



KNCHR ALTERNATIVE REPORT TO THE COMMITTEE ON ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

MARCH 2017

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

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Introduction

1. This report has been prepared by Kenya National Commission on Human Rights¹ in consultation with other stakeholders namely: FIDA Kenya; Refugee Consortium of Kenya; Kenya Human Rights Commission; East African Centre for Human Rights; and National Commission on Integration and Cohesion. It is the purpose of this submission to provide information in relation to the Kenyan Government's efforts towards meeting its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination "hereinafter referred to as ICERD".
2. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with 'A status' accreditation. KNCHR was established in 2003 by statute with the mandate of protecting, promoting and monitoring the exercise of human rights in Kenya. In furtherance of its statutory mandate to act as the chief agent in ensuring government's compliance with its obligations under international human rights law, KNCHR hereby submits its report to the committee.
3. This report demonstrates how Kenya has made attempts to meet its obligations under ICERD and where it has failed, it further sets out recommendations where the state could take steps to adequately meet its obligations under the convention.² Finally the report has considered the Committee's concluding observations made with respect to the state's initial report and the status of implementation made so far.³

The Normative Context

4. The Constitution of Kenya, 2010 contains a progressive Bill of Rights providing for robust civil, political, economic, social and other rights which cannot be easily limited by the state without recourse to the conditions set out in Article 24 of the Constitution⁴. For instance, for purposes of the ICERD, it is important to note that the Constitution⁵ in Article 27 affirms the equality of all persons before the law and that no one shall be discriminated upon by the state directly or indirectly on any ground,

¹ Kenya National Commission on Human Rights as established under Article 59(4) of the Constitution.

² The state has an obligation to submit its report to the Committee under the provisions of Article 9 of the Convention

³ The previous recommendations were made by the Committee during the seventy-ninth session

⁴ See Chapter 4, Constitution of Kenya, 2010.

⁵ Constitution of Kenya (2010)

including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁶

5. Article 2(5) of the Constitution states that *the general rules of international law shall form part of the law of Kenya while Article 2 (6) states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*. With this background, it suffices to say that the ICERD is part of laws of Kenya. It is therefore incumbent upon Kenya to meet its obligations under ICERD given that the Convention has the same legal force like Kenya's municipal law.

Comments on Kenya's compliance with Article 1 of the ICERD

6. The Constitution of Kenya, 2010 does not define the term racial discrimination in an elaborate manner as the ICERD does. The closest the Kenyan law, attempts to give a glimpse of what discrimination is, can be found under article 27 of the Constitution. According to the Article-

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination....

⁶ Constitution of Kenya, Article 27(4)

7. At Article 10(2)(b) of the Constitution, national values and principles of governance are enumerated. These values include; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
8. Whereas the Constitution fails to define the term discrimination, it is instructive to note that some statutes that contain anti-discrimination law define the term discrimination. For instance, the National Cohesion and Integration Act defines discrimination at section 5 as follows-
'...less favourable treatment of other persons on ethnic grounds by segregation, harassment and victimization by reason of action taken against the discriminator in relation to violations under the Act; and the application of requirements, conditions, provisions, criterion or practices which while also applied to persons of other ethnic groups or race, are detrimental to persons from specific ethnic groups, unjustified and/or an disproportionate means of achieving a legitimate goal.'
9. Whereas it is commendable that the Act defines the term discrimination, we argue that the definition is narrow compared to what the convention contemplates. The scattered and piecemeal legislation on anti-discrimination and the lack of comprehensive law or definition of the same has made implementation of the ICERD elusive.

Proposed recommendation

10. The state should consider amending and expanding the scope of discrimination in the enabling legislation/s to give effect to Article 27 of the Constitution and to align it with the comprehensive definition provided for in the International Convention on Elimination of Racial Discrimination.
11. The state should consider enacting a comprehensive legislation on anti-discrimination.

Comments on Kenya's Compliance with Article 2 of the ICERD

12. Despite Kenya being a signatory to the Convention, we regrettably note that discrimination is manifest in most spheres in the Kenyan government's operations.

Discrimination within Kenya is evident in matters that include citizenship⁷ and discrimination in access to economic, social and cultural rights.

Comments on Kenya's Compliance with Article 4 of the ICERD

13. Kenya is home to 42 tribes with diverse cultural practices and beliefs. Discrimination based on ethnicity is rampant in Kenya. The state submission has not comprehensively captured the rampant discrimination on the basis of ethnic origin. Social ills like tribalism, nepotism, social discrimination and inequitable distribution of resources are part and parcel of Kenyan life. During political campaigns, politicians incite one ethnic community against the other.

Incitement - Article 4(a)

14. The use of hate speech along ethnic lines and derogatory remarks about other tribes, races and communities has become the hallmark for Kenya's political rallies during the run-up to elections despite the experiences of the 2007 post-election violence where violence targeted individuals and communities on the basis of their ethnicity and their political leanings. The same incitements were also repeated during the election campaigns in the 2012/13 electoral cycle.

15. The laws are severely inadequate as a basis for protecting against hate speech, ethnic intolerance and incitement to hatred for example Section 77(3) (e) of the Penal Code provides that: *'(1) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding three years...*

(3) For the purposes of this section, 'subversive' means... (e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya: Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities.

⁷ KNCHR, 'An Identity Crisis? A study on the issuance of National Identity Cards', 2007 available at www.knchr.org/dmdocuments/Final%20IDsSubmission.pdf

16. The Penal code in section 96 criminalizes incitement and provides for an imprisonment term of a maximum of three years. The Election Code of Conduct also prohibits the use of inflammatory language which can be used to incite people to violence.
17. A more comprehensive provision is in Section 62 of the National Cohesion and Integration Act 2008, in which hate speech is described as follows; *'Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both or a newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings.'*
18. Section 13 of the Act finds liable any person who uses threatening, abusive or insulting words or behaviour, or displays any written material, which is threatening, abusive or insulting and that is intended or likely to stir up ethnic hatred. It further defines "ethnic hatred" as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.
19. The problem with the definition of hate speech in this Act is that it falls short of the definition required to protect one from being a victim of hate speech. First, hate speech is only recognized as such only if it occurs on the basis of *'ethnicity or race'*. There are many other grounds upon which hate speech can be propagated, including religion, nationality, gender, sexual orientation and so on, all of which ought to be included in the definition of hate speech.
20. The law as drafted does not send a strong message that hate speech is unacceptable, harmful, and dangerous and shall not be tolerated. On the other hand the law and in absence of any legal precedents there is lack of clarity on what factors would be considered before one is accused of perpetrating hate speech e.g. the targets of the speech, the position of influence occupied by the perpetrator *vis a vis* the target group. Such clarity would be helpful in ensuring that hate speech is not misused especially by the political elite to silence their opponents.
21. Whereas we acknowledge the government's efforts in establishing the National Integration and Cohesion Commission (NICC), the Commission as envisioned under the

provisions of the National Integration and Cohesion Act has limited powers of enforcement. The commission is only empowered to investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney General.

22. In discharge of its mandate, the commission has recommended the prosecution of politicians from both political divides. Regrettably, despite there being incriminating evidence on hate speech against most politicians, successful prosecution is yet to be seen.⁸ Buoyed by the absence of any prosecution on account of hate speech, most politicians still use inflammatory language in their political rallies.⁹

Proposed recommendations

23. The state to consider increasing the powers of National Commission on integration and reconciliation; the state should also consider increasing budgetary to enable it effectively execute its mandate.

24. The NCIC to continue carrying out continuous public education on hate speech, integration and cohesion.

25. Laws dealing with hate speech in Kenya are scattered and thus proving burdensome. We recommend that Kenya enacts a single Act dealing with hate speech.

26. The NCIC should be freed from political interference and the Constitution provisions on its independence be adhered to. Its effectiveness in discharging its mandate should also be enhanced by providing it with adequate resources.

27. Whereas we acknowledge the effectiveness of ADR as employed by the NCIC in discharging its mandate, we recommend that there be clear guidelines on which kind of matters that should be referred to ADR. This will prevent abuse of ADR by perpetrators of hate speech and their sympathisers¹⁰

⁸ Society for International Development, Breaking away from a legacy of hate: Addressing hate speech in Kenya. Available on <http://dialogues.sidint.net/community/content/breaking-away-legacy-hate-addressing-hate-speech-kenya>

⁹ Society for International Development (note 8 above) 1

¹⁰ Section 51 of NCIC Act

Comments on Kenya's Compliance with Article 5 of the ICERD

28. Kenya is in breach of its obligations under this article through the government's systematic discrimination and marginalization. The marginalized¹¹ communities are unable to enjoy the rights outlined in Article 5 of ICERD by reason of their peculiar status.

Article 5 (a) -Right to equal treatment before tribunals and other organs Administering Justice

29. There has been marked improvement in Kenya in terms of physical access to Courts, the challenge remains that most Kenyans are unable to afford legal services due to the high costs and the fact that the proceedings before courts and tribunals continue to be complex for citizens who would wish to access these services. Despite the passage into law of the Legal Aid Act, the law in itself is insufficient since it has not been fully operationalised.¹²

30. The lack of access to the justice system has locked out many Kenyans who are indigent from the seat of justice. The system is more accessible to those who have financial ability to pay for the services of legal counsels and to pay court charges.

31. The alternative dispute resolution mechanisms through alternative justice systems would complement the formal justice system since it has the flexibility and simplicity that the formal justice system lacks; the challenge faced by this system is that some of the procedures adopted by the Alternative Justice systems are discriminatory since they are steeped in culture and tradition where for example women are not allowed to present cases before it nor have audience before it.¹³

Proposed recommendations

32. The state to operationalise the legal aid scheme by increasing budgetary allocation to the Legal aid board

33. The state should fastrack the establishment of the small claims courts that will deal with minor disputes

¹¹ Article 260 of the Constitution defines a marginalized group as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of

¹² The Legal Aid Act, No. 6 of 2016. Section 29 establishes a legal aid fund

¹³ Office of the High Commissioner for Human rights, Human Rights and traditional justice systems in Africa(2016) 32

34. The state should build the capacity of alternative justice systems on human rights; this will enable the systems to dispense justice from the perspective of human rights.
35. Raise awareness on prohibition of racial discrimination and right to equality and non-discrimination;
36. Reinforcement of the role of the Directorate Public Prosecution in initiation of proceedings for acts of discrimination and hate speech

Article 5(b) - The right to security of Person

37. The state is duty bound to protect the lives and property of all citizens; in the event of breach the state must take action by conducting conclusive investigations and ensuring that those who have been found culpable are arraigned in a court of law.
38. The state in response to terror attacks commenced counter-terror initiatives targeting *Al-shabab* in Somali and their sympathisers Kenya. The Kenya National Commission on Human Rights in a report titled: The error of fighting terror with terror documented over one hundred and twenty cases of egregious human rights violations that include twenty five extrajudicial killings and eighty one enforced disappearances arising from the operation.¹⁴
39. The violations were widespread, systematic and well-coordinated and include but not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances. KNCHR heard multiple narratives of suspects being rounded up and detained for periods ranging from a few hours to many days in extremely overcrowded and inhumane and degrading conditions. The operation mainly targeted persons of Somali descent.¹⁵
40. On 5th April 2014, the government launched a second internal security operation dubbed operation sanitization of Eastleigh, which was carried out under the aegis of the National Police Service. This operation was largely designed to be carried out

¹⁴ Kenya National Commission on Human Rights, The error of fighting terror with terror. Available on <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>

¹⁵ Kenya National Commission on Human Rights(n 14 above) 6

around Eastleigh estate and other areas perceived to be hideouts for illegal immigrants.¹⁶

41. As the operation got underway, there emerged widespread media reports of alleged ethnic profiling of certain ethnic groups, as well as unlawful detention and deportations carried out by the police.¹⁷ In addition, there was criticism from a section of the public who were concerned that the operation had infringed on their fundamental human rights and that to a larger extent, it had been skewed towards specific segments of the society.¹⁸

42. Large number of persons of Somali extraction was deported to Somalia. According to Independent Policing Oversight Authority a total of 332 Persons of Somali ethnicity had been deported to Mogadishu, Somalia as at 24th may 2014.¹⁹ There were also allegations of forceful deportations of Somali refugees and asylum Seekers to Somalia²⁰ in Contravention of the Refugee principle of *non- refoulement* contrary to article 33 of the 1951 Refugee Convention.

43. The sexual minorities in Kenya due to the remarks made by politicians and church leaders have been targeted and attacked on the basis of their perceived sexual orientation for example on **21st June, 2013** a member of the LGBTI Community was slashed with a machete/'panga' several times especially around the neck/throat area. His attacker later threw him out of a moving vehicle and left him for dead. Fortunately he was rescued and taken to hospital.²¹

44. On **22nd June, 2013** a man was sexually assaulted using a hammer and repeatedly hit on the head with it. He also suffered several knife cuts on the head and arms. The incident was reported to the police but no action was taken.²²

45. Lastly on **23rd and 24th June, 2013** a Mombasa based Radio station *Radio Rahma* call-in talk show hosted agitated callers who openly said that they were on a mission to

¹⁶ Refugees International, *Between a rock and a hard Place: Somali Refugees in Kenya*. Available on <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5610dc28e4b00b12a238d62a/1443945512557/Between+a+Rock+and+a+Hard+Place+Somalis+in+Kenya+letterhead+2.pdf>

¹⁷ IPOA, *Operation Sanitization Eastleigh Report "Usalama Watch"*, July 2014

¹⁸ IPOA(n 17 above)

¹⁹ IPOA (n 17 above)

²⁰ Refugees International(n 16 above)

²¹ Human Rights Watch, *Attacks on LGBTI People on Kenya's Coast* (2015) 20. Available on https://www.hrw.org/sites/default/files/report_pdf/kenya0915_4upr.pdf

²² Human Rights Watch (n 21 above) 21

“clean up” Mombasa of sex workers especially MSM/Male Sex Workers (MSWs) and the organizations that provide them with health services.²³

46. In all the instances alluded to in the preceding paragraph the state has not taken action to conduct comprehensive investigations with a view to seeking accountability for the violations suffered by the LGBTI Community in Kenya.²⁴

47. In the period under review Kenya has witnessed an upsurge in cases of insecurity over the last 4 years. The cases of insecurity have been manifested in a variety of ways, which include: terrorist attacks targeting public facilities, civilians and security personnel in Garissa, Wajir, Mandera, Mombasa, Nairobi and Lamu; attacks against security personnel and installations in Baragoi, Nairobi, Mombasa, Lamu, Baringo and Turkana; inter-ethnic, governance and resource based conflicts in Tana- River, Lamu, Baringo, Turkana, Samburu, Mandera, Wajir and Pokot; and finally, famine related attacks against communities in Bungoma and Busia.²⁵

48. The Kenya National Commission on Human Rights Report²⁶ indicates that from the period 2010/2014 a total 1894 of deaths were reported as resulting from gunshots,574 deaths resulting from ethnic clashes, 260 deaths resulting from armed robberies,214 deaths resulting from terror attacks and 91 deaths were attributed to police killings.²⁷

49. The cases above demonstrate the fact that insecurity has grown in intensity and magnitude as new cases are considerably on the increase, even in areas that were initially not considered as “unsafe”. Therefore, insecurity is as synonymous to Nairobi County and other major urban towns in the counties as it is with the rural settings of the counties.²⁸

Proposed recommendations

50. The state should take steps to safeguard the right to life and property of Citizens

51. The State should address the killings attributed to Security agencies

²³ Human Rights watch (n 21 above) 34

²⁴ Human Rights Watch(n 21 above) 19

²⁵ Kenya National Commission on Human Rights, Are we under siege? The state of security in Kenya an occasional report (2010 – 2014) 13

²⁶ Kenya National Commission on Human Rights (n 25 above)

²⁷ Kenya National Commission on Human Rights (n 25 above) 13

²⁸ (n 27 above)

52. The state should ensure that cases that are reported at police stations are recorded and conclusively investigated by security agencies
53. The state should ensure that law enforcement officers adhere to the rule of law in conducting security operations
54. The state should step up training of security agents on human rights to ensure that in the conduct of the security operations they abide by the rule of law and the tenets of human rights

Political Rights- Article 5(c)

55. The Constitution of Kenya in article 81 (b) provides that not more than two-thirds of the members of elective public bodies shall be of the same gender. Before the 2013 general elections the Supreme Court in *The matter of the Principle of Gender representation in the National Assembly and the Senate [2012] eKLR* held that the provisions of Article 81(b) would not apply in the 2013 elections but would be realised progressively in that the National assembly and senate were obliged to enact a legislation to give effect to the provisions of Article 81(b) of the Constitution.
56. Despite the order by the Supreme Court, the National Assembly and Senate failed to enact the legislation as contemplated in Article 81(b) of the Constitution. This resulted in the filing in court of a petition to compel the National assembly and senate to enact the enabling legislation within a period of 60 days.
57. Representation of women in parliament has increased especially after the 2013 general election, with the constitutional requirement that each of the 47 counties should elect a woman representative in addition to those nominated by political parties. A total of 86 women were elected and nominated to parliament.²⁹
58. Political Parties (Amendment) Act 2016 provides that not more than two-thirds of the membership of all party organs, bodies and committees, in aggregate, are of the same gender.
59. There is no data from the State Department of Gender Affairs on the number of women in public and private sectors.

²⁹ Association of Media Women in Kenya, 86 and Counting: Women in the 11th Parliament(2014) available at https://ke.boell.org/sites/default/files/86_and_counting_bookweb_09_03_15.pdf

60. The Constitution in Article 100 further provides that Parliament shall enact legislation to promote representation in parliament of women, persons with disabilities, ethnic minorities and marginalised communities. Despite the fact that parliament was under the obligation to enact the legislation within 5 years as provided for under schedule 5 of the Constitution the same has not been enacted.

Proposed recommendations

61. The state should enact legislation to enable the realization of the two third gender rule in elective positions
62. The state should put in place measures to ensure the realization of the two third gender rule in appointive positions.
63. Implement the decision of the High court in the case of *Marilyn Kamuru Vs AG* Petition 566 of 2015 to ensure that the Cabinet meets the two third gender principle
64. The IEBC should put in place measures to ensure that Party Nomination Lists meets the two third gender rule.
65. The state to ensure that the gender provisions of the political parties Act are implemented especially during the 2017 general election to enhance the participation of women in the political sector.
66. Develop a monitoring mechanism to establish the gender parity in all sectors of the country not just the elective posts (data collection component) and report on its findings.
67. The state to provide information of the implementation of the 2006 presidential decree that sought to increase participation of women in governance and leadership and the effectiveness the national monitoring framework on gender mainstreaming in government planning, budgeting, legislation and policy.
68. The State Department of Gender Affairs to have a comprehensive data of women in both public and private sectors and the positions they occupy.

The right to freedom of Movement- Article 5(d) (i)

69. The Constitution of Kenya in Article 39 replicates the provision of Article 5(d)(i) of the Convention. The right to freedom of movement may be limited in line with the

provision of Article 24 of the Constitution if such limitation would be reasonable and justified in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors. The state in response to previous terrorist attacks in parts of Northern Kenya has declared curfews in contravention of Section 8 (6) of the Public Order Act.

70. Despite the High Court in *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR* declaring that the encampment policy as illegal the state did not heed the court directive and continued to hold the refugees in refugee camps therefore limiting the right of movement of the refugees to the designated refugee camps.

Proposed recommendations

71. The state should respect the High Court decision in *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR* and ensure that refugees have the right of movement within the state

72. The state in declaring curfew should follow the law and the curfew should not be in force for a disproportionate long periods of time

73. The state should improve on the security to its citizens and should only resort to curfew in exceptional circumstances and for a limited time.

The Right to Nationality- Article 5(d) iii

74. Despite the committee urging State party to ensure compliance with article 5 (d) (iii) of the Convention by making the necessary amendments to its legislation and administrative procedures in order to implement the new constitutional provisions on citizenship, the state has failed to make meaningful progress towards ensuring that citizens access identity documents in a timely manner.

75. Communities living near the Kenyan borders and minority communities such as Nubians and the Makonde continue to face challenges in accessing identity documents. The administrative measures that the state has put in place hamper the easy access to the identity documents. The measures in some instances have left the communities stateless due to the lack of identity documents.

76. KNCHR acknowledges the positive step taken by the state to recognize the Makonde community and issue them with identity documents but calls on the state to extend the same recognition to other groups.
77. Some minority groups such as Kenyan Somali are required to go through burdensome discriminatory vetting process which other citizens are not subjected to. The differential treatment is often justified on the basis of public security.
78. Despite the Kenyan High Court³⁰ and the African Committee of Experts on the Rights and Welfare of the Child,³¹ requiring Kenya to end its discriminatory practices with respect to issuance of National Identity cards and birth certificates, the state has not taken any steps to redress the practice hence a continuation of the practice.
79. According to KNCHR, some refugees have been issued with Kenyan IDs through corruption whereas eligible Kenyans are denied registration; The state should therefore address the corruption in the process of issuance of National Identity Card.³²
80. The lack of a National ID in Kenya has an effect of violating the right to vote since one needs a national identity card in order to register as a voter, and to exercise the right to vote. This therefore means that one is unable to ensure effective representation in policy processes.

Proposed recommendations

81. The state should implement the decision by the African Experts on the Rights and Welfare in *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v. The Government of Kenya*
82. The state ought to act on the incidences of corruption with respect to issuance of National Identity cards especially in the border counties

³⁰ In January 2011, a Mombasa human rights group, Muslim for Human Rights (MUHURI) and Khelef Khalifa successfully petitioned the High Court to declare unconstitutional an internal memo of the Ministry of Immigration which required Kenyan Muslims, Arabs and Kenyans of Asia origin to be subject to further vetting procedures as a prerequisite for the issuance of national identity cards. Accessed from http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402477_text, last accessed on November 8, 2014

³¹ *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v. The Government of Kenya*

³² Kenya National Commission on Human Rights, *Out of the Shadows towards ensuring the Rights of Stateless Persons and Persons at risk of Statelessness in Kenya*(2010) 15. Available on <http://www.unhcr.org/4e8338d49.pdf>

83. The state should stop discriminatory practices targeting the communities who live in the border counties who have to undergo lengthy vetting as compared to other communities living in Kenya and implement the mobile civil registration in all counties to facilitate this process of applying for the national identification documents
84. The state ought to ensure that children born of Nubian and Somali parents are promptly registered after birth in line with the provisions of the Constitution and the Convention without necessarily subjecting them to long and rigorous processes of vetting before registration.
85. The state should extend automatic citizenship to all children found within its borders (0-17 years) as opposed to the current practice (0-8 years)

Right to own property alone as well as in association with others- Article 5(d)(v)

86. The Constitution in Kenya in Article 40 affirms the right of individuals and groups to own property either individually or collectively. Due to incitement by local leaders private properties owned by white settlers have been invaded in parts of Laikipia County by pastoralist ostensibly in search of pasture for their animals. Albeit the response by the state, the situation continues to be precarious and has led and continues to lead to loss of life and property.³³
87. The 2007/08 Post-election violence resulted in internal displacement of citizens due to fear of attacks. Some of the internally displaced persons left their property for fear of further attacks and the fact that their security at the point in time was not assured. The security situation has improved over time but some internally displaced persons have not gone back to the places where they owned property for fear of attacks despite the state assuring them of their security. This prompted the state to compensate some of them; some of them have however complained about the insufficiency of the compensation while some have complained that they have not been compensated at all.³⁴

³³ <https://www.standardmedia.co.ke/article/2001230325/spate-of-invasions-in-laikipia-raise-queries-on-herders-motives>

³⁴ Kenya National Commission on Human Rights, A Human Rights Assessment of situation of Internally Displaced Persons in Kenya (2011) 36-44

Proposed recommendations

88. The state should provide security to all citizens which would assure them of their right to own property
89. The state ought to step up its integration programmes especially in areas that were hard hit by post-election violence with a view of integrating all communities and ensuring that communities and internally displaced persons are able to continue to co-exist together.
90. The state ought to consider implementing the recommendations made by Truth Justice and Reconciliation Commission with respect to resettlement of internally displaced Persons and squatters.

Article 5(d) VI-The Right to inherit

91. The Law in Kenya does not discriminate between male and females in terms of inheritance so long as one is able to prove dependency in line with the provisions of the Succession Act. The Law provides that the property will be shared out equally among the beneficiaries unless a contrary indication had been expressed by the deceased in his/her last will and testament.
92. The challenge however continues in practice that married women are seldom allowed to inherit from their deceased fathers and /or mothers; most Kenyan cultures are not in consonance with the provisions of the succession Act and has often resulted in discrimination of women when it comes to inheritance.
93. The law of succession in Section 36(1)(c) provides that a widow is not entitled to inherit from the estate of the deceased husband if she remarries, this provision does not apply to widowers who re marry after their spouses die. This provision in the succession Act is therefore discriminatory against women who would want to remarry after the demise of their spouses.

Proposed recommendations

94. The state should consider that re-introducing provisions on spousal consent in cases of disposition of property.

95. The state should raise public awareness on the rights of women and girls to inheritance

96. Amendment of section 7 of the Matrimonial Property Act for division of matrimonial property to be done 50/50 (half share) not according to contribution as this is prejudicial to women proving their contribution due to the cultural set-up.

Article 5(d) vii-The right to freedom of thought and conscience and religion

97. Though the right to freedom of thought and conscience and religion is amplified in Kenya by the protection afforded in Article 32 this right has in some occasions been limited in Kenya. The Deputy registrar of societies on 29th April 2016 gave a 7 day notice to the Atheists Society that the society would stand dissolved at the expiry of 7 days with effect from the 29th of April 2016. The reasons for suspension and de-registration were hinged on Section 12(1) (b) of the Societies which provides for de-registration on the basis that a society is “...*Prejudicial and incompatible with peace, stability and good order of the Republic of Kenya*. The Society has since filed a petition in court challenging de-registration of the Society.³⁵

98. In some instances school going children who wear religious cloths such as the Hijab have been discriminated and required to conform to the standard school uniform. The Court of Appeal has however clarified In the case of *Mohamed Fugicha versus Methodist Church in Kenya (suing through its registered trustees) and three others* (2016) eKLR, *inter alia* that it is not unlawful and unconstitutional for Muslim children to wear Hijab in school.

Proposed recommendations

99. The state should not discriminate on the basis of religion and should take measures to ensure that groups that seek to be registered are allowed to do so without unnecessary considerations

100. The state should put in place an anti-discrimination legislation that will give effect to the provisions of the Convention and the Constitution of Kenya and the limitation thereof should be desirable in an open and democratic society and that the limitation would be necessary.

³⁵ Atheists in Kenya V. The Registrar of Societies and 2 Others, Petition 308/2016

The right to freedom of opinion and expression- Article 5(d) viii

101.Despite the Constitution and other laws affirming the right to freedom of opinion and expression serious claw backs exist in legislations limiting this right. The state has in several occasions utilised the provisions of such law in some instances to intimidate and harass journalists.

102.The Amendments made vide the Security Amendment Act of 2014 for example criminalised the unauthorized dissemination of information that undermines counter-terrorism operations. The proposed amendments to Kenya Information and Communications Act prescribed that the communications and multimedia appeals tribunal has power to withdraw media accreditation and also provides for punitive fines of up to 20 million for breach of code of conduct.

103.The Courts in Kenya have played a positive role in affirming the right to freedom of opinion and expression in declaring unconstitutional some sections of the law. The High court in the case of *Jackline Okuta and Another Vs AG*³⁶ declared criminal libel unconstitutional while in the case of *George Andare Vs AG and another*³⁷ Petition No 149 of 2015 declared section 29 of the Information and Communications Act on use of electronic devise unconstitutional this section was often used by the state to undermine the independence of journalists and bloggers

Proposed Recommendations

104.Amendments to the Penal Code limiting criminalizing dissemination of information on counter-terrorism initiatives.

105.The state ought to fully operationalise the Access to information Act

The right to freedom of peaceful assembly and association- Article 5(d)

106.Sexual minorities in Kenya continue to suffer discrimination that is perpetuated by the state. The National Gay and Lesbian Human Rights Commission for example was denied registration of their association by the Non-governmental board on the pretext that the association is meant to advance immoral tenets which have been outlawed by the penal code.

³⁶ Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR.

³⁷ Geoffrey Andare v Attorney General & 2 others [2016] eKLR

107. The National Gay and Lesbian Human Rights Commission filed a case in the High court challenging the decision to deny them registration;³⁸ the High court directed that the organisation be registered. The state has since appealed against the decision of the high court. The action by the state against the National Gay and Lesbian Human Rights Commission amounts to state sanctioned discrimination against sexual minorities on the basis of sexual orientation.

108. The Transgender persons in Kenya like sexual minorities have also been discriminated; The Transgender Education and Advocacy (TEA) organisation was denied registration by the NGO board ostensibly on the basis that the organisation's aim was to advance the concerns of the transgender persons which would corrupt the morals of Kenyans. The organisation filed a suit and obtained orders directing the board to register the organisation.³⁹

Proposed recommendations

109. The state through its agents should not discriminate upon sexual and gender minorities in the exercise of their right to association

110. The state through its agencies should not profile and target sexual and gender minorities for arrest on the basis of their orientation and expression.

Recognition and upgrading of informal settlements

111. So far, the Government has taken no steps to formally recognise the existence and rights of the residents of informal settlements, particularly in relation to their rights to be protected from forced eviction and to have access to basic services, including water and sanitation, energy, garbage disposal, education and health services.

112. Despite the progress made in slum upgrading the number of urban poor without housing remains high with the intervention by the state being assessed as inadequate. The states intervention through the Kenya Slum Upgrading Programme (KENSUP) Targeted to improve the livelihoods of about 5.3 million by 2020 as the country approaches the 2020.

³⁸ Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR

³⁹ Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR

113. Progress on slum-upgrading policy and projects remains very slow. To date, there has been no official attempt to establish any national system for slum upgrading whereby communities who wish to commence upgrading can instigate the process within an official framework. The only significant step is that the new Government programme for Integrated Land and Urban Sector incorporates slum upgrading as one of its key components. Residents' key concerns remain to be addressed, including: the immediate provision of tenure security and access to water and sanitation.⁴⁰

Proposed recommendations

114. Provides legal recognition to informal settlements, as proposed by the Nairobi Informal Settlements Coordination Committee in 1997;

115. Takes immediate steps to provide access to basic services in informal settlements – in particular water, sanitation, garbage disposal and energy – as well as access to healthcare and free primary education for children. Nairobi City County Government and the Government should examine the possibility of commencing with a Kibera-wide basic infrastructure project on water and sanitation; and

116. Adopts a comprehensive national policy for improving and upgrading informal settlements, as anticipated in the National Housing Policy for Kenya and the Memorandum of Understanding with UN-HABITAT. This should be accompanied by an institutional framework and budgetary support that allows communities to organise upgrading, with Government support for the process.

Comments on Kenya's Compliance with Article 6 of the ICERD

117. Compliance by Kenya with provisions of Article 6 is found in specific provisions of the Constitution. The governments' constitutional obligations are expressed in article 22 of the constitution. It relates to the enforcements of rights and identifies persons who may approach the court for relief where a right in the Bill of Rights has been infringed or threatened.

118. Article 22 is to be read with article 23 (authority of courts to uphold and enforce the Bill of Rights), article 48 (access to justice), article 49 (the rights of an arrested person)

⁴⁰ Ibid note 16

and also article 50 (fair hearing). In addition, there exist other forums that may be approached by victims of racism and racial discrimination; such as: The Kenya National Commission on Human Rights, Gender and Equality Commission and the Commission on Administrative Justice all of which are established under Article 59 of the Constitution of Kenya;

119.Despite the above positives, Kenya is yet to meet its obligations under the convention. For instance, there have been allegations of violence by members of the Kenya Police Service during security operations. Disarmament operations by the security organs have also been marred with allegations of violence and gross violation of human rights.

120.Despite the Committee making recommendations to ensure that victims of post-election violence access redress and that all the perpetrators of PEV are held accountable The state has made half-hearted efforts in terms of resettlement of internally displaced persons with integrated IDPs complaining of bias in terms of benefitting from the programmes commenced by the state. The general view is that the IDPs who were in camps got some form of compensation while those who were integrated did not get commensurate compensation. The IDPs have also raised concerns that IDPs from particular regions and ethnicities benefited more than IDPs from certain other regions and ethnicities

Comments on Kenya's Compliance with Article 7 of the ICERD

121.The National Commission on Integration and Cohesion (NCIC) has made some efforts such as establishing peace clubs in institutions of learning. NCIC is also consulting with the Ministry of education to infuse cohesion in the curriculum. Notwithstanding the efforts by NCIC, Kenya is yet to take specific measures in the field of teaching, education, culture and information to combat prejudices that lead to racial discrimination and to measures adopted to promote the principles of the Convention.

122.Whereas the state through NCIC and other partners had partnered to form the UWIANO platform succeeded in de-escalating tensions and bringing about cohesions to many communities living in both informal settlements and peri-urban settings, the programme faced numerous challenges which included financial limitations due to low financing levels compared to the actual expenditures which according to NCIC resulted

in the scaling down of the planned activities. The limited financial resources also limited the engagements of communities through supply of Information, Education and communication materials. These efforts however, came to an end in 2012 despite the need for more sustained efforts to bring about peace and cohesions among the diverse ethnic communities living in Kenya.

123. The Commission proposes that the committee makes a recommendation to the state to fast track the slum upgrading programme to reach most of the target population by the timeline of 2020 and also through NCIC upscale cohesion activities within the state party and particularly in the slum setting

124. Art. 7, KNCHR is concerned that the state despite being required by the committee to step up educational efforts to promote national cohesion and reconciliation, including by ensuring that they effectively address ethnic prejudices and stereotypes as well as the history of inter-ethnic violence in the State party, utilizing media that reach all segments of the population. The state has not undertaken comprehensive measures to promote inter-ethnic understanding and tolerance, the measures taken and the strategies adopted do not reach all the segments of the population

125. The state ought to embark on a comprehensive initiative with a wide reach targeting the general public in order to enhance inter-ethnic understanding and tolerance, it's on this score that the Commission requests the committee to step up its efforts on promotion of inter-ethnic tolerance

126. Art. 6 and 7, The Committee during the last review of Kenya had encouraged Kenya to continue to fully support the work of the Truth, Justice and Reconciliation Commission until the completion of its work and further called on the State party to uphold its findings and implement its recommendations. KNCHR while acknowledging that the TJRC Commission completed its task within the timeframe set for it, the state has not shown sufficient commitment to implement all the recommendations made by the TJRC. The reparation fund set up by the state has not been effected and implemented more than a year after it was set up and consequently victims have therefore not benefited.

127. Further, it is also not clear whether there are any monitoring mechanisms in place to ensure compliance with the Convention. It is also in doubt whether the Kenyan government has initiated the training of law enforcement officials to ensure

compliance with the provisions of ICERD and the Code of Conduct for Law Enforcement Officials (1979) in terms of General Recommendation XIII. Finally, the government is yet to put in place strategies for the implementation of the Durban Declaration and Programme of Action at national level.

Making optional declaration (Art 14) to provide for individual complaints

128. Kenya will be taking the right direction in meeting her obligations under ICERD if she declares that she recognizes the competence of the committee to receive and consider communications from individuals or group of individuals within its jurisdiction claiming to be victims of a violation by that state party of any rights in the Convention. Such a move will help individuals who have failed to obtain redress for rights violations in the domestic jurisdiction.

Proposed recommendation

129. Therefore, it is our recommendation that Kenya makes an optional declaration contemplated under article 14 of the Convention.

Durban declaration and programme of action (racism, racial discrimination, xenophobia and related intolerance)

130. Regrettably, Kenya has not taken concrete steps in implementing the Durban declaration. This state of affairs is a contravention of the ICERD.

131. In light of this, it is our recommendation that Kenya takes urgent steps to implement the Durban declaration and include the status or progress of such steps in her next submission to the committee.

Addressing ethnic and regional disparity

132. We acknowledge and commend the Kenyan government in the steps it has taken to implement devolution in an effort address ethnic and regional disparity. Such steps include the introduction of an Equalisation Fund targeted at giving more resources to marginalised areas to catalyse development and reduce inequalities. However, it is of concern that County governments have complained of inadequate resources which now stand at 15% of the national revenue hence the push for referendum by the opposition to increase monetary allocation to County Governments up to 40%.

Further, even with the little funds under the control of the county governments, there are no proper standard checking mechanisms for use of funds by the 47 county governments.

Implementation of Constitutional and statutory⁴¹provisions on ethnic representation in government bodies and offices and extend representation in bodies and commissions.

133. We urge the government to take urgent steps in ensuring that non-discrimination provisions contained in Kenyan law are fully upheld. This move will bring to an end the many cases lodged in courts especially on the two thirds gender rule, cases by People with Disabilities and cases by the minority communities. It is our other recommendation that the government should direct the Registrar of Political Parties to ensure that all political parties uphold non-discrimination provisions contained in Kenyan law.

Step up educational efforts to promote National cohesion and reconciliation.

134. We urge the government to fully support the NCIC in its activities such as establishing peace clubs in institutions of learning. It is also our recommendation that the government through the Ministry of education should infuse cohesion in the curriculum. Such a curriculum will greatly aid in addressing ethnic prejudices and stereotypes and history of inter-ethnic violence.

⁴¹County Government Act, Political Parties Act, Elections Act contain non- discrimination provisions