prepared to deal with a future situation in which the number of older people is forecasted to grow at a very rapid rate.³³

113. The United Nations General Assembly Proclamation on Ageing, paragraph 2 recommends that appropriate national policies and programmes for the elderly should be considered as part of a government's overall development strategy. The government developed the program *PesaKwaWazee* but the initiative has been marred by corruption and lack of accountability.

114. The State has to date rolled out cash transfer programmes to cover older persons, orphans and vulnerable children (OVCs), and persons with severe disabilities. During the last four years, money has been allocated on an annually increasing basis to each of these groups to be transferred to individual households across the country. The cash transfer program should be expanded to include all PWDs and not just the seventy targeted households per county.³⁴

NSSF & NHIF

115. The social security system under Kenyan laws is employment centered. Furthermore, the social security protection envisaged under Kenyan laws does not recognize or make

³²(2009), *Growing Old In Kenya: Making It A Positive Experience*, Kenya National Commission on Human Rights, Kenya, p. 5

³³Ibid

³⁴UPR 2011-2012, op.cit., p. 39

any provision for vulnerable groups such as refugees, asylum seekers, internally displaced persons³⁵.

116. The State should place a policy framework that would recognize and provide for the right to social security for all Kenyans especially the poor, women, the vulnerable workers, the unemployed, older persons, persons with disabilities, refugees and other marginalized groups.³⁶

117. State agencies strive to ensure that minimum work standards apply within the informal sector. The situation of workers in informal employment is gradually being improved through their inclusion in social protection schemes and health schemes. For example, now, even workers with minimal earnings can become members of the National Hospital Insurance Fund (NHIF).

Proposed Recommendations

- a. The state should streamline and address the concerns of corruption and delays in disbursement of the cash transfer programs
- b. The state should increase budgetary allocation to the social cash transfer programs
- c. The State should take steps to ensure universal social security coverage, and extend the coverage of social security to all workers in the private sector, as well as persons with disabilities in line with general comment No. 19 (2007) on the right to social security.
- d. The state should ensure universal health insurance coverage of its Citizens.

ARTICLE 10 – PROTECTION OF THE FAMILY

118. The Government is committed to promoting the welfare of the family, which is critical in the realisation of the economic, social and cultural rights for individuals.

Protecting the Rights of Women

119. The Government drafted three family law bills ó the Marriage Bill 2012, the Matrimonial Property Bill 2012 and the Protection against Domestic Violence Bill 2012 ó to give effect

³⁵UPR 2012-2012, op.cit., p. 71

³⁶Ibid, p. 72

to the constitutionally guaranteed rights of the family. The Bills are expected to be enacted into law in the 11th Parliament.

120. While there has been an attempt to establish gender desks in some police stations, they have proved ineffective in dealing with cases of violence against women as they are not manned by skilled personnel. There is also no adequate gender based violence recovery centres throughout the nation, and the ones that exist are unable to provide effective redress to gender based violence. In fact, services for victims of gender-based violence are mainly provided by non-state actors.³⁷

121. The state in acceding to the treaty had placed a reservation on Article 10 on maternity leave; the law in Kenya namely the Constitution and the employment Act now reflect the provisions of the convention on this issue.

Combating Under Age Marriage and Female Genital Mutilation (FGM)

122. The Prohibition of Female genital Mutilation Act was passed in 2011 and a National Policy and Action Plan on FGM were developed. However, the law is still weak in protecting people against FGM as it is still yet to be aggressively applied. Unless perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM.³⁸

123. Under age marriage remains a challenge arising mainly due to poverty and lack of economic opportunities for girls especially in rural areas, cultural and religious beliefs and practices.

Counter Trafficking Measures

124. In Kenya the problem of trafficking in persons particularly affects the country as a major host for asylum seekers and refugees and a travel hub within the East African region. Women and children are particularly vulnerable to this vice. Trafficking undermines the quality of life of the victims, many of who are already vulnerable or in difficult circumstances and often subjects them to a life of servitude, exploitation, violence and other forms of abuse.

³⁷(2011), *Universal Periodic Report: An Assessment by Stakeholders of Government's Performance in Implementing the Universal Periodic Report*, Kenya National Commission on Human Rights, Kenya, p. 17

³⁸UPR 2011-2012, op.cit., p. 30

125. The State is yet to launch and implement its national plan of action, convene the Counter-Trafficking in Persons Advisory Committee, take tangible action against trafficking complicity among law enforcement officials, including police, labour inspectors and children's officers.

126. The State's efforts remain uncoordinated and lacked strong oversight, creating an environment conducive to trafficking. Further, while the Act provides for the protection of trafficked persons found in Kenya, there are no victim shelters where such persons can be accommodated. Victim support services such as provision of psycho-social support are also not available.³⁹

Protection of Vulnerable Children

127. Every child is guaranteed the right to a name and nationality at birth, basic nutrition, shelter, and healthcare, protection from abuse, neglect and harmful cultural practices, violence, inhuman treatment, and hazardous or exploitative behaviour. Every child also has the right to parental protection and care. One of the Government's initiatives to protect vulnerable children includes the provision of Cash Transfers for OVCs. The State should show an account of the initiative.

Proposed Recommendations

- a. The state should remove the reservation placed on Article 10 on the rights of women to maternity leave
- b. The State should take urgent steps to address child labour, including through ensuring effective enforcement of legislation protecting children from economic exploitation and exposure to hazardous or abusive work.
- c. The State should ensure that all cases of domestic violence are investigated and that perpetrators are promptly prosecuted and sentenced
- d. The state should upscale its efforts to eradicate Female Genital Mutilation and further support the Anti FGM Board.

³⁹UPR 2012-2013, op.cit., p. 40

ARTICLE 11 – RIGHT TO ADEQUATE STANDARD OF LIVING

Tackling Poverty

128. Article 204 of the Constitution establishes that Equalization Fund. The fund is meant to provide basic services including water, roads, health facilities and electricity in marginalized areas .Over the years, the Government has introduced various avenues to address economic growth and poverty in the country.
129. The various initiatives: Constituency Development Fund (CDF), Constituency Bursary Fund, free primary education fund, Local Authority Transfer Fund (LATF), Poverty Eradication Loan Fund, the National Development Fund for PWDs, Womenø Enterprise Fund and the Youth Enterprise Development Fund.
130. Budget allocation for the poverty alleviation programs was increased during the 2011/12 financial period. To promote rural development for employment and poverty reduction, the Government increased provisions for the Economic Stimulus Program (ESP) projects to ensure that they were fully completed and initiate new projects. ESP projects were in health, education, fish enterprise development, agriculture, irrigation, youth employment and support for ASALs using devolved funds.⁴⁰
131. Despite the various funds and projects initiated by the Government, the marginalized communities still do not receive the basic services and if they do it is of low quality. Plans have been developed but rarely implemented due to corruption practices at all levels of service delivery.
132. The recent (2011) World Bank Forensic Audit Report on the Arid Lands and Resources Management Project in Northern Kenya linked the 2010/11 hunger in the region to fraud.⁴¹ Tight anti-corruption measures and effective monitoring and evaluation plans must be implemented to ensure development funds are used effectively and results achieved. There is delay in relaying feedback to individuals applying for the various funds. Processing the request forms takes a long time and feedback to the individuals on whether they have qualified for the funds is slow and sometimes no feedback is given.⁴²

⁴⁰UPR 2010-2011, op.cit., p. 29

⁴¹Ibid

⁴²Ibid, p. 30

133. Effective assessment of these programmes requires the documentation and publishing of the Government's poverty alleviation strategies. However, the Government has failed to adequately monitor and document the effectiveness of these strategies.

Right to Food & Food Security

134. The policy institutional framework guiding the Ministry of Agriculture is the Sector Development Strategy (ASDS 2009-2020) reflecting the aspirations of the Kenya Vision 2030 framework which aims at improving prosperity of Kenyans through economic development programmes, and also ensuring enhanced agricultural strategies focusing of food security.⁴³

135. In 2011, the Government put in place various programmes that focus on reduction of food security, such as the *Njaa Marufuku* Kenya Programme and the National Accelerated Agricultural Input Access Programme (NAAIAP). The effect of the programs has not been significant over the years.

136. The UN General Comment 12 makes special mention of vulnerable groups and obligated the State to develop special programs to cater for the various groups concerned. Factors leading to food insecurity, particularly in Northern Kenya, include recurrent drought, conflicts, insecurity and crop failure. Insecurity along the Kenya-Somalia border disrupts market supply to people leading to low levels of supply of food and other necessities.

137. Further, inflation has raised the cost of commodities which may not be attainable by majority of the people in the region. In 2012, the Kenya Food Security Steering Group (KFSSG) confirmed that about 2.2 million people are classified in either crisis or stress phases of food insecurity down from the 3.75 million people in 2011. The strategic national grain reserves were almost depleted.

138. Of most concern is that the interventions are largely through food aid from relief agencies which intervene through general distribution, food assets, cash for assets and unconditional cash transfers modalities.⁴⁴ The National Food and Security Nutrition Policy states that over the past 30 years, per capita availability of food has declined by more than

⁴³Ibid, p.27

⁴⁴UPR 2011-2012, op.cit., p. 41

10%.⁴⁵The country has been dependent on relief and aid and long term solutions are required to tackle the issue of food security.

139. There needs to be a coordinated and holistic approach to ensuring food security in Kenya which includes among others undertaking legislative, policy and administrative measures. There is also need to monitor cross border issues that affect food security in the county. The development and adoption of the National Disaster Management policy should be fast tracked and regular studies conducted to determine the food supplies level.⁴⁶

Right to Water and Sanitation

140. The National Water Quality Management Strategy (2012-2016) has been developed to streamline and harmonize water quality management. The Ministry of Water is also undertaking measures geared towards ensuring provisions for development of water storage units address the perennial water shortage including enhancing irrigation countrywide.⁴⁷

141. An emerging issue for the environment, water and irrigation sector is enshrining the rights to clean and safe water in adequate quantities and also to reasonable standards of sanitation.⁴⁸The Pro-poor Implementation Plan for Water Supply and Sanitation 2007 provides that the Government through the Ministry of Water and Irrigation commits to meet the MDGs which target to half by 2015 the proportion of people without sustainable access to safe drinking water and giving access to the poor the highest priority on all levels.

142. Sustainable access to safe water in Kenya is estimated at 60% in the urban areas, dipping sharply to 40% in the rural areas.⁴⁹The right to water is not enjoyed by all Kenyan. Formal settlements have access to water although sometimes they face water rationing and disruption. However, residents in informal settlements have limited and/or no access to adequate and safe drinking water. In addition, inadequate management of the country's

⁴⁵ N. Ivy,(2014), Realising the Right to Food under the Constitution of Kenya 2010, Rule of Law Report 2012-2013: Towards Progressive Implementation of Economic, Social and Cultural Rights, Kenya Section of the ICJ, p.29

⁴⁶ Ibid

⁴⁷ UPR 2011-2012, op.cit., p. 42

⁴⁸ Environment, Water and Irrigation sector Report, January 2011: Medium term Expenditure Framework 2011/2012-2013/14).

⁴⁹ Ministry of Water and Irrigation, the National Water Services Strategy 2007-2015. p.1

watersheds has led to excessive soil erosion, increased cost of water treatment and rapid siltation of reservoirs.⁵⁰

143. The State is expected to ensure equal distribution of water to the entire population. In the case of *Ibrahim Sangor Osman versus The Attorney General*⁵¹ the Court held that the right to water is justiciable and whether or not the right is stated in the Constitution, important statements in international law recognise and ensure that standards of this right are being met.

144. Poor sanitation remains a challenge to the majority of the Kenyan population. The challenge is greater for the urban poor as compared to the rural poor in sanitation. Further, Kenya also has a uniform water tariff irrespective of differences in socio-economic status of users or the quality of the water or the nature of the water use. As a result, the poor persons' access to water and sanitation is severely compromised.⁵²

Proposed Recommendations

- a. The State should increase the current food reserves and also provide farm inputs including fertilizer to farmers in order to increase production. There should be improvement of infrastructure to ensure that farmers are able to market their products and also ensure easy access for relief food supplies when delivering supplies.
- b. The State should ensure the participation of farmers/food producers in setting prices and decision making on international trade policies. The State should prioritize Agriculture, Livestock, Fisheries, Water, infrastructure, research and other portfolios that impact of food security.
- c. The state must put in place land use planning strategies that anticipate growth and plan for water re-generation, conservation and harvesting.
- d. The State should develop and enforce minimum standards of sanitation.
- e. The State should ensure water tariffs take into consideration the quality and use of the water.

⁵⁰ UPR 2010-2011, op.cit., p. 28

⁵¹ Constitutional Petition No. 2 of 2011

⁵² UPR 2012-2013, op.cit., p. 76

- f. The state must in allocation of funds distinguish the amount allocated for water and sanitation from the estimate for environment, water, irrigation and housing in order to enhance it as a
- g. The state should adopt the draft National Water Policy and enact the Water Bill, 2014.
- h. The State party should step up its efforts to reduce poverty and integrate a human rights based approach in all poverty reduction programmes and strategies, guaranteeing entitlements to individuals and ensuring accountability.

Right to Housing

145. The Housing Bill 2012 aims at providing effective coordination, facilitation and monitoring of the housing and human settlement sector: to provide for capacity building within the housing sector; to establish the Kenya Housing Authority and the National Housing Development Fund for the provision of the right to accessible and adequate housing under Article 43 (1)(b) of the Constitution.

146. The Ministry of Lands, Housing and Urban Development have initiated various programs such as the Appropriate Building Technology Program, Slum Upgrading and Prevention Policy, Eviction and Resettlement Bill, Civil Servants Housing Scheme, Housing Infrastructure and Government Estate Management.

147. The State should harmonize policy and legislation intended to deal with matters of adequate housing in order to prevent any further incoherence in the housing sector.⁵³ Vision 2030: the blueprint calls for the radical reshaping of all; urban planning processes in order to create conditions for an adequate and decently housed nation in sustainable environment. It recommends the passage of a housing legislation to consolidate all housing-related legislation into one law.

148. An emphasis on the provision of housing for civil servants only by the State and leaving a larger investment in housing to the private sector is likely to be an impediment to the fulfilment of the right to housing and reasonable standards of sanitation.⁵⁴

149. In 2011, the Government launched the Kenya Informal Settlement Improvement Programme (KISIP) to improve the housing for the informal sector. But there have been

⁵³ Ibid, p. 69

⁵⁴ M. Carol, (2014), *The Right to Housing under the New Constitution*, Rule of Law Report 2012-2013: Towards Progressive Implementation of Economic, Social and Cultural Rights, Kenyan Section of the ICJ, p.84

little to no results to speak of. The controversial Kenya Slum Upgrading Project (KENSUP) a project funded jointly by the Government of Kenya and the UN-HABITAT/World Bank Cities alliance was premised on the fact that almost half of the Nairobi City's Population in over 100 slums and squatter settlements live in deplorable conditions with little or inadequate access to safe water and sanitation. Lack of public participation in decision making and political expediency has greatly hampered the success of the project.⁵⁵

150. To improve housing of residents in informal settlements, the Government of Kenya in partnership with the UN HABITAT initiated a pilot project in Kibera Soweto East to rehabilitate the area, through provision of new permanent residential housing, equipped with basic services. About 822 houses have been fully completed; ready to be handed over to 822 households.

Proposed Recommendations

- a. The state should revise the National Housing Policy and the Draft Housing Bill to, make reasonable provisions, within its available resources, to ensure adequate access to housing especially for the most vulnerable and marginalized groups.

Land Ownership and Forced Evictions

151. Kenya has not ratified the ILO Convention No. 169 but has instead ratified other ILO conventions that are relevant to indigenous and tribal people; Conventions Numbers 29, 111 and 182. This is seen as a hood wink as it is not adequate, until and unless the ratification of the ILO Convention No. 169 takes place.⁵⁶

152. The State should ratify the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which contains protects for indigenous people's right to land and natural resources. The State should ensure enactment of legislation on community land to provide the legal framework for the use, transfer and management of community land in

⁵⁵ (2011), Contributions for the French Institute for Research in Africa Conference, "Slum Upgrading Programmes in Nairobi Challenges in Implementation", September, No. 44

⁵⁶ Ibid, p. 45

line with the Constitution 2010.⁵⁷The State should not undertake evictions in the absence of proper guidelines measures to prevent any other or further violations of the rights.⁵⁸

153. The State through the National Land Commission stopped transactions of land belonging to indigenous and minority communities, however the same has been ineffective as there are subsequent reported complaints of eviction of communities by the Government without proper procedures set out in the new land legislations of May 2012. The failure to adequately address land historical injustices in the Coastal region has led to challenges in State legitimacy as epitomized by the rise of the MRC.⁵⁹

154. In February 2010, ACHPR found that the Government of Kenya had violated the rights of the Endorois, an indigenous community, by removing them from their ancestral lands. The government was asked to report on the implementation of the recommendations within three months from the date of notification. First, its response was that this decision will be implemented within the larger framework of the National Land Policy.⁶⁰

155. Before the Human Rights Committee in July 2012, the State indicated that the AGs office and the Ministry of Justice, National Cohesion and Constitutional Affairs were working on an implementation framework. The stakeholders are yet to be consulted on such a framework.⁶¹The ACPHR in April 2013 held an implementation hearing with the State and the community, resulting in further direction on the implementation of the case.⁶²The TJRC recommended the implementation of decision in the Endorois case.

156. The members of the Ogiek community evicted from the catchment and biodiversity hotspots within the Mau Forest Complex continue to await resettlement in line with the recommendations of a government-sanctioned taskforce.⁶³

157. In *Satrose Ayuma and Others versus The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others* (2013) the court found that the Respondents had violated the petitioners right to adequate housing and sanitation, right to human dignity and the right to the protection of children, especially the right to shelter and education.

⁵⁷ Ibid, p. 46

⁵⁸ Ibid, p.69

⁵⁹Ibid, p. 34

⁶⁰UPR 2011-2012, op.cit., p. 32

⁶¹Ibid, p. 33

⁶²UPR 2012-2013, op.cit., p. 45

⁶³(2009)*Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex*, Government of Kenya, Kenya).

The Court stated that the Government should develop proper policies and a legal framework for evictions in line with the acceptable international standards.

158. Further, the Government was mandated to ensure the process of reform and redress of the matter should involve all the parties involved in the matter. In the case of *Osman versus Minister of State for Provincial Administration & Internal Security and Others* (2001) the High Court of Kenya held that the forced eviction of 1,122 people was a violation of various rights under the Constitution, 2010. The Court stated that the appropriate remedy in cases of forced evictions is restitution of the petitioners to the original land and the construction of alternative accommodation. The Court permanently restrained the authorities from further evictions of the petitioners.

159. Forced evictions continue to occur with an example of the May 2013 eviction at City Carton in Nairobi West. The more than 400 families were rendered homeless and in urgent need of food, water and shelter. Police, who were providing food for the eviction, used live ammunition and teargas.⁶⁴

Proposed Recommendations

- a. The state should ratify ILO convention 169 to promote and protect the rights of the indigenous people
- b. The state should put in place a legislative framework that will give effect to the UN guiding principles on Business and human rights
- c. The state should fast track the enactment of Community Land Bill
- d. The state should implement the decision of the African Court on Human and Peoples Rights with respect to the Endorois
- e. The state should ensure that the Indigenous and marginalized communities in Kenya are protected by putting in place enabling legislation in line with the constitutional provision
- f. The State should ensure, as part of its National Environmental Policy, that comprehensive independent impact assessments are carried out prior to the setting up of mining projects, and ensure that such activities are not a threat to health and do not adversely impact water, air or soil quality, in particular in rural and remote areas

⁶⁴UPR 2012-2013, op.cit., p. 69

ARTICLE 12 – RIGHT TO HEALTH

160. The Committee on Economic and Social Rights in its General Comment No. 14 provides two essential elements for the right to health: availability and accessibility. Accessibility of the right has four dimensions: non-discrimination of any person on any grounds; physical accessibility by all; economic accessibility (affordable) and information accessibility on health issues.
161. The Africa Union, 2001, Abuja Declaration on HIV/AIDS, Tuberculosis and other related Infectious Diseases recommended that a State must progressively strive to include its national health budget to 15% of the total national budget.
162. Despite the budgetary allocation and various laws and policies that touch on the right to health in Kenya, access to health still remains a big challenge. Affordability and physical accessibility remains a major hindrance to access to quality healthcare.⁶⁵ A quarter of the Kenyan households are located more than 8 kilometres from any form of health facility.⁶⁶
163. Universal health care refers to a healthcare system which provides health care and financial protection to all its citizens. The right to health envisioned by the Constitution does not connote the concept of universal health care as it only provides for a rights to the highest attainable which is to be realised progressively.
164. The NHIF scheme in Kenya can however be stated to be move towards universal healthcare but the major concern is the fact that the fund does not cover everyone, making realisation of health to the very poor and vulnerable people in society a big problem.⁶⁷
165. Other avenues for health financing have included use of devolved funds and pre-payments schemes. Prudent utilization of devolved funds such as the CDF and county budgets can provide a mechanism for increasing access to health services for all including the poor.
166. Unfortunately, uncoordinated development has resulted in some of the health facilities built with those funds becoming white elephants because of lack of proper planning.

⁶⁵Ibid, p. 62

⁶⁶Ibid

⁶⁷M. Sarah, (2014), *“Right to Health in Kenya”*, Rule of Law Report 2012-2013: Towards Progressive Implementation of Economic, Social and Cultural Rights, Kenyan Section of the ICJ, p.59-60

Corruption too has shown its ugly face in these developments, resulting in some of the buildings being condemned as unfit for the intended purpose.⁶⁸

167. A presidential Decree was issued in 2013 that made maternal health care free for women. However the same should be translated to policy and resources allocated for the same. So far, many maternal health care facilities are experiencing an overwhelming influx of patients resulting into a myriad of challenges in actualizing this directive, for instance there is a shortage of hospital facilities, infrastructure, personnel capacity and mobile services to those hard to reach places.⁶⁹

168. The State must develop and put in place a comprehensive maternal healthcare programme that address amongst others: the necessary infrastructure, capacity personnel on pre and post maternal health care and programs to reach hard to reach populations.⁷⁰

169. The WHO has set a minimum threshold of 23 doctors, nurses and midwives per population of 10,000 as necessary for the delivery of essential child and maternal health services. Kenya's most recent ratio stands at 13 per 10, 000.⁷¹ This shortage is markedly worse in the rural areas where, as noted in a recent study by Transparency International, under-staffing levels of between 50 and 80 percent were documented as provincial and rural health facilities.⁷²

170. Actualization the realisation of the right to the highest attainable standard of physical and mental health and availing women with the necessary reproductive health information and family planning methods is yet to be achieved.⁷³ WHO statistics 2013 indicate that in 2010 maternal mortality rate per 100, 000 births for Kenya was 530.⁷⁴

⁶⁸Ibid, p.71

⁶⁹ UPR 2012-2013, op.cit., p.62

⁷⁰ Ibid, p.63

⁷¹ World Health Organisation, (August 2010) Global Atlas of Health Work Force

⁷² (2011), The Kenya Health Sector Integrity Study Report, Transparency International ó Kenya

⁷³ UPR 2011-2012, op.cit., p. 32

⁷⁴ M. Sarah, (2014), op.cit., p. 63

Proposed Recommendations

- a. The state should Increase Budgetary allocations to the health sector
- b. The state should implement the various recommendations and concluding observations of various treaty bodies relating to the rights to health.
- c. The state should guarantee the enjoyment of free maternal services by mothers in Public hospitals by enacting enabling legislation

ARTICLE 13 – RIGHT TO EDUCATION

171. The budget allocation to the education sector has been undermined by gross misappropriation of funds, thus negating the real benefit intended for children. All allegations of misappropriation of funds emerged in 2009, leading to withdrawal of funding by certain development partners. These allegations were confirmed further by the Ministry of Finance in its audit report detailing how public funds were misappropriated under the Ministry of Health and the Kenya Education Sector Support Programme under the Ministry of Education.⁷⁵

172. In the 2013/2014 National Budget, the education budget consisted of Kshs. 10.3 billion towards free Primary education. Kshs. 2.6 billion for the school feeding programme, Kshs. 20.9 for free Day Secondary education, Kshs. 1.17 billion for Secondary schools bursary and Kshs. 800 million to upgrade National Schools.

173. The Government allocated in the medium term Kshs. 53.2 billion for deployment of digital content, building capacity and rolling out computer laboratories. The Government's laptop project raises the issue of misplaced prioritization of the education sector needs particularly the issue of quality education.⁷⁶

Quality of Education

174. The implementation of the free education programme is facing challenges threatening the quality of education offered. This may be a result of limited infrastructure and human

⁷⁵Final Audit Report Addressing the Governance Challenges in the Kenya Education Sector Support Programme (KESSP) under the Ministry of Education and the Pending Bills Audit of the Ministry of Medical Services, Ministry of Finance, 2011)

⁷⁶UPR 2012-2013, op.cit., p. 66

personnel. Kenya needs 52,335 more teachers for primary schools.⁷⁷ By September 2012, there were 19360 primary schools and 6178 post primary institutions that require a total of 333, 480 teachers. However, the institutions only have 263, 060 teachers, creating a shortage of 70, 420 teachers.⁷⁸

175. Further, the teachers have gone sought better working conditions and remunerations for over 15 years and have gone on several strikes in pursuit of their rights and agreements made with the Government. In *The Teachers Service Commission versus Kenya Union of Post Primary Education Teachers (KUPPET)*(2013), the Court held that the employer of the teachers and by extension the Government must secure and protect the rights of the teachers in order to safeguard the rights of the children.

176. Access to education is also not equally realised since free education programme does not address the education needs of children from poor or marginalized backgrounds.⁷⁹ Schools in rural areas and semi-arid regions suffer greater shortages than schools in urban centres.

177. The Basic Education Act 2013 seeks to address some of the challenges faced by children with special needs. However, integration of children with special needs into the regular school system is still a challenge at both primary and secondary level. Transition levels for children with special needs to the secondary schools is also a challenge as they are required to have the same pass marks as other children.

178. There is a shortage of trained teachers for children with special needs and the existing ones are not properly remunerated.⁸⁰ Greater emphasis must be placed on these areas (Northern Frontier District), and the need has been recognised by Vision 2030, with two of its flagship projects being the building of at least one primary boarding school in each constituency within pastoral districts, and to build 560 new secondary schools to accommodate the increasing number of students graduating from private schools.⁸¹

⁷⁷Human Resources Sector Development Report, 2011/12- 2013/14

⁷⁸Education Sector Medium Term Expenditure Framework 2012/13-2014/15 (January 2012); quoted in UPR 2012, p. 47

⁷⁹UPR 2010-2011, op.cit., p. 12

⁸⁰UPR 2012-2013, op.cit., p. 65-66

⁸¹ Kenya Vision 2030 Popular Version, p.109

Proposed Recommendations

- a. The state should address gender and regional disparities in access to Education
- b. The state should implement the policy on alternative provision of basic education and training for children in urban slums and other informal settlements.
- c. The state should Reduce the student teacher ratio in public schools and ensure that the quality of education.
- d. The state should increase budgetary allocation for free primary education and free day secondary education, special needs education.
- e. The State Should take steps to improve the quality of instruction in and physical infrastructure of schools in rural areas and take urgent steps to increase attendance rates, address the high dropout and repetition rates, in particular for girls in rural areas, and address the illiteracy rate among children of indigenous communities