



REPORT TO THE UNITED NATIONS COMMITTEE ON THE
ELIMINATION OF RACIAL DISCRIMINATION ON THE
IMPLEMENTATION OF THE PROVISIONS OF THE
INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION

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INTRODUCTION

The Kenya National Commission on Human Rights (KNCHR) submits this report to the Committee on the Elimination of Racial Discrimination to inform its review of the State's 8th & 9th Periodic Report under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The Kenya National Commission on Human Rights is established under Article 59 of the Constitution of Kenya, 2010 and operationalized under the Kenya National Commission on Human Rights Act 2011 (revised 2012).¹ It is the successor to the Kenya National Commission on Human Rights established in 2003 under the Kenya National Commission on Human Rights Act 2002.² The Commission is constitutionally mandated as the principal organ of the State in ensuring compliance with obligations under international and regional human rights treaties and conventions. KNCHR is the national monitoring agency under Article 33 (2) of the Convention on the Rights of Persons with Disabilities³ and has additional functions to oversight implementation of the Prevention of Torture.⁴ The KNCHR has since 2004 enjoyed an Affiliate Status with the African Commission on Human and Peoples' Rights.⁵ The Commission also enjoys affiliate status with the African Committee of Experts on the Rights and Welfare of the Child. The Commission is also a member of the Network of African National Human Rights Institutions (NANHRI), the regional umbrella body that brings together National Human Rights Institutions in Africa. The

¹ Act No 14 of 2011 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2014%20of%202011>.

² Act No 9 of 2002 (repealed). The History of the institution however dates further back in 1996 when the then His Excellency President Moi set up a Standing Committee on Human Rights (SCHR) vide a gazette notice of June 1996.

³ Letter from the Hon Attorney General to the Secretariat of the Committee on the Rights of Persons with Disabilities referenced DOJ/COM/8/21/TY (97) dated 9th June 2017 nominating the Kenya National Commission on Human Rights as the Monitoring Agency under the United Nations Convention on the Rights of Persons with Disabilities.

⁴ Act No 12 of 2017 available at <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2012%20of%202017>.

⁵ Status granted during the 36th Ordinary Session of the African Commission on Human and Peoples' Rights held in Dakar Senegal between 23rd November and 7th December 2004. This is in line with the Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa - ACHPR/Res. 370 (lx) 2017, available at <http://www.achpr.org/sessions/60th/resolutions/370/>.

Commission is accredited as an 'A' status National Human Rights Institution on its compliance with the Paris Principles, by the Global Alliance of National Human Rights Institutions (GANHRI).

KNCHR presents this report to the Committee on the Elimination of Racial Discrimination in fulfilment of its constitutional and statutory obligations, and in line with its regional and international obligations as a national human rights institution; in order to assist and apprise the Committee on efforts made towards implementation of the provisions of the ICERD at the domestic level and highlights the key achievements, concerns and challenges in implementing ICERD in Kenya.

RESPONSES TO THE CONCLUDING OBSERVATIONS

1. Statistics

The Committee recommended that the State party request the Kenya National Bureau of Statistics to provide statistical data, disaggregated by sex, on the socioeconomic situation and representation in education, employment, health care, housing and public and political life of ethnic groups, including indigenous peoples, in order to provide it with an empirical basis on which to evaluate the equal enjoyment of rights under the Convention.

According to the 2019 Kenya Population and Housing Census, a total of 17.8 million individuals reported that they were at school/learning institution (41.9% male, 39.4% female and 33.5% intersex); 11.6 million left school/learning institution after completion (27.4 & male, 25.5% female and 24.3% intersex); 6.9 million left school/learning institution before completion (14.7% male, 16.6% female and 19.0% intersex); and 7.1 million had never been to school (14.9% male, 17.6% female and 20.7% intersex)⁶.

In terms of housing conditions, the report indicated that the proportion of households owning the main dwelling unit they occupied was 61.3 per cent while those occupying rented/provided dwelling units were 38.7 per cent. Majority (93.9 per cent) of the owned dwelling units were constructed, 3.3 per cent were inherited and 2.8 per cent were purchased⁷.

With respect to education, 91% of women and 94% of men are literate in Kenya; with 19% of women and 21% of men have more than secondary education while 6% of women and 3% of men have no education.⁸

⁶ 2019 Kenya Population and Housing Census Report Vol IV: Distribution of Population by Socio-Economic Characteristics p. 11 accessible at <https://www.knbs.or.ke/download/2019-kenya-population-and-housing-census-volume-iv-distribution-of-population-by-socio-economic-characteristics/>

⁷ Ibid p. 11

⁸ 2022 Kenya Demographic Health Survey <https://www.knbs.or.ke/wp-content/uploads/2023/07/2022-KDHS-Summary-Report.pdf>

2. Definition of Racial Discrimination

The Committee recommended that the State party amend the definition of ethnic discrimination contained in the National Cohesion and Integration Act to align it with article 1 (1) of the Convention.

The National Cohesion and Integration Act prohibits discrimination on ethnic grounds. As per the Act, ethnic grounds means any of the following grounds- colour, race, religion, nationality or ethnic or national origins and any discrimination on the said grounds is prohibited.

The National Cohesion and Peacebuilding Bill, 2021 seeks to repeal the National Cohesion and Integration Act, 2008 and to provide for a coordinated structure for peace building and cohesion in Kenya⁹. The Bill, however, retains the Act's definition of "ethnic discrimination" which does not align with the definition of racial discrimination under the Convention.¹⁰ The Commission, in its advisory on the Bill, recommended that the definition of "ethnic discrimination" under the Bill should be aligned with article 1 (1) of the Convention.

Proposed recommendation

- (i) The State to amend the National Cohesion and Integration Act so as to align the definition of ethnic discrimination with that of the Convention.

⁹ The National Cohesion and Peacebuilding Bill, 2021 <http://www.parliament.go.ke/sites/default/files/2021-06/19-%20NATIONAL%20COHESION%20AND%20PEACE.pdf>

¹⁰ Article 1 ICERD defines "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

3. National Human Rights Institution

The Committee recommended that the State party ensure that adequate financial resources are allocated to the Kenya National Commission on Human Rights, in full accordance with article 249 (3) of the Kenyan Constitution and with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

Whereas the Commission is the designated State's lead agency in the promotion and protection of human rights as well as in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination, the Commission is constrained in undertaking its mandate in the manner envisaged by the Law.

The exchequer has funded salaries of staff covering 5 offices in Kenya, and rent for the said offices. The Commission is only present in 7 out of the 47 counties. Furthermore, it has not allocated funds for program work thereby forcing the Commission to seek funding from donors who can only fund their particular areas of interest. This inadequate allocation has led to the inadequate infrastructure and equipment such as vehicles and computers. The allocations for the Commission in the last five financial years against budgetary allocations is as indicated below:

Table 1: Financial Trends of KNCHR for 2018/19 to 2022/2023.

Year	Requirement	Allocation	Shortfall
	Million (KShs)	Million (KShs)	Million (KShs)
2018/19	600	398	202
2019/20	729	395	334
2020/21	744	374	370
2021/22	762	399	363
2022/23	767	441	326
Total	3,602	2,007	1,595

The new approved staff establishment as per the re-organization requires the Commission to have 461 staff to operate optimally. The Commission currently has 110 staff in post. According to the Public Service Commission Evaluation Report for the Year 2017/2018 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution¹¹, the Commission was ranked the most under-established Constitutional Commission operating at 24.5% of its authorized staff establishment. Nonetheless, the Report rated the Commission highly on three of the six domains of evaluation including Performance Management (100%); Improvement in Service Delivery (100%); Accountability for Administrative Acts (90.6%). The Commission also led in four of the six domains of evaluation in the Commission and Independent Offices Category including Performance Management, Improvement of Service Delivery, and Accountability for Administrative Acts and Diversity Management.

Moreover, since the term of the immediate former Commissioners expired on 3rd March 2020, having served for the statutory non-renewable period of six years, it has taken close to two years to hire successive Commissioners. Section 11 of the KNCHR Act that provides the procedure of selection and appointment of Commissioners states that whenever there is a vacancy in the Commission, the President shall within fourteen days of the occurrence of the vacancy, convene a selection panel for purposes of selecting suitable candidates for appointment as the chairperson or member of the Commission. As a result of countless efforts made to the Office of the Attorney General, notifying him of the need to recruit a new crop of Commissioners, the Ministry of Public Service and Gender issued a vacancy notice for the positions of Chairperson and Commissioners. The President declared the positions of Chairperson and Members vacant via [Kenya Gazette](#) dated 23rd August 2021. The absence of the commissioners affected the operational and policy matters including recruitment of top management staff. However, as at reporting, the Chairperson and members of the Commission had assumed office.

¹¹ Public Service Commission, 'Evaluation Report for the Year 2017/2018 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution' Prepared and Issued Pursuant to Article 234(2)(h) of the Constitution (December, 2018); Available at: <http://publicservice.go.ke/index.php/publications/reports>

Proposed recommendations

- (i) The State should increase the annual budgetary allocations to the Commission.
- (ii) The State should increase the number of staff members of the Commission.

4. Acts of racial discrimination, racist hate speech and incitement to racial hatred

Recalling its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system and No. 35 (2013) on combating racist hate speech, the Committee:

(a) Recommends that the State party amend its legislation to align it with article 4 of the Convention;

Section 22 of the Computer Misuse and Cybercrimes Act, 2018 prohibits the intentional publication of false, misleading or fictitious data or misinformation that is likely to propagate war or incite persons to violence; constitutes hate speech; advocates hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination such as race, ethnic or social origin, or colour.¹² Any person found guilty of committing this offence is liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.¹³

Clause 41 (1) of the National Cohesion and Peacebuilding Bill, 2021 prohibits the utterance, publication, writing, or posting of words or images intended to incite feelings of contempt, hatred, hostility, violence, or discrimination against any person.¹⁴ A person found guilty of contravening Clause 41 is liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both.¹⁵

¹² Section 22, Computer Misuse and Cybercrimes Act, 2018, available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf>

¹³ Section 23, Computer Misuse and Cybercrimes Act, 2018, available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf>

¹⁴ Clause 41 (1), National Cohesion and Peacebuilding Bill, 2021, available at <http://www.parliament.go.ke/sites/default/files/2021-06/19-%20NATIONAL%20COHESION%20AND%20PEACE.pdf>

¹⁵ Clause 41 (2), National Cohesion and Peacebuilding Bill, 2021, available at <http://www.parliament.go.ke/sites/default/files/2021-06/19-%20NATIONAL%20COHESION%20AND%20PEACE.pdf>

(b) Encourages the State party to continue to prosecute acts of racial discrimination and racist hate speech and to increase the powers of the Director of Public Prosecutions in the initiation of proceedings and the responsibilities of the National Cohesion and Integration Commission, at the same time enhancing its independence;

The National Cohesion and Peacebuilding Bill, 2021 seeks to repeal the 2008 National Cohesion and Integration Act and to create the National Cohesion and Peacebuilding Commission. In terms of composition of the Commission, the Bill seeks to reduce the number of commissioners from the current eight and one chairperson to four commissioners and the chairperson. The Bill mandates the Commission to investigate and make recommendations to the Director of Public Prosecution on complaints of hate speech, ethnic or racial contempt and discrimination on the basis of ethnic, clan or religious origins.¹⁶

(c) Reiterates its request for information on complaints, prosecutions, convictions, administrative procedures initiated, by area (employment, education, media, housing, hate speech, etc.), and sanctions imposed for acts of racial discrimination (see CERD/C/KEN/CO/1-4, paras. 9-10), and requests information on compensatory measures available to victims adopted by the authorities as a result of such convictions or sanctions;

Between 2016 and 2021, the KNCHR received a total of 7 complaints of acts of racial discrimination in the following areas: employment (3 cases), historical land injustice (2 cases), insecurity (1 case) and political participation/inclusion (1 case).¹⁷

In 2015, the Cohesion Commission received 252 complaints in the following categorization hate speech (95), racial/ethnic contempt (5), ethnic discrimination (39), complains outside the Commission's mandate (113). The said complains were processed by either being referred to partner institutions (102), investigations (118), complains closed (22) while those that lacked in

¹⁶ Clause 9, National Cohesion and Peace Building Bill, 2021, available at <http://www.parliament.go.ke/sites/default/files/2021-06/19%20NATIONAL%20COHESION%20AND%20PEACE.pdf/>

¹⁷ Data from the Complaints Management System of the Kenya National Commission on Human Rights

substance were ten (10).¹⁸ In the 2017/2018 financial year, the Cohesion Commission received a total of 136 reported cases in the following categories hate speech (31 under investigation, 5 pending before court); ethnic contempt (32 under investigation, 11 pending before court); incitement to violence (56 under investigation, 7 pending before court); and discrimination (14 pending before court).¹⁹

Following the receipt of complaints on allegations of ethnic discrimination in the nominations of the members of a political party and violation of laws governing inclusivity and non-discrimination in the nominations of members in county assembly, the National Cohesion Commission moved to court in the matter of *Nairobi High Court Petition No. 466 OF 2017 -National Cohesion and Integration Commission Vs Independent Electoral and Boundaries Commission (IEBC)* to challenge the nomination of these members.²⁰

(d) Requests an explanation of the different administrative bodies with the authority to address acts of racial discrimination (by area, including hate speech, housing, education, media and employment).

[The National Gender and Equality Commission](#) handles matters concerning gender and special interest groups. The Commission was established to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution. To this end, the Commission monitors, facilitates and advises on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions.

[The Commission on Administrative Justice](#) is established under the Commission on Administrative Justice Act 2011. The main mandate of the Commission is to investigate any conduct in state

¹⁸ NCIC's Annual Report, 2015 accessible at <https://cohesion.or.ke/index.php/resources/downloads?start=50> p.36

¹⁹ NCIC's Annual Report accessible at https://cohesion.or.ke/images/docs/downloads/NCIC_ANNUAL_REPORT_2017_2018.pdf page 29.

²⁰ National Cohesion and Integration Commission Annual Report, available at https://cohesion.or.ke/images/docs/downloads/NCIC_ANNUAL_REPORT_2017_2018.pdf page 29

affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice.

[The Media Council of Kenya](#) is an independent national institution established by the Media Council Act, No. 46 of 2013 for purposes of setting media standards and ensuring compliance with those standards as set out in Article 34(5) of the Constitution. The Council's functions include the promotion and protection of the freedom and independence of the media, to enhance ethical and professional standards amongst journalists and media enterprises and to advise the government or the relevant regulatory authority on matters relating to professional education and the training of journalists and other media practitioners. The Media Council Act establishes the Media Council of Kenya to set media standards for journalists and the Complaints Commission to which a person aggrieved by a media organization may seek redress. The media complaint commission has adjudicated complaints on various issues including protecting individuals and groups from hate speech.

[The National Employment Authority](#) was established in April, 2016 through the National Employment Authority Act No. 3 of 2016 which effectively provides the legal framework and mandates for its operations. The Authority mainly provides for a comprehensive institutional framework for: employment management; enhancement of employment promotion interventions; and increasing access to employment by the youth, minorities and marginalized groups.

5. Access to Justice

The Committee encouraged the State party to continue implementing its legal aid policies to ensure equal access to justice for victims of racial discrimination, minorities and indigenous peoples, in particular by:

(a) Providing adequate funding and staffing for legal aid services

The Government developed the [National Action Plan on Legal Aid \(2017-2022\)](#) to act as a roadmap for coordinated implementation of legal aid interventions. The Action Plan has eight strategic objectives, one of which is *"to allot fiscal, human and technical resources for legal aid and awareness services in Kenya"*.

In March 2023, the National Legal Aid Service board was constituted with their Chairperson set to serve for a term of six (6) years.²¹ The Board is constituted of eleven (11) members drawn from both state and non-state agencies. Operationalization of the Board enhances access to justice through provision of legal aid.

(b) Reducing the distances between national courts and the areas where some minority groups and indigenous peoples live, including by building the human rights-related capacity of alternative justice systems and continuing to establish and operationalize small claims courts to deal with minor disputes

In order to improve people's ability to access justice, the Judiciary established new courts in different parts of the country. These include two Employment and Labour Relations Courts in Bungoma and Malindi, and 11 Environment and Land Courts in Isiolo, Nanyuki, Nyamira, Kitui, Siaya, Vihiga, Iten, Homa Bay, Kwale, Kapsabet and Kilgoris. During the period under consideration, the following sub-registries were also established and operationalized: two

²¹ Chairperson of NLAS appointed through Gazette Notice No. 3421 accessible at http://www.kenyalaw.org/kenya_gazette/gazette/volume/MjgyMA--/Vol.CXXV-No.65/

Supreme Court sub-registries in Mombasa and Kisumu; five sub-registries for the Court of Appeal in Busia, Kakamega, Meru, Garissa, and Kisii.²²

Article 159 of the Constitution of Kenya recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Pursuant to this, the Judiciary has embarked on several alternative dispute resolution initiatives to enhance access to justice in Kenya. Launched by the Judiciary in 2016 as a strategic flagship initiative on ADR, the Court Annexed Mediation programme offers speedy case resolution under the umbrella of the court. The programme has been implemented in Nairobi, Nakuru, Embu, Kisii, Mombasa, Garissa, Kisumu, Machakos, Nyeri, Eldoret, Nyamira, Tononoka and Malindi Law Courts. During the 2019/2020 financial year, 3,540 matters were referred to mediation by courts where 1,050 of them were settled successfully.²³

Furthermore, a Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems) was appointed by the Chief Justice in March 2016 to “formulate an appropriate judicial policy on Alternative Justice Systems and to consider the methodology and viability of mainstreaming Alternative Justice Systems; and to suggest concrete ways of doing so”.²⁴ The Alternative Justice Systems Baseline Policy and the Alternative Justice Systems Framework Policy were launched in August 2020.²⁵ The Policies’ mission is to ensure affective and efficient access to justice through the respect, protection and transformation of AJS mechanisms in Kenya. The Taskforce identified the following policy initiatives, each with corresponding activities:

²² State of the Judiciary and Administration of Justice Annual Report 2021/2022 pg. 46

<https://www.judiciary.go.ke/wp-content/uploads/2023/07/Sojar-21-22-for-Launch-1.pdf>

²³ The Judiciary of Kenya, “State of the Judiciary and the Administration of Justice Annual Report 2019/2020,” available at <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/>, pg. 74

²⁴ The Kenya Gazette, Gazette Notice. Vol. CXVIII-No.21, 4th March 2016. Available at: http://kenyalaw.org/kenya_gazette/gazette/volume/MTI5MQ--/Vol.CXVIII-No.21

²⁵ The Policies are available at: <https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/>

- (i) The formal recognition of Alternative Justice Systems (AJS) and identification of the kinds of cases AJS can hear.
- (ii) Strengthening the process for selection, election, appointment and removal of AJS practitioners.
- (iii) Development of procedures and customary law jurisprudence.
- (iv) Facilitation of effective intermediary interventions.
- (v) Strengthened and sustainable resource allocation and mobilization

Strategic Objective 5 of the [National Action Plan on Legal Aid \(2017-2022\)](#) is to promote the use of alternative and traditional dispute resolution mechanisms. Pursuant to this, the Action Plan aims to: develop syllabi and curricula for trainers; carry out research on ADR and traditional justice systems; document best practices in ADR; establish or strengthen existing training for ADR practitioners; establish training for traditional justice leaders; undertake research, document and disseminate information on ADR and traditional justice systems; develop data collection tools to monitor and evaluate usage of ADR; establish and strengthen strategic partnerships with reputable research institutions/organizations and academia on ADR, TDR and access to justice; and document best practices and share information and experiences. The [Legal Aid Act, 2016](#) further enhances access to justice as enshrined in the Constitution by setting up agencies that provide free legal aid services to the public.

Notably, the [Alternative Dispute Resolution Bill, 2021](#) and the [Mediation Bill, 2020](#) were introduced at the Senate and National Assembly, respectively. Both Bills provide for the resolution of civil disputes by alternative means other than judicial determination, pursuant to Article 159 of the Constitution of Kenya. As at the time of submission, both Bills had undergone first reading at the respective houses of parliament.²⁶

²⁶ Senate Bills Tracker as at 10th September 2021. Available at: http://www.parliament.go.ke/sites/default/files/2021-09/Bills_Tracker_updated_as_at_10th_September%2C_2021.pdf pg. 6

Kenya's approach to ADR in the context of racial discrimination should align with its international obligations under ICERD, which include ensuring that individuals who are victims of racial discrimination have access to effective remedies through national legal systems which would involve utilizing ADR mechanisms when appropriate to address racial discrimination issues and provide redress for affected individuals. This would fast track grant of justice to those afflicted on the basis of racial and ethnic discrimination.

Small Claims Courts

The Small Claims Court is established under section 4 of the Small Claims Act 2016 (No. 2 of 2016) as a subordinate court pursuant to Article 169 (1) (d) of the Constitution of Kenya, 2010 which creates subordinate courts. It has a monetary jurisdiction of matters whose value does not exceed Ksh 1 million (USD 10,000). The Small Claims Court is presided over by an adjudicator who is an advocate of the High Court of Kenya with at least three years' experience in the legal field.²⁷

The primary objective of small claims courts is *"to guarantee the right of access to justice as envisioned under Article 48 of the Constitution through simplicity of procedure, timely disposal of proceedings, fairness of process and reasonable court fees"*.²⁸ The courts are intended to reduce backlog of cases by having disputes resolved through simple, inexpensive and expeditious procedures, thus enhancing access to justice. The procedures of the Court are informal and simple and are not guided by the strict rules of evidence. The court can allow use of indigenous languages by parties besides the English and Kiswahili which are the formal languages in other courts. The Act allows courts to employ inquisitorial than adversarial techniques including seeking evidence

National Assembly Bills Tracker as at 15th October 2021 available at <http://www.parliament.go.ke/sites/default/files/2021-10/BILLS%20TRACKER%20AS%20AT%2015%20OCT%202021.pdf> page 42

²⁷ S 5 Small Claims Court Act (No. 2 of 2016).

²⁸ The Judiciary of Kenya, *Small Claims Court Milimani: How It Works*, p. 3 available at <https://www.judiciary.go.ke/courts/surbordinate/small-claims-courts/#publications>.

and making other investigations on its on motion; such provision is "*particularly useful for pro se (self-representing) litigants and other litigants not schooled in law*".²⁹

The Act stresses on expeditious disposal of cases. According to the provisions of section 34 of the Act, cases are to be heard and determined on the same day or on a day-to-day basis until final determination. Furthermore, judgment is to be delivered on the same day or within three (3) days from the date of the hearing. The Court may only adjourn the hearing of any matter under exceptional circumstances to be recorded and in any case, a matter must be disposed of within sixty days. So far, the small claims court has so far resolved 9,315 cases which are valued at Kshs. 1.431 billion.³⁰

To further improve and expand the SCC, especially in the densely populated areas in cities, the Judiciary has partnered with the Nairobi Metropolitan Services to establish five SCC in the subcounties of Kasarani, Makadara, Dagoretti, Mathare, and Embakasi.³¹

²⁹ Remarks by the Acting Chief Justice of the Republic of Kenya Hon. Lady Justice Philomena Mbete Mwilu, MGH During the Launch of the Nairobi Small Claims Court, Milimani (26th April 2021) pg. 14, available at: <https://www.judiciary.go.ke/courts/surbordinate/small-claims-courts/#publications>.

³⁰ 2021-2022 SOJAR annual report p. 48

³¹ Ibid

6. Special Measures to Address Inequalities

The Committee recommended that the State party strengthen its efforts to ensure that counties implement the minority recruitment requirements of the County Governments Act, including by considering the possibility of imposing sanctions on non-compliant counties. The Committee also requests that the State party encourage private corporations and businesses in the country to facilitate greater equality in employment across ethnic groups.

Kenya has in place a strong constitutional, policy and legislative framework to ensure ethnic balance in the hiring and promotion across all institutions at both national and subnational levels. The Public Service (Values and Principles) Act, 2015 provides guiding principles for the discharge of services to the public. Some of the principles include public participation, high standards of professional ethics, responsive, prompt, effective, impartial and equitable provision of services.

The Public Service (Values and Principles) (Amendment) Bill, 2022 is currently before parliament.³² The purpose of this Bill is to amend the Public Service (Values and Principles) Act to require all state organs in the national and county governments and state corporations to submit annual reports on details of the human resource in constitutional Commissions, independent offices and County Public Service Boards and County Assembly Service Board. These reports should contain details outlining the total number of employees and highlighting their gender, age, county of birth and county of residence. This will facilitate the public service values and principles that require the public service to reflect Kenya's diverse communities and afford adequate and equal opportunities for appointment of women and men, members of all ethnic groups and persons with disabilities, pursuant to article 232 of the constitution. As at the time of reporting, the Bill was at the Committee hearing stage.³³

³² The Public Service (Values and Principles) (Amendment) Bill, 2022. Available at: <http://www.parliament.go.ke/sites/default/files/202304/Public%20Service%20%28Values%20and%20Principles%29%28Amendment%29%20Bill%2C%202022.pdf>

³³ National Assembly Bill Tracker as at 25th August 2023. Available at: <http://www.parliament.go.ke/sites/default/files/202309/BILLS%20TRACKER%20AS%20AT%20FRI%2025TH%20AUGUST%202023.pdf>

Article 10 of the Constitution provides for the national values and principles of governance key among them being human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Further in Article 232, the public service is governed by certain principles including affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; the members of all ethnic groups; and persons with disabilities.

It is encouraging to note that the Public Service Commission (PSC), in 2018, drew up an ethnic quota system for recruitment to the civil service. This was done to promote inclusion and diversity. Under the system, limits would be set on the number of civil service jobs that can be held by the country's ethnic groups based on their share of the nation's total population. This quota system, presented by the PSC to the National Assembly during submission of the Commission's 2018/2019 budget, required Parliament's formalization and legislation.³⁴

In their 2016 report, the National Cohesion and Integration Commission revealed that appointments made since the counties were established (2013 to date) have contravened the law. Only 15 counties (31.9%) have adhered to section 65 of the County Governments Act by giving more than 30% of the vacancies at entry level to members of ethnic groups that are not dominant in their precincts. In fact 68.1% of the counties have hired more than 70 percent of their staff from one ethnic group. This implies that in spite of the existing law, new recruitments continue to contravene the provisions of the law.³⁵

The Constitution creates the Equalization Fund whose purpose is to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of

³⁴ Kenya's public service commission proposes an ethnic quota system. Available at:

<https://www.globalgovernmentforum.com/kenyas-public-service-commission-proposes-ethnic-quota-system/>

³⁵ NCIC's Ethnic and Diversity Audit of the County Public Service. Available at:

<https://cohesion.or.ke/index.php/resources/downloads?start=20>. Pg. xv.

the nation, so far as possible.³⁶ The Fund, into which 0.5% of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received is set aside, shall go to provide basic services including water, roads, health facilities and electricity to marginalized areas.

In addition, the National Assembly approved the Public Finance Management (Equalization Fund Administration) Regulations, 2021 which will provide guidance on the administration and management of the Fund.³⁷ In a case challenging the constitutionality of the guidelines that would administer the Fund, the High Court made a declaration that the Fund, being for the benefit of marginalized counties can only be disbursed by the national government through the respective and affected county governments, and in accordance with the recommendations made by the Commission on Revenue Allocation as approved by Parliament.³⁸

The Marginalization Policy developed by the Commission for Revenue Allocation in line with Article 216 (4) of the Constitution identified fourteen (14) counties to benefit from the Equalization Fund namely Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita Taveta, Isiolo and Lamu.³⁹ A 2018 audit done by the NGEC on the status of water, road and health sectors in 8 of the marginalized counties found that all the 8 counties have made remarkable progress in the empowerment of the marginalized counties since the

³⁶ Constitution of Kenya 2010, Article 204. Available at: http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#KE/CON/Const2010/chap_12/hc_chap_12/hc_p art_XXXII/sec_204

³⁷ National Assembly Committee on Delegated Legislation Report on the Consideration of the Public Finance Management (Equalization Fund Administration) Regulations 2021. Available at: http://www.parliament.go.ke/sites/default/files/2021-07/Report_of_the_CD_L_ON_PFM_Equalization_Fund_Administration_Regulations%2C_2021_%281%29.pdf

³⁸ Council of County Governors v Attorney General & 2 others; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR. Available at <https://kenyalaw.org/caselaw/cases/view/184290/>

³⁹ CRA First Policy for Identifying Marginalized Areas and Sharing of the Equalization Fund. Available at: <https://cra.go.ke/downloads/>

promulgation on the new Constitution in 2010. However, the 8 counties had notable weaknesses in data management.⁴⁰

The County Governments Act, 2012 (No. 17 of 2012) establishes the County Public Service Board, to be present in each of the Counties. The county public service board must ensure diversity in terms of employment opportunities at the respective county and prohibits any form of discrimination on any grounds including gender, ethnicity, religion, health, marital status or disability.⁴¹ Section 65 (1) (e) of the County Governments Act provides that at least 30% of the vacant posts at entry-level should be filled by candidates not from the dominant ethnic community. Despite the legal provisions, most counties do not adhere to this. A study by the NCIC in 2016 revealed that less than half of the countries (only 15 out of 47) recruited more than 30% of the county vacancies from non-dominant ethnic groups since the counties were established in 2013.

In June 2019, the Government of Kenya developed a National Action Plan on Business and Human Rights, later adopted as [Sessional Paper No. 3 of 2021](#). This is a comprehensive strategy for protecting against human rights abuses by businesses, whether public or private. The National Action Plan (NAP) has domesticated the UN Guiding Principles on Business and Human Rights and has focused on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy. It outlines concrete commitments by the Government for addressing adverse business-related human rights impacts under these themes. It does not create new obligations but restates those already recognised under the Constitution. It is oriented towards addressing actual and potential business and human rights challenges, by both the Government and businesses. The NAP expressly states that businesses should not condone discrimination in their operations, including

⁴⁰ Equalization Fund Report 2018. Available at:

<https://www.ngeckkenya.org/Downloads/Equalization%20Fund%20Report%20Version%204.pdf/>

⁴¹ County Governments Act. Available at:

http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%2017%20of%202012#part_VII

in employment. Moreover, in a bid to address inequalities, Article 54(2) of the Constitution of Kenya expressly states that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

Kenya should enhance the conduction of awareness and sensitization campaigns to promote understanding and tolerance among different racial and ethnic groups. This would enhance the understanding of the different indigenous and minority rights and their conducts thus reduce discrimination and promote inclusivity.

Proposed recommendations

- (i) Public institutions should adhere to the diversity Charter developed by the Public Service Commission to ensure that their employees reflect the face of Kenya.
- (ii) Counties that achieve the 30% allocation to employees from minority groups should be recognized and awarded and those that fail to do so are sanctioned.
- (iii) The Equalization Fund should be disbursed in time and prudently spent by the marginalized counties.
- (iv) Private corporations and businesses should embrace diversity in their workforce.
- (v) Public and private bodies should competitively hire persons with disabilities.
- (vi) The Government should fully implement the National Action Plan on Business and Human Rights.

7. Situation of Indigenous Peoples

In line with its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee urgently called upon the State party to:

(a) Prevent, investigate, prosecute and sanction acts threatening the physical security and property of the Sengwer, the Endorois, the Ogiek and other indigenous peoples.

The KNCHR Report of the High-Level Independent Fact-Finding Mission to Embobut Forest in Elgeyo Marakwet County established that human rights violations, including violation of the right to life, right to liberty and security of person and right to property, were committed by the Kenya Forest Service against the Sengwer from December 2017. The Government committed to ensure that those found responsible for the violations would be held accountable. However, the KNCHR reported that very little had been done to ensure accountability.⁴²

(b) Ensure legal acknowledgement of the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources.

The Commission has continued to urge the Government to implement the decision made by the 2010 African Commission on Human and People's Rights, which found the Government of Kenya to have violated at least six articles of the African Charter on Human and Peoples Rights in relation to the Endorois Community. In its decision, the African Commission recommended that the Government recognize the rights of the community to own land, ensure compensation and benefit from the economic activities around Lake Bogoria.⁴³ The KNCHR is using strategies such

⁴² KNCHR, "The Report of the High-Level Independent Fact-Finding Mission to Embobut Forest in Elgeyo Marakwet County," available at <https://www.knchr.org/portals/0/grouprightsreports/KNCHR-Fact-Finding-Mission-to-Embobut-Forest.pdf>, pg. 36

⁴³ Latest on Endorois Case. Available at: <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1022/Latest-on-Endorois-Case/>

as community sensitization, convening different stakeholders to formulate an implementation plan, rendering advisories to the Government on implementation of the decision and proactively participating in the appointed taskforce whose term has since elapsed. Regrettably, there is lack of political goodwill and commitment to implement the decision on the Endorois case.

In relation to the Ogiek community, the KNCHR is enjoined as Amicus Curiae in Petition 1 of 2017 at the High Court in Bungoma (Peter Kitelo & Others v AG & Others) filed by members of the Ogiek of Chepkitale. The Petition seeks a determination of the indigenous land claim to the land in Chepkitale area of Mt. Elgon Forest by the Ogiek Community.⁴⁴ The matter is still ongoing.

The Commission takes note of the June 2022 judgement by the African Court on Human and Peoples' Rights⁴⁵ on reparations for the Ogiek community in Kenya, where it ordered, among others, that the government compensates the community the sum of Kshs. 157 million for material and moral prejudice suffered, to be paid into a Community Development Fund established within 12 months from the date of judgment. The State was also required to report back to the Court within 12 months on the status of implementation of the judgment but this is yet to be done.

(c) Carry out effective consultations between relevant actors and communities likely to be affected by projects to develop, conserve or exploit indigenous ancestral land or its natural resources and obtain the free, prior and informed consent of indigenous communities before implementing such projects.

In a ground breaking decision, the Meru Environment and Land Court left Kenya's biggest wind project in limbo. The High Court in Meru nullified the title deed for the land on which the Lake Turkana Wind Power project sits after establishing that due process was not followed in setting apart the 150,000 acres of community land. The company acquired a 33-year lease for the 150,000 acres to develop a 300Mw wind power farm near Loiyangalani. However, feeling aggrieved, some members of the community petitioned the High Court in 2018 (Mohamud Iltarakwa Kochale & 5 others v Lake Turkana Wind Power Ltd & 9 others [2018] eKLR) saying the project had led to the

⁴⁴ Constitutional Petition 1 of 2017. Available at: <https://kenyalaw.org/caselaw/cases/view/160686/>

⁴⁵ See, <https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babafd8d467689318212.pdf>

loss of rangeland, water sources and access. They argued that the land is also central to their survival and livelihood as it is their cultural, ancestral and grazing land held under an intergenerational trust for future generations.⁴⁶

Community land ownership

The Community Land Act, 2016 provides for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land.

With regard to awareness creation, twenty-four (24) counties with community land have been sensitized on the Community Land Act, 2016, 113 Registrars re-designated to Community Land Registrars and 34 adjudication officers gazetted. So far, ten (10) community land title deeds have been processed: four (4) in West Pokot County, three (3) in Laikipia County, one (1) in Samburu County and two (2) in Kajiado County. Furthermore, the Ministry of Lands successfully presided over the election of Community Land Management Committee members in twenty-three (23) communities.⁴⁷

Progressive steps have been taken to advance the rights of indigenous persons to own, develop, control and use their lands, resources and communal territories, through the enactment of the Community Land Act, 2016, the Mining Act, 2016 and the establishment of Task Forces⁴⁸.

The Forest Conservation and Management Act, 2016 has public participation and community involvement in the management of forests as one of its guiding principles thus ensuring that forest dwellers, who are often indigenous people, are involved in matters concerning the forests.

⁴⁶ Environment & Land Case 163 of 2014 (Formerly Nairobi ELC 1330 of 2014). Available at: <https://kenyalaw.org/caselaw/cases/view/152078>

⁴⁷ Ministry of Lands & Physical Planning Report to the National Assembly on Achievements and Progress in the 2020/2021 Financial Year. Available at: <https://lands.go.ke/wp-content/uploads/2021/09/CS-Report-FY-2020-2021.pdf>

⁴⁸ Taskforce on Implementation of the Decision of the African Court on Human and Peoples Rights Issued against the Government of Kenya in Respect of the Rights of the Ogiek Community of the Mau (Gazette Notice No 10944 of 23rd October 2017) available at http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXIX-No_.167_.pdf

Further, the registration of community forest associations is another avenue where the interests of indigenous people may be channelled through.⁴⁹

To ensure that indigenous communities are involved in the conservation and utilization of resources, the REDD+ project is a framework created by the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) to guide activities in the forest sector. Besides reducing emissions from deforestation and forest degradation, it also supports the sustainable management of forests. Through this project, communities living in and around forests in Kenya have been roped in to conserve. This is done through the formation of community forest associations and embracing alternative dispute resolution mechanisms.⁵⁰

(d) Carry out effective consultations between relevant actors and communities likely to be affected by projects to develop, conserve or exploit indigenous ancestral land or its natural resources and obtain the free, prior and informed consent of indigenous communities before implementing such projects.

Right to education

The Children Act, 2022 enshrines the right of every child to be educated without discrimination. Furthermore, Article 56 of the 2010 Constitution of Kenya imposes a positive obligation on the State to adopt affirmative action programmes to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields. For example, bright but needy students from marginalized communities have been recipients of scholarships from both the Government, development partners and private players.⁵¹ The National Government-Constituency Development Fund (NG-CDF) has been instrumental in keeping the hopes and dreams of children from poor, vulnerable and marginalized groups alive through the disbursement of bursaries to secondary schools, colleges and universities. Constituencies in

⁴⁹ Section 48(1) of the Forest Conservation and Management Act, 2016

⁵⁰ United Nations Climate Change <https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd>

⁵¹ Ministry of Education, Government Scholarships <https://www.education.go.ke/index.php/downloads/category/14-government-scholarships/>

marginalized counties such as Turkana, Samburu, West Pokot, Baringo, Marsabit amongst others receive disbursements running into millions, where bursaries have been paid to support students from poor families.⁵²

In five years (from 2017/2018 FY- 2021/2022), about 6 million students had benefited from the NG-CDF bursary programme totalling to over Kshs. 57 billion. The fund was also used to construct a number of learning facilities in both primary and secondary schools.⁵³

The Commission has also been on the forefront in urging the government to make education accessible, affordable and available for all. In a 2016 report, the Commission recommended that there is need for affirmative action in provision of education in the hard to reach and marginalized areas to ensure that there is equal access in education to all children especially those in Arid and Semi-Arid Lands (ASALs) and informal settlements in urban areas.⁵⁴ In a 2020 memorandum to the National COVID-19 Education Response Committee, the Commission averred that despite the ravaging pandemic and its attendant effects, non-discrimination is a core element of accessibility meaning that education must be accessible to all, especially the most vulnerable groups.⁵⁵ This is also in line with the Sustainable Development Goal 4.7 on ensuring access to quality education through acquiring the knowledge and skills required to promote sustainable development through education, human rights, gender equality as well as appreciation of cultural diversity.

During her visit to Kenya in 2018, the United Nations Independent expert on the enjoyment of human rights by persons with albinism noted that in certain towns, such as Migori, there were no special schools that could properly accommodate persons with albinism. Rather, persons with

⁵² National Government-Constituencies Development Fund, Laisamis Constituency. Available at: <https://www.laisamis.ngcdf.go.ke/>

⁵³ Key achievements 2017/2018-2020/2021 financial year National Government Constituency Development Fund report accessible <https://ngcdf.go.ke/key-achievements-2017-2018-to-2021-2022/>

⁵⁴ Leaving No One Behind; Covering the Base. Available at: https://www.knchr.org/Portals/0/EcosocReports/Leaving%20no%20one%20behind_Making%20Universal%20Primary%20Education%20a%20Reality%20for%20Children%20in%20Kenya.pdf?ver=2019-04-23-130635-897/

⁵⁵ KNCHR Memo to the National COVID-19 Education Response Committee. Available at: <https://www.knchr.org/Portals/0/publications2020/KNCHR%20MEMO%20TO%20THE%20NATIONAL%20COVID%2019%20EDUCATION%20RESPONSE%20COMMITTEE-22%2005%202020.pdf?ver=2020-05-24-131259-273/>

albinism attended mainstream schools but these were not equipped for inclusive education. The teachers trained to attend to special needs are sparse and assistive devices are not provided. Amongst others, she recommended that the Government ensures full implementation of the inclusive education policy, not least by allocating the necessary resources and also ensures the provision of reasonable accommodation to students with disabilities including those with albinism, by providing low-vision aids, adaptive devices and large-print materials in all schools.⁵⁶ In its report, the Commission made a raft of recommendations to the different State agencies that will enhance the promotion and protection of the rights of persons with albinism in the country.⁵⁷

Further, the Commission notes the government's commitment to attaining a 100% transition from primary to secondary school, and efforts to transition and place grade 7 learners to Junior Secondary Schools (JSS) under the new Competency Based Curriculum (CBC) in January 2023. The Teachers Service Commission also recruited 30,550 teachers to manage the JSS transition. However, the Commission remains concerned that as per media reports; about 160,000 learners are out of school, of which 50,143 are yet to join JSS and 111,046 are yet to join form one,⁵⁸ despite the Ministry of Education's efforts towards 100% transition. The Commission calls on the Ministry of Education to follow-up and ensure that all the 160,000 learners report to their respective schools.

The Commission decries the deplorable state of university education in the country, with public universities grappling with a 56 billion debt in unremitted staff pensions and statutory deductions. In the current financial year, for instance, the funding requirement for public universities is

⁵⁶ Report of the Independent expert on the enjoyment of human rights by persons with albinism, 2018. Available at: <https://digitallibrary.un.org/record/1664341?ln=en/>

⁵⁷ KNCHR Report Mapping Laws, Policies and Programmes on Albinism and Existing Gaps and Mapping Organizations of Persons with Albinism in Kenya. Available at: <https://www.knchr.org/Portals/0/Albinism%20Mapping.pdf>

⁵⁸ Nation Media reports as at 3rd March 2023. Available at: <https://nation.africa/kenya/news/education/160-000-yet-to-report-to-form-1-grade-7-4143894>

Kshs71,945,049,600 against an approved allocation of Kshs44,023,955,000 and as such, universities cannot offer quality teaching, training and research as per their mandates.⁵⁹

The Commission notes interrupted access to education in the North Rift, Wajir, Mandera and Lamu due to insecurity. The Commission commends the Government through the Ministry of Interior for putting in place measures to restore normalcy in the insecurity-prone areas; reconstructing education facilities especially for early childhood development education; posting teachers and stationing security officers.

To enhance access to quality education in the country, The Presidential Working Party on Education Reform recommended, inter alia, that there be a one year mandatory retooling program for all graduates of pre-service training to be CBC compliant; and a one-year mandatory internship program upon completion of pre-service training before being registered into the teaching profession.⁶⁰

Access to government opportunities

The Access to Government Procurement Opportunities (AGPO) is an affirmative action program to ensure that the enterprises owned by women, youth and persons with disabilities, including those from marginalized communities, are able to have access to procurement opportunities from the Government. This is made possible through the implementation of the legal requirement that 30% of Government procurement opportunities be set aside specifically for enterprises owned by these groups. As a result, the program is aimed at empowering them by giving them more

⁵⁹ Speech by the CS for Education during Universities Funding Conference. Available at:

<https://www.education.go.ke/sites/default/files/2023-02/CS%20Hon%20Ezekiel%20Machogu%20Speech%20during%20UFC%20Conference%202023%20held%20on%20Feb%2023-2023.pdf> p4

⁶⁰ Report of the Presidential Working Part on Education Reform. Available at:

<https://www.education.go.ke/sites/default/files/202308/B5%20REPORT%20OF%20THE%20PRESIDENTIAL%20WORKING%20PARTY%20ON%20EDUCATION%20REFORM%207th%20JULY%202023%20.pdf>

opportunities to do business.⁶¹ However, a study conducted in 2018 found that most contracts are Nairobi-centric with the county having the highest number of registered firms under AGPO.⁶²

During the 2019/2020 financial year, it was established that 88 (54%) institutions awarded tenders to Women, Youth and PWDs groups; Seventy-six (46%) institutions did not award tenders to the special groups; 4% of the institutions complied with the AGPO policy of awarding a minimum of 30% of the approved procurement budget to women, youth and PWDs. In terms of disaggregation, the Youth were the highest beneficiaries at 55%, followed by women (40%) and PWDs (5%).⁶³

In the 2018/2019 financial year, 244 entities (both at the national government and county governments) had awarded a total of 26,017 contracts to the special interest groups disaggregated as 13,175 to women; 10,892 to the youth; and 1,826 to persons with disabilities.⁶⁴ During the 2017/2018 financial year, 289 entities (270 from the national government and 19 from the county governments) had awarded 20,017 contracts as follows 15,350 to women, 12,710 to the youth and 1,835 to PWDs.⁶⁵ In the 2016/2017 financial year, 222 entities awarded 20,766 contracts to the special interest groups with women receiving 10,230 contracts, youth getting 9,189 contracts and PWDs received 1,347 contracts.⁶⁶ An analysis of the reports indicates that persons with disabilities receive the least number of contracts as compared to the women and the youth.

⁶¹ Access to Government Procurement Opportunities (AGPO). Available at: <https://agpo.go.ke/pages/about-agpo/>

⁶² Summary of findings. Available at: <https://hivos.org/assets/east-africa/2018/02/AGPO-summary-of-findings-Web-version.pdf/>

⁶³ Status of the Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution, 2021 available at <https://www.publicservice.go.ke/index.php/publications/reports> p. 34

⁶⁴ 2018/2019 FY Public Procurement Regulatory Authority Annual Report available at <https://ppra.go.ke/annual-reports/> p. 61

⁶⁵ 2017/2018 FY Public Procurement Regulatory Authority Annual Report available at <https://ppra.go.ke/annual-reports/> p. 45

⁶⁶ 2016/2017 FY Public Procurement Regulatory Authority Annual Report available at <https://ppra.go.ke/annual-reports/> p. 61

Proposed recommendations

- (i) The State should implement court decisions made in favour of indigenous peoples such as the Ogiek and the Sengwer.
- (ii) Forceful evictions of indigenous peoples from forests and other places of settlement should be stopped.
- (iii) The State should ensure effective consultations and participation of communities likely to be affected by development programs.
- (iv) The State should expedite the process of adopting the National Action Plan on Persons with Albinism to protect and promote the rights of persons with albinism, including children.
- (v) The State should ensure that access to procurement opportunities under AGPO should strictly benefit the youth, women and other marginalized groups.

8. Historical Land Injustices

Given the fact that the discriminatory pattern of land distribution is a core grievance fuelling ethnic disputes, the Committee urges the State party to take the requisite measures towards redistribution of land. The Committee reiterates its recommendation that the State party take measures without delay to operationalize the mechanisms for addressing land problems fairly, taking into account the historical contexts of landownership and acquisition (see CERD/C/KEN/CO/1-4, para. 18). The Committee invites the State party to provide data about patterns of land ownership. The Committee also wishes to have more information about the constitutional requirements to set a maximum limit on the amount of land that can be owned or leased by an individual or group. The Committee urges the State party to take every opportunity, through urban planning programmes, to create communities in which residents live, work, go to school and exercise political participation in multi-ethnic settings.

Article 67(2) (e) of the Constitution of Kenya mandates the National Land Commission to initiate investigation on its own initiative or on a complaint into historical land injustices and recommend appropriate redress. To give effect to this Constitutional requirement, section 15 of the National Land Commission Act as amended by Section 38 of the Land Laws Amendment Act 2016, provides the legal framework for redressing historical land injustices.

Section 15(2) of the National Land Commission Act defines a historical land injustice as a grievance which was occasioned by a violation of right in land on the basis of law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th June 1895 and 27th August 2010; has not been sufficiently resolved and subsists up to the afore specified period and meets the criteria specified under Section 15(3). Section 15(3) specified a broad range of criteria, including that it is verifiable that the act complained of resulted in displacement of the claimant; the claim has not or is not capable of being addressed through the ordinary court system (including because the claim contradicts a law that was in force at the time when the injustice began) and that the claim is brought within 5 years of the commencement of the National Land Commission Act. The Historical Land Injustices

Rules, 2016 apply to historical land injustices that occurred between 15th June 1895 and 27th August 2010.

As at July 2021, the Commission had received 740 complaints from members of the public. The complaints related to historical land injustices, colonial displacement, evictions due to development projects among others.⁶⁷

In [Gathoni Park Farm Limited v National Land Commission and 7 Others](#), the Environment and Land Court at Thika found that Section 15 of the National Land Commission does not provide for arbitrary deprivation of the right to property and is therefore not unconstitutional.

The Ministry of Lands and Physical Planning processed a total of 500,000 title deeds out of which 129,073 were from adjudication sections; 5,446 titles for informal settlements; 286,686 from county registries; 35,360 from Nairobi Registry; 3518 from the school titling programme and 21,444 leases in the 2019/ 2020 Financial Year. The titling programme aims to resolve long-standing land-ownership disputes and uncertainties that have locked out land-owners and businesses from accessing credit facilities from financial institutions.⁶⁸

In terms of the minimum land acreage, there is no regulating the same. However, there was a proposed law, the Maximum and Minimum Land Holding Acreages Bill, 2015 that sought to provide for the minimum and maximum land acreage that a person could own based on ecological zones, reducing inequality and promoting equitable distribution of land as well as regulating subdivision of land. The proposed law is yet to be introduced to Parliament for debate.⁶⁹

⁶⁷ Standard Newspaper Article on Complaints received. Available at: <https://www.standardmedia.co.ke/adbblock?u=https://www.standardmedia.co.ke/national/article/2001418891/nlc-receives-740-historical-land-injustice-claims-ahead-of-deadline>

⁶⁸ Available at: <https://lands.go.ke/case-studies/national-land-titling/>

⁶⁹ Minimum and Maximum Land Holding Acreages Bill, 2015. Available at: <https://www.kpda.or.ke/documents/Policies/Minimum%20and%20Maximum%20Land%20Holding%20Acreage%20Bill%202015.pdf>

9. Informal Settlements

Given that the informal settlements are still a source of continuing resentment and potential ethnic tension, the Committee would like to be informed about the measures the State party has devised to address the magnitude of the problem, calls upon the State party to expedite the Kenya Slum Upgrading Programme and encourages it to promote a mix of ethnic groups in housing.

The right to housing

According to Article 43(1) (b) of the Constitution, every person has the right to accessible and adequate housing, and to reasonable standards of sanitation. Under the 4th Schedule of the Constitution of Kenya, county planning and development, including housing, is a county government function. Affordable housing is part of the big four agenda declared by the president on 12th December 2017.⁷⁰ The following are the aspirations under affordable housing: deliver 500,000 affordable homes across the 47 counties; reduce the cost of home ownership by 50%; create 300,000 new jobs in the construction sector; reduce the average cost of construction by 30%; increase the construction sector contribution to GDP by 100% and reduce the low income housing gap by 60%.⁷¹ While the big four agenda promises great benefits for the economy, inefficient implementation of the affordable housing pillar remains a challenge.⁷²

The Kenya Slum Upgrading Programme

Kenya faces a shortage of affordable housing which directly and indirectly contributes to development of slums and poorly serviced informal settlements near the urban areas.⁷³ Residents

⁷⁰ The Big 4 'Empowering the nation' <<https://big4.delivery.go.ke/>>. Accessed on 16 November 2021. Under the Big Four agenda, the government targets to support value addition and raise the manufacturing sector's share of GDP to 15 percent by 2022; focus on initiatives that guarantee food security and nutrition to all Kenyans by 2022; provide Universal Health Coverage and guarantee quality and affordable health care to all Kenyans; and provide at least five hundred thousand (500,000) affordable new houses to Kenyans by 2022. See also:

<http://www.parliament.go.ke/sites/default/files/2018-09/Budget%20Watch%202018.pdf>

⁷¹ The Big 4 'Empowering the nation' <<https://big4.delivery.go.ke/>> Accessed on 16 November 2021

⁷² <http://www.parliament.go.ke/sites/default/files/2018-09/Budget%20Watch%202018.pdf>

⁷³ <http://www.parliament.go.ke/sites/default/files/2018-09/Budget%20Watch%202018.pdf> p 27

of slums and informal settlements face many challenges including unemployment, poverty, insufficient water and sanitation infrastructure, poor housing, and high rates of crime and insecurity.⁷⁴

Since 2016, a number of policies that recognize upgrading of informal settlements have been developed. These include National Urban Development Policy (2018), National Land Use Policy (2017), National Slum Upgrading and Prevention Policy (2016) and the National Housing Policy (2004, 2018). All of these provide a framework for upgrading informal settlements and preventing the emergence of new ones.⁷⁵

The Government of Kenya, in collaboration with UN-HABITAT and other stakeholders, initiated the Kenya Slum Upgrading Programme (KENSUP) in 2004. The objective is to improve lives and livelihoods of people working and living in slums through various initiatives and interventions. KENSUP addresses national aspirations as envisaged in Vision 2030 and in the Bill of Rights of the Constitution. It also contributes to fulfilment of the Sustainable Development Goals, in particular goal 11 ('make cities and human settlements safe, resilient and sustainable') and target 11.1 ('by 2030, ensure access for all, to adequate, safe and affordable housing and basic services and upgrade slums').

Following the Court's decision in *David Ngige Tharau & 128 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 others* [2016] eKLR where the court ordered that only deserving and genuine members reap the benefits of the slum upgrading project, the Commission was appointed by the High Court to oversee the allocation of the said houses to ensure only genuine cases benefit and to ensure that the allocation exercise is free from any form of corruption and other interference.

⁷⁴ <https://journals.sagepub.com/doi/pdf/10.1177/0956247816689218>

⁷⁵ <https://documents1.worldbank.org/curated/en/687061598631750150/pdf/Kenya-Informal-Settlements-Improvement-Project.pdf> pg. 43

The KNCHR took leadership and guided the process from review and analysis of all relevant documents, complaints management and dispute resolution, development of a web based data management system, public communication, overseeing pre-ballot, balloting, and allocation of the housing units. The balloting and allocation exercise took place on 22nd March 2016 at Nyayo Stadium. The handing over took place on 8th July 2016 outside the newly built housing estate in Kibera. KNCHR oversaw the allocation of 690 housing units. Of the beneficiaries 66% were men while 34% were women. Furthermore, of these beneficiaries 2% were persons with disabilities and 1% older members of society. The subject of the petition was 624 units however at the time of allocation more housing units had been completed all beneficiaries were issued with letters of offer by the Ministry and signed acceptance of the offer. They were then issued with house keys.⁷⁶

The Kenya Informal Settlements Improvement Project

A separate slum upgrading programme is the Kenya Informal Settlements Improvement Project (KISIP) primarily financed by the World Bank.⁷⁷ The overall objective of the project, which closed on 30th November 2019, was to improve living conditions in informal settlements in selected urban centers in selected counties in Kenya. Challenges faced during the implementation of the project include difficulties in tenure regularization including due to issues such as unclear land ownership. Notably, the World Bank report on the project indicates that:

Upgrading infrastructure also had some unintended outcomes...Increased demand for housing in upgraded settlements triggered increase in house rents. In such cases, informal settlement beneficiaries were being edged out of the rented houses since they were unable to pay the higher rents.⁷⁸

⁷⁶ A Report Submitted to the High Court of Kenya (Nairobi) by KNCHR on the Implementation of Petition No. 304 of 2015. Available on: <https://www.knchr.org/Portals/0/IDP%20Work/Kibera%20Housing%20Project.pdf?ver=2018-06-07-105134-690>

⁷⁷ <https://documents1.worldbank.org/curated/en/687061598631750150/pdf/Kenya-Informal-Settlements-Improvement-Project.pdf> Accessed on 16 November 2021

⁷⁸ <https://documents1.worldbank.org/curated/en/687061598631750150/pdf/Kenya-Informal-Settlements-Improvement-Project.pdf> pg. 16

This is an issue of concern, because it implies the development of new slums and informal settlements in order to accommodate those who are unable to afford the upgraded infrastructure. Ultimately, the Kenya Informal Settlements Improvement Project was judged a success. Benefits realized for the intended beneficiaries include: increased accessibility, enhanced security, improved drainage systems, improved liability and improved access to water and sanitation facilities, which have been a missing link in informal settlements and slums.⁷⁹ The Second Kenya Informal Settlements Improvement Project has already been approved (as at 7 August 2020)⁸⁰.

⁷⁹ <https://documents1.worldbank.org/curated/en/687061598631750150/pdf/Kenya-Informal-Settlements-Improvement-Project.pdf> pg. 68

⁸⁰ <https://documents1.worldbank.org/curated/en/687061598631750150/pdf/Kenya-Informal-Settlements-Improvement-Project.pdf>

10.Stateless Persons

In accordance with its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee urged the State party to stop discriminatory practices and accelerate its efforts to address statelessness, including through standardized registration procedures and issuance of official identification documents. The Committee also urged the State party to consider awarding Kenyan citizenship to all Nubians who were residing in Kenya on the date of Kenyan independence and their descendants

Notably, there has been progress towards recognition of the right to citizenship of the Nubian community. To begin with, Nubians have been included in the vetting committee responsible for issuance of identity cards. Secondly, the Nubian Rights Forum in collaboration with the United Nations High Commissioner for Refugees and the Department of Civil Registration have embarked on birth registration campaigns in various regions of the country, with the aim of ensuring all children, including Nubian children are registered. Lastly, the Nubian ethnic code at the 2019 Kenya Population and Housing Census provided a means towards identifying Nubian children and adults.⁸¹

On 12th December 2020, the Government announced the landmark decision to grant citizenship to 1,670 stateless Shona and 1,300 stateless persons of Rwandan descent who qualify under the law as Kenyan citizens.⁸²

It is also interesting to note that the government has recognized other ethnic groups' contributions to the country's development. This includes the Asian community in Kenya, which was declared as Kenya's 44th tribe in 2017 by President Uhuru Kenyatta.⁸³ Previously, they had

⁸¹ KNCHR, "Briefing Report on the Implementation of the African Charter on the Rights and Welfare of the Child," Available at:

<https://www.knchr.org/Portals/0/KNCHR%20Briefing%20Report%20on%20the%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20.pdf> page 9

⁸² UNHCR, "UNHCR applauds Kenya's decision to resolve the statelessness of the Shona and other communities," Available at: <https://www.unhcr.org/news/press/2020/12/5fd733664/unhcr-applauds-kenyas-decision-resolve-statelessness-shona-other-communities.html> Accessed on 21st October 2021

⁸³ Kenya Gazette, 2017 available at http://www.kenyalaw.org/kenya_gazette/gazette/volume/MTUzNg

been referred to as 'Other'. This came on the backdrop of the Makonde, which had also been a stateless community, being declared Kenya's 43rd tribe in 2017.⁸⁴ In a 2021 petition presented to the National Assembly's Departmental Committee on Administration and National Security regarding the recognition of the Pemba people of Kenya as citizens of the Republic of Kenya, the Committee observed that the Pemba people from the coast should be recognized as an ethnic group in Kenya.⁸⁵

Moreover, in the 2019 census, Kenya provided for the counting of indigenous peoples that had not been previously counted. This includes code 413, a new number which was added to denote the Ogiek community under the census's tribe category.⁸⁶ Recognition of these ethnic communities enables them to access identification documents issued by the Government, thereby enabling them to participate in the country's socio-economic and political affairs.

The Constitution of Kenya, 2010, addresses Statelessness primarily under Article 14, outlining the principles and provisions related to Kenyan Citizenship to include prevention and reduction of statelessness. The principle of non-discrimination under Article 14(1) of the Constitution states that a person is a Kenyan citizen by birth if, on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen of Kenya. This provision prevents discrimination in citizenship based on the place of birth.

Registration of Stateless Persons under Article 14(2) allows for the registration of persons as Kenyan citizens who are not citizens by birth but have been lawfully and voluntarily resided in Kenya for an uninterrupted period of at least seven years and satisfy other conditions. This

⁸⁴ The Makonde: From Statelessness to Citizenship in Kenya. Available at: <https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html>

⁸⁵ Parliament, Administration and National Security. Available at: <http://www.parliament.go.ke/sites/default/files/2021-08/Report%20onPublic%20Petition%20No.41%20of%202020%20regarding%20Recognition%20of%20the%20Pemba%20People%20of%20Kenya%20as%20Citizens%20of%20the%20Republic%20of%20Kenya.pdf>

⁸⁶ A new census in Kenya is counting people never counted before. Available at: https://www.washingtonpost.com/world/africa/kenya-census-intersex-and-indigenous-people/2019/08/28/fbeca98e-c529-11e9-8bf7-cde2d9e09055_story.html

provision helps prevent statelessness by providing a pathway to citizenship for certain categories of residents.

Children's Citizenship considered under Article 14(4) provides that a child found in Kenya who is, or appears to be, less than eight years old and whose nationality and parents are not known is presumed to be a Kenyan citizen by birth. These provisions are aimed at preventing and addressing statelessness as a result of any form of discrimination in Kenya, and ensuring that individuals who would otherwise be stateless have access to citizenship through various mechanisms outlined in the Constitution.

Proposed recommendation

- (i) Kenya should sign and ratify the 1954 Convention Relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness and other relevant Conventions on statelessness.

11. Counter-Terrorism Measures

The Committee recommends that the State party promptly address the alleged violations and ensure that all suspected persons benefit from fundamental legal safeguards, particularly when the suspects are of foreign descent or nationality, in the light of the statement on racial discrimination and measures to combat terrorism adopted by the Committee on 8 March 2002 (see A/57/18, para. 514).

In the period under review, Kenya has faced several terrorism threats and incidences. The most notable one being the Dusit D2 hotel complex al-Shabaab attack in Nairobi's Riverside area in 2019, in which 21 people were killed and 28 injured. The Kenya Defence Forces (KDF) continues its participation in African Union Mission in Somalia (AMISOM) and is a member of the Global Coalition to Defeat ISIS. In a bid to address terrorism, the Government of Kenya has put in place various measures both legislative and policy. The Constitution of Kenya 2010 underscores that the exercise of national security is subject to the Constitution and is to be pursued in compliance with the law and "utmost respect for the rule of law, democracy, human rights and fundamental freedoms".⁸⁷

In 2014, Kenya enacted the Prevention of Terrorism Act, 2012 (No. 30 of 2012), which provides for the detection and prevention of terrorist activities including offences for terrorist acts.⁸⁸ Section 40A of the Act establishes a counter-terrorism centre as a national mechanism for coordinating counter-terrorism efforts. Any offence that constitutes a terrorist act under the Prevention of Terrorism Act is subject to the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) as well as the Extradition (Commonwealth Countries) Act (Cap. 77).

Through an amendment to the Prevention of Torture Act 2012, the Statute Law (Miscellaneous Amendments) Act 2019 introduced a section to the law that requires the counter-terrorism centre to also act as the Centre for approving and reporting for all civil society organisations and

⁸⁷ Article 238(2) Constitution of Kenya 2010.

⁸⁸ Prevention of Torture Act 2012(No. 30 of 2012). Available at: <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2030%20of%202012>.

international non-governmental organisations engaged in preventing and countering violent extremism and radicalisation. This move was challenged in Court as unconstitutional through the Mombasa Constitutional Petition No. 134 of 2019 in which the Commission appeared as the first interested party. The Commission had advised that the law offended the Bill of Rights more specifically Articles 33 and 36 on the freedom of expression and association for the national and international non-governmental organisations as well as the general public. As at the time of submission of this report, a judgment had been delivered in which the High Court dismissed the petition ruling that the limitation was reasonable and justifiable under Article 24 of the Constitution. An appeal against the judgment had been lodged at the Court of Appeal. In 2016, the National Strategy to Counter Violent Extremism was developed, offering a policy framework that prioritizes partnership of non-state actors with the state actors to address the drivers that lead young people towards violent extremism. The strategy complements these security-focused counterterrorism measures with a framework for Countering Violent Extremism (CVE) measures, which include the provision of employment options, business opportunities and life skills, among other interventions, aimed at reducing youth vulnerability to violent extremism. Following the National Strategy, County Action Plans (CAPs) for CVE in the 47 counties have been developed thus providing a framework to support national CVE efforts at the grass root level. Various factors have however hindered effective counter-terrorism response in Kenya. These include 'uneven coordination, resource constraints, insufficient training, corruption, and unclear command and control continue to hinder counterterrorism effectiveness'.⁸⁹ In 2020, the National Police Service reported 34 cases of terror related incidences countrywide. As a result, 75 suspects were arrested while 2 were fatally shot by security officers.⁹⁰

In the period under review, reports of human rights violations by security forces during counter-terrorism operations have been reported. This includes allegations of extra-judicial killings,

⁸⁹ Country Reports on Terrorism 2019: Kenya available at <https://www.state.gov/reports/country-reports-on-terrorism-2019/kenya/>.

⁹⁰ National Police Service Annual Report 2020 available at: <https://www.nationalpolice.go.ke/crime-statistics.html?download=89:nps-annual-report-2020>

disappearances and torture. A 2016 public inquiry on insecurity and the enjoyment of human rights at the coastal region by the KNCHR established blatant human rights violations.⁹¹ The inquiry established that radicalization and perceptions of terrorism had led to Muslims and Islamic worship centres within the coastal region being regularly monitored by security agents, which in turn, instilled fear and did not allow the faithful to freely exercise their freedom of worship.⁹² The inquiry unearthed inter alia criminal/youth gangs in Mombasa, violent extremism, extra-judicial executions and enforced disappearances.

Nonetheless, the Courts have been instrumental in the protection of the rights of suspects including terror suspects from discrimination in the fight against terrorism. In *Alliow Somo Abdi on behalf of the subject Mohamed Adan Abdow & 2 others v Minister of State for Provincial Administration and Internal Security & 3 others*⁹³ the court held that one was not exempted from the ordinary protection of the law, whether one was a terror suspect or an ordinary suspect. Whatever the security considerations that the Police had, the recognition and preservation of the liberties of the subjects was the only way to reinforce the country's commitment to the rule of law and human rights. Police have the capacity to battle terrorism and enforce human rights at the same time as the two were not incompatible. In the judgment of January 2019, the High Court concluded that the removal from Kenya and handing over the subjects to the Ugandan authorities to face trial without extradition proceedings or other lawful process was a culmination of various violations of their fundamental rights and freedoms.⁹⁴

⁹¹ KNCHR *Guarding the Coast: A Report of the Public Inquiry on Insecurity and its Impact on the Enjoyment of Human Rights in the Coast Region of Kenya* (2019). Available at <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Security-Sector>

⁹² KNCHR *Guarding the Coast* (2019) p xxii. Article 32 of the Constitution of Kenya 2010 safeguards the right to freedom of conscience, religion, thought, belief and opinion.

⁹³ *Alliow Somo Abdi on behalf of the subject Mohamed Adan Abdow and 2 others v Minister of State for Provincial Administration and Internal Security and 3 others* [2019] eKLR. Available at: <http://kenyalaw.org/caselaw/cases/view/166970/>.

⁹⁴ Paras 44, 45 [*Alliow Somo Abdi on behalf of the subject Mohamed Adan Abdow and 2 others v Minister of State for Provincial Administration and Internal Security and 3 others.*](#)

The State passed into law the [National Coroners Service Act, 2017](#) that provides a comprehensive framework to facilitate an effective investigation process on mysterious deaths especially at the hands of security officials. The Act seeks to promote accountability and transparency in the investigations processes. However, as at reporting, the Service had not yet been properly constituted and the Commission continues to advocate for operationalization of the same.⁹⁵

Proposed recommendations

- (i) The National Assembly should amend section 40C (1) of the Prevention of Terrorism Act 2012⁹⁶ by deleting the amendment requiring non-governmental organisations dealing with CVE to report to the counter-terrorism Centre.
- (ii) The State to investigate and prosecute security agents responsible for extrajudicial killings
- (iii) The State should intensify training of all security agencies on human rights in CVE measures.
- (iv) The execution of duty by security agencies must follow the laid down international human rights law, standards and procedures as contained in human rights instruments and the Constitution of Kenya, 2010.
- (v) The State should appoint members to the National Coroners Service to operationalize it.

⁹⁵ News Article on call for operationalization of the Coroners Service Act by KNCHR accessible at <https://www.kenyanews.go.ke/knhcr-calls-for-operationalization-of-national-coroners-service-act/>

⁹⁶ Section 40C(1) introduced through the Statute Law Miscellaneous Amendments Act 2019 reads, "The Centre shall be an approving and reporting institution for all civil society organisations and international non-governmental organisations engaged in preventing and countering violent extremism and radicalisation through counter-messaging or public outreach, and disengagement and reintegration of radicalised individuals".

12. Trafficking In Persons and Migrant Workers Overseas

The Committee recommended that the State party accelerate its efforts to combat trafficking in persons and provide in its next periodic report data on human trafficking, including information on court cases and remedies provided to victims. It also encourages the State party to pursue its efforts to combat abuse of Kenyan migrant workers abroad and to ratify the Domestic Workers Convention, 2011 (No. 189) of the International Labour Organization (ILO).

Following the enactment of the Counter-Trafficking in Persons Act, 2010, the government constituted and launched the Counter-Trafficking in Persons Advisory Committee which has spearheaded the development of the National Plan of Action for Combatting Human Trafficking 2013-2017. The Advisory Committee has put in place a data collection mechanism to improve tracking of anti-trafficking initiatives across all 47 counties. The Act also establishes the National Assistance Trust Fund for Victims of Trafficking which caters for both financial and psychosocial needs of victims of trafficking.

The reporting period has also seen the development of new policies by the Ministry of Labour for persons seeking employment opportunities abroad to ensure that their work contracts meet minimum standards set out by the Ministry. The impact of this policy is yet to be seen; however, this marks an important step towards preventing trafficking of persons in Kenya overseas. In January 2020 the States of East and Horn of Africa discussed on Priority actions for effective Labour Migration Policy Development and Drafting, Negotiating and Implementation of Bilateral Labour Migration Agreements.⁹⁷ In addition, the National Employment Authority has a list of the recently accredited recruitment agencies; this ensures that those seeking employment abroad go through genuine agents.⁹⁸

⁹⁷ The signed communique. Available at: <https://nea.go.ke/web/wpcontent/uploads/2020/02/SIGNEDCOMMUNIQUE-HLMM-JAN-21-2020-compressed.pdf>

⁹⁸ List of accredited recruitment agencies. Available at: <https://nea.go.ke/web/wp-content/uploads/2020/03/List-ofAccredited-Recruitment-Agencies-12.03.202>

Furthermore, the State developed and disseminated the National Guidelines for Identifying Victims of Human Trafficking in Kenya, which will standardize the process of assisting victims of trafficking, promote cooperation between all relevant stakeholders involved in providing assistance to victims and improve the quality of service to victims of trafficking. The guidelines will provide first responders with a consistent basis to assist victims in accordance to international and national laws, as well as good practice.⁹⁹

The State does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. The government demonstrated overall increasing efforts compared to the previous reporting period, considering the impact of the COVID-19 pandemic on its anti-trafficking capacity; therefore Kenya remained on Tier 2. These efforts included increasing the number of investigations and prosecutions of trafficking crimes; convicting more traffickers; increasing personnel dedicated to specialized anti-trafficking police units; and launching a new hotline to report trafficking crimes.¹⁰⁰

KNCHR has also developed a handbook on migration and human rights, whose objective is to mainstream human rights approaches in service delivery to the public and migrants; to enhance knowledge on human rights and obligation of migrants and prevent human rights violations especially at the border points; to provide an understanding of reporting mechanisms and assistance pathways for victims of human trafficking and smuggling in Kenya.¹⁰¹

The National Assembly Labour and Social Protection Committee has conducted an inquiry into the mistreatment of Kenyan domestic workers in Saudi Arabia and tabled a report before the

⁹⁹ National Referral Mechanism For Assisting Victims of Human Trafficking in Kenya. Available at:

<https://www.socialprotection.go.ke/wp-content/uploads/2019/07/NRM-Guidelines-for-Kenya-law-res.pdf>

¹⁰⁰ As per the US State Department Trafficking in Persons Report, June 2021. Available at: <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> page 328

¹⁰¹ KNCHR's Handbook on Migration and Human Rights. Available at:

<https://www.knchr.org/Portals/0/GroupRightsReports/Handbook%20on%20Migration%20and%20Human%20Rights.pdf?ver=2018-06-06-190119-147>

National Assembly in 2019.¹⁰² Amongst its key recommendation is to resource labour related services within Embassies to monitor and document employment trends in Gulf Countries.

Despite efforts made to address trafficking persons, the Commission remains concerned that Kenya continues to be a country of origin, transit and destination for trafficking in persons.¹⁰³ Of further concern is the lack of consolidated data or repository of information on trafficking in persons which makes it difficult to inform policy on protection, prevention and prosecution.¹⁰⁴

Authorities continue to misidentify victims of trafficking as criminals. In some instances, victims of trafficking are penalised for crimes that the traffickers compel them to do due to inadequate screening or knowledge of trafficking indicators.¹⁰⁵ Foreign trafficking victims are often charged with contravention of immigration laws (unlawful entry into Kenya) and are held for deportation due to lack of valid identification documents. In addition and sometime officials conflate smuggling with trafficking in persons pointing to the need to train law enforcement officials.¹⁰⁶

The Commission is concerned of reports of abuse of Kenyan domestic workers in Gulf Countries by their employer's.¹⁰⁷ Concerns have been raised of the exclusion of domestic workers from governing labour laws, the exclusion from dispute resolution mechanisms and the presence of the legally mandated Kafala system further contribute to abuse.¹⁰⁸ Whereas the State has established

¹⁰² Departmental Committee on Labour and Social Welfare 'Report of the Committee's visit to Riyadh, Saudi Arabia on a Fact Finding Mission on the Welfare of Migrant Kenyan Workers in the Kingdom of Saudi Arabia (August 2019) Available at: https://parliament.go.ke/sites/default/files/2019-09/Report%20of%20the%20DC%20Labour%20on%20labour%20committee%20on%20visit%20to%20Saudi%20Arabia_compressed.pdf

¹⁰³ Stop the Traffik-Kenya 'Kenya's Human Trafficking Routes: New Data Insights into High Activity Locations and Regional Risks' (2020)

¹⁰⁴ Stop the Traffik- Kenya 'Human Trafficking- Kenya UPR Factsheet (2019)'

¹⁰⁵ United States Department of State '2016 Trafficking in Persons Report-Kenya'. Available at: <https://www.state.gov/documents/organization/258880.pdf> page 226; 2019 Trafficking in Persons Report-Kenya (n 66) page 273

¹⁰⁶ Trafficking in Persons Kenya (n 66) page 273

¹⁰⁷ Report filed by Nation TV 'Exclusive footage depicts Kenyans in Qatar pleading for help' https://www.youtube.com/watch?v=dkHv8FF_qrs. Accessed on 17th November 2021

¹⁰⁸ F Malit & A Youha 'Kenyan Migration to the Gulf Countries: Balancing Economic Interests and Worker Protection' (Migration Policy Institute, 2016). Available at: <https://www.migrationpolicy.org/article/kenyan-migration-gulf-countries-balancing-economic-interests-and-worker-protection>

labour related services in Embassies, reports of lack of interest in protecting rights and slow response to distress cases have further embedded distrust in Kenyan institutions as capable of providing assistance to victims of trafficking.¹⁰⁹

Illegal and unethical recruitment practices persist with unlicensed recruitment agencies continuing to deploy labour migrants to Gulf Countries. This is despite government increased restriction on recruitment or deployment of Kenyans in Gulf Countries and regulatory restrictions.¹¹⁰ Linked to unethical recruitment practices is contract substitution either at source or at destination where recruitment agencies provide prospective applicants with false information to accept employment offers.¹¹¹ The asymmetrical information has resulted in abuses within the market and facilitates trafficking in persons.¹¹²

Implementation of the Counter Trafficking in Persons Act has also been hampered due to secretariat activities being anchored in the Department of Children Services with the justification that dimensions of trafficking have presented as being labour or affecting children issues primarily within the responsibility of the Ministry of Labour. Kenya being a source, transit and destination for trafficking in person makes trafficking in persons both a security and migration issue which would ideally be handled by the Ministry of Interior.¹¹³

A survey conducted by the Commission on the status of migrants in places of detention in Kenya revealed that an approximated 2000 migrants are held in detention centres across the country with a third of these migrants being detained for being in the country without proper documentation. The detained migrants often have their human rights violated as they end up being detained together with criminals serving sentences for committing crime. Similarly, the legal enforcement officers illuminated unique judicial and corrective administrative challenges as

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Coalition of Anti-trafficking CSOs for UPR-Kenya '3rd Cycle UPR Report on Trafficking in Persons (2019)

pertaining the processing of migrants through unfamiliar legal systems while acknowledging these processes come at an avoidable cost to the state.¹¹⁴

KNCHR has also developed a handbook on migration and human rights, whose objective is to mainstream human rights approaches in service delivery to the public and migrants; to enhance knowledge on human rights and obligation of migrants and prevent human rights violations especially at the border points; to provide an understanding of reporting mechanisms and assistance pathways for victims of human trafficking and smuggling in Kenya.¹¹⁵

In 2019, the Commission held a stakeholder engagement on ratification of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families that was aimed at creating awareness to the State and other agencies on the need to protect the rights of migrant workers in Kenya and those of citizens working abroad. The State is yet to approve ratification of the said Convention citing that there are numerous regional and international instruments that protect the rights of migrant workers.

Proposed recommendations

State to ratify the following Conventions:-

- (i) ILO Convention No. 181 on Private Recruitment agencies to regulate the activities of the Private recruitment agencies in Kenya and the receiving countries, implementation of the Global Compact on migration to promote safe, orderly and regular migration and the formulation of the Kenyan Migration policy which will provide policy guidance in the sector;

¹¹⁴ KNCHR's Survey Report on the Status of Migrants in Places of Detention in Kenya accessible at <https://www.knchr.org/Portals/0/A%20Survey%20Report%20on%20the%20Status%20of%20Migrants%20in%20Places%20of%20Detention%20in%20Kenya.pdf> page ix.

¹¹⁵ KNCHR's Handbook on Migration and Human Rights accessible at <https://www.knchr.org/Portals/0/GroupRightsReports/Handbook%20on%20Migration%20and%20Human%20Rights.pdf?ver=2018-06-06-190119-147>

- (ii) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- (iii) Domestic Workers Convention, 2011 (No. 189) of the International Labour Organization (ILO);
- (iv) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.
- (v) Strengthen efforts to address protection and assistance to victims of trafficking especially those in foreign countries
- (vi) Strengthen data collection and repository of information on trafficking in persons

13. Persons with Albinism

The Committee recommends that the State party take effective measures to protect persons with albinism from violence, discrimination and stigmatization.

The National Council for Persons with Disabilities runs the albinism support program, which cushions persons with albinism from the harmful rays of the sun that cause skin cancer. It provides them with free sunscreen lotions, lip care and after sun lotions, protective clothing, and comprehensive eye care as well as awareness creation.¹¹⁶

KNCHR is the monitoring State agency for the rights of persons with disabilities under the UN Convention on the Rights of Persons with Disabilities. To this end, the Commission recently hosted an essay competition as a way of commemorating the 2021 International Albinism Awareness Day on June 13. The competition offered the public a chance to replace myths on the condition with proven knowledge on this form of disability in Kenya.

The State developed the Sector Policy for Learners and Trainees with Disabilities which recognizes persons with albinism as a category that requires reasonable accommodation while at a learning institution.¹¹⁷

There are no specific measures put in place to protect persons with albinism from abduction, human trafficking and other discriminatory practices that jeopardize their life. Persons with albinism are protected like other members of the public by security agencies and the provisions of the Sexual Offences Act, Criminal Procedure Code (the framework for arrests and prosecutions) and Counter-Trafficking in Persons Act.¹¹⁸

¹¹⁶ <https://ncpwd.go.ke/albinism-support-program/>

¹¹⁷ Sector Policy on Learners and Trainees with Disabilities. Available at: <https://www.education.go.ke/index.php/downloads/file/510-sector-policy-for-learners-and-trainees-with-disabilities>

¹¹⁸ KNCHR's 'Compendium on Submissions to Committee on Rights of Persons with Disabilities: Response of the Kenya National Commission on Human Rights on the List of Issues on Kenya's Initial Report on Implementation of the Convention on the Rights of Persons with Disabilities Submitted on 30th July 2015' (2016). Available at: <http://www.knchr.org/Publications/InternationalObligation.aspx>

On security, persons with albinism are subjected to attacks linked to the use or sale for use of body parts for witchcraft purposes.¹¹⁹ Persons with albinism are also at risk of trafficking for purposes of sale of body parts with reports of trafficking being reported in border towns of Migori and Taita Taveta which are close to the United Republic of Tanzania. Beyond border towns, persons with albinism have reported fear of attack due to common belief that their body parts can be sold for significant amounts of money. Persons with albinism are forced to take care of their own protection due to lack of due diligence to investigate, prosecute, and punish those responsible for inflicting harm on persons with albinism.

In January 2021, the Cabinet approved the ratification of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Persons with Disabilities in Africa. The Protocol specifically refers to persons with albinism and the challenges they face specifically violence. The Protocol obligates State Parties to protect persons with disabilities including persons with albinism from all forms of violence.¹²⁰ The State has since deposited instruments of ratification in February 2022.

Stigma against person with albinism manifests in ridicule including name calling referring to the financial value of persons with albinism or ridicule targeting physical appearance. The Commission is concerned that no redress is provided for victims even where the remarks amount to criminal offence.¹²¹ The same was reported by the Commission when it conducted its report on the laws, policies and gaps on the protection of persons with albinism.¹²²

¹¹⁹ United Nations 'Independent Expert on the Enjoyment of Human Rights by Persons with Albinism (A/HRC/40/62/Add.3) (22 January 2019) Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/013/58/PDF/G1901358.pdf?OpenElement> pg. 10

¹²⁰ Article 10 Protocol to the African Charter on Human and Peoples Rights on the Rights of Persons with Disabilities in Africa.

¹²¹ See Kenya National Commission on Human Rights 'Press Statement in Response to Hon. Junet Mohamed's Disability comments against Hon Senator Isaac Mwaura ' (February 2021) Available at: <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1109/Press-Statement-in-Response-to-Hon-MP-Junet-Mohamed%e2%80%99s-Disability-Comments-Against-Senator-Dr-Isaac-Mwaura>

¹²² Mapping Laws, Policies and Programmes on Albinism and Existing Gaps and Mapping Organizations of Persons with Albinism in Kenya. Available at: <https://www.knchr.org/Portals/0/Albinism%20Mapping.pdf>

Proposed recommendations

- (i) The State should expedite the process of adopting a National Action Plan on Persons with Albinism.
- (ii) The State should implement the recommendations in the Commission's report on mapping the status of persons with albinism in the country.

14. Truth, Justice and Reconciliation Commission

The Committee requests the State party to provide further details and assurances concerning the recommendations made by the Truth, Justice and Reconciliation Commission and remedies provided to those affected by the 2007 post-election violence (see CERD/C/KEN/CO/1-4, paras. 14-16).

The Truth Justice and Reconciliation Commission was established after the 2007 General election following the post-election violence that marred the country at the time. The core mandate of the Commission was to look into cases of human rights violations in the country between 1963 and 2008.¹²³ The TJRC report recommended the setting up of a reparations mechanism for which the state shall be responsible. Further, it recommends the following forms of reparations to be provided to victims of historical injustices: restitution, compensation, rehabilitation, satisfaction which includes official declarations restoring dignity and reputation, public apology, commemoration and tributes; and Guarantees of Non-repetition.

During the State of Nation Address in 2015, the President offered a public apology on behalf of the government for all past human rights violations and other historical injustices. His Excellency also instructed the National Treasury to establish the Restorative Justice Fund to offer relief to the victims and survivors of past human rights violations and other historical injustices.¹²⁴ Other related positive gains from the TJRC process include the enactment of the Prevention of Torture Act (No. 12 of 2017) and the National Coroners Service Act (No. 18 of 2017). However, there remains a huge gap in implementation of these milestones and other specific recommendations in the report. Indeed, some sections of the TJRC report are yet to be gazetted.

¹²³ TJRC Act section 5. Available at:

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202008>

¹²⁴ State of the Nation Address by President Uhuru Kenyatta delivered on 26th March 2015. Available at:

<https://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/>

The Commission continues to advocate for the implementation of the recommendations of the TJRC report including reparations to victims of historical injustices. Towards this end, KNCHR has since the year 2019 to date continued its quest for a substantive legal framework to address the right to effective remedy. The State, in partnership with the Commission and the International Center for Transitional Justice (ICTJ) developed the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017. The purpose of these Regulations was to provide a framework for the establishment and operationalization of a reparations program. As at the time of reporting, the mechanism was yet to be formalised and adopted by the State. The Regulations however stalled and no action has been made.

There has been recent efforts to draft a policy on reparations. As at the time of reporting, a draft policy was finalised and in the Office of the Attorney General, yet to be adopted. In concert with various stakeholders, the Commission has been lobbying for the enactment of The Reparations for Historical Injustices Bill, 2021 which is currently in its draft stages. The Bill aims to, *"provide a legislative framework for reparations to victims and survivors of gross human rights violations and historical injustices experienced between 12th December 1963 to date by operationalizing implementation of the report of the Truth Justice and Reconciliation Commission established under section 3 of the Truth, Justice and Reconciliation Act, No. 6 of 2008 and other related reports referred to therein"*.¹²⁵

The Commission has further been working to support the Office of the Attorney General and Department of Justice to develop regulations towards operationalisation of the victim protection trust fund to actualise redress for victims of torture and other crimes under the Prevention of Torture Act, 2017 and the Victim Protection Act, 2014. As at the time of reporting, discussions over the draft Victim Protection (Trust Fund) Regulations, 2020 as well as the Victim Protection

¹²⁵ Memorandum of Objects to the draft Reparations for Historical Injustices Bill, 2021.

(General) Regulations led by the State Law Office had been concluded. The Regulations awaited finalisation and adoption.

The Failure by the National Assembly to adopt the full TJRC report has hindered the implementation of the report. Following a petition for its adoption, the Senate's Standing Committee on Justice, Legal Affairs and Human Rights in its report of July 2020, observed that, *"the failure to operationalize the reparations framework by the state continues to unduly lengthen the suffering of survivors and the families of the victims of Kenya's historical injustices and human rights violations"*.¹²⁶ The Committee further recommended on the need for the National Assembly to formally consider the TJRC report in order to pave way for its implementation and that the CS Treasury submits to Parliament the Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017 so as to anchor the restorative justice fund into legal framework.

Additionally, the Commission in partnership with civil society organizations have been engaging County Governments to develop county laws and interventions on reparations of county based historical injustices. The key intervention under the County frameworks is memorialization and county dialogue on historical injustices to complement National Government interventions.

In the context of electoral violence experienced during the 2017 general elections, the Commission has been at the forefront in advocating for redress for victims of human rights violations. The Commission recommended that internally displaced persons should be provided with reparations either in the form of restitution, compensation, satisfaction, rehabilitation or guarantees of non-repetition.¹²⁷

¹²⁶ Standing Committee on Justice, Legal Affairs and Huma Rights, 'Report on Consideration of a Petition by Bernard Waheire and Jacqueline Mutere on Implementation of the Report of the Truth, Justice and Reconciliation Commission (TJRC) p 18.

¹²⁷ KNCHR's On The Brink of a Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence Preliminary Edition p. 11. Available at. https://www.knchr.org/portals/0/reports/knchr_report_on_the_brink_of_the_precipe.pdf

Proposed recommendations

- (i) The State should fast track the adoption of the Reparations Policy.
- (ii) The National Assembly should formally consider and adopt the TJRC Report to pave way for its implementation.
- (iii) The State should fast track the adoption and operationalisation of the Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017.
- (iv) The State should fast track the adoption of the Victim Protection (General) Regulations and the Victim Protection (Trust Fund) Regulations.

15. Refugees and Asylum Seekers

The Committee recommended that the State party ensure the protection of asylum seekers and refugees in its territory, in accordance with its legal obligations, in particular by:

- (a) Continuing to partner with international humanitarian agencies to establish and maintain sufficient capacity for refugees and asylum seekers in reception facilities by providing adequate food, shelter and health services.
- (b) Inviting once again the international community to discharge its responsibility towards refugees under the principle of burden sharing.
- (c) Developing, in consultation with the groups concerned and in partnership with the Office of the United Nations High Commissioner for Refugees and other relevant organizations, a long-term strategy for the durable solution of local integration of the refugees, especially with regard to education and access to decent livelihoods, as residence in camps does not represent a durable solution for their inhabitants.

The Kenyan government, on 24th March 2021, issued a 14-day ultimatum to the United Nations High Commissioner for Refugees (UNHCR) to develop a plan to close the Kakuma and Dadaab refugee camps in the country. Following this announcement, UNHCR urged the government to rescind the decision noting its impact on the protection of refugees in Kenya, including in the context of the ongoing Covid-19 pandemic. It called upon the government of Kenya to ensure that any decisions allow for suitable and sustainable solutions to be found, and that those who continue to need protection are able to receive it.¹²⁸

The government later on 25th March 2021 met with development partners including the United Nations, World Bank and International Monetary Fund representatives regarding the plight of refugees in light of the directive on closure of refugee camps and repatriation. The UNHCR

¹²⁸ The Guardian newspaper reporting, 'Kenya issues ultimatum to UN to close camps housing almost 400,000 refugees'. Available at: <https://www.theguardian.com/global-development/2021/apr/01/kenya-issues-ultimatum-to-un-to-close-camps-housing-almost-400000-refugees/>

developed a roadmap that was shared with the government, which included voluntary return for refugees in safety and dignity, departures to third countries under various arrangements, and alternative stay options in Kenya for certain refugees from East African Community (EAC) countries. Further, the government met with diplomats from East African countries and agreed to give refugees from East African countries the option of being issued a work permit for free so that they can integrate into Kenyan communities or return to their country of origin.¹²⁹

(d) Respect the 2013 High Court decision in Kituo Cha Seria and others v. The Attorney General and follow the law when declaring curfews, ensuring that they are not maintained for a disproportionate length of time and are resorted to only in exceptional circumstances.

Parliament introduced the Refugees Bill, 2019 whose principal object is to provide for the recognition, protection and management of refugees. The Bill was passed and forwarded for assent but the President rejected and returned it to the National Assembly with his reservations, among others, that definition of “transit centre” in the Bill be amended to also include a prison, immigration detention centre, police station, remand home or any other similar place that may be designated as a transit centre. The President’s rationale was that detention facilities may be used as holding centres for refugees and asylum seekers where there is need for humanitarian assistance.¹³⁰ The National Assembly considered the President’s reservations, amended the Bill accordingly and resubmitted to the President who assented it into law on 17th November 2021.¹³¹

The Commission notes that whilst the proposed law is an improvement in some respects from the current form, it is inadequate to comprehensively solve the gaps in the extant refugee law. The Commission is also concerned that the government’s resolve to use detention facilities as holding

¹²⁹ Joint statement by the Government of Kenya and the United Nations High Commissioner for Refugees: Dadaab and Kakuma Refugee Camps Roadmap. Available at <https://www.unhcr.org/news/press/2021/4/608af0754/joint-statement-government-kenya-united-nations-high-commissioner-refugees.html/>

¹³⁰ National Assembly Hansard Report, 1st September 2021. Available at <http://parliament.go.ke/sites/default/files/2021-09/Hansard%20Report%20%20Wednesday%2C%201st%20September%202021%20%28P%29%20-%20Special%20Sitting.pdf> p1-2

¹³¹ Refugees Act, 2021 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2010%20of%202021>

centres for refugees and asylum seekers would exacerbate their situation in the country as evidenced by findings in the Commission's recent inquiry on the status of migrants in Kenya's places of detention and holding facilities. Notably, any legal framework should address the key concerns of the Comprehensive Refugee Response Framework (CRRF).

Furthermore, the Ministry of Interior and Coordination of National Government published the Registration of Persons (National Integrated Identity Management System) Regulations 2020, made pursuant to section 9A (1) of the Registration of Persons Act (Cap 107) to provide mechanisms for operation and maintenance of the National Integrated Identity Management System (NIIMS); and facilitate the assigning of the Huduma Namba and issuance of the Huduma card to a resident individual. The Commission in its advisory to the ministry urged the State to take into account the rights of the most vulnerable in the society including those from marginalised communities, the elderly, persons with disabilities, refugees and intersex persons in the NIIMS. It called for considerations on the effect (unintended or otherwise) of the new regime of identity and registration on this group of persons so that no one is disenfranchised. The Commission reiterated that Article 56 of the Constitution mandates the State to take measures to ensure that minorities and marginalised groups have reasonable access to water, health services and infrastructure. With this Huduma system, the effect would literally deny this population their identity and access to basic services unless foundational matters regarding their registration and issuance of identification documents were addressed.

The Commission further reminded the government that in its Concluding Observations on the combined third to fifth periodic reports of Kenya of 2016, the Committee on the Rights of the Child observed that, *'some groups of children, such as refugee children, children of Nubian descent, Makonde children, indigenous Somali children in Kenya, children with mothers in custody and*

*intersex children, face difficulty in obtaining birth registration*¹³² and urged the State to inter alia, '*... strengthen various efforts to ensure the birth registration of all children...*'.

In October 2018, the Commission was petitioned by a Non-Governmental Institution (NGO) offering humanitarian support to refugees (requested to remain anonymous) over reported incidences of human rights violations on the refugees and asylum community members both at Kakuma and Dadaab Refugee camps. The KNCHR was informed that among other things refugees and asylum seekers were denied registration and those who have applied were taken through slow process of refugee status determination (RSD) and that the government had issued an ultimatum to relocate minorities and close Dadaab camp which was going to result into forceful repatriation of refugees. In its report, the Commission found inter alia that there was lack of consultation and/or participation in the decision-making process by those targeted in the movement/relocation. The report was tabled to the National Assembly for debate.

The Commission established in its 2019 inquiry into the human rights status of Dadaab and Kakuma refugee camps that while the government and UNHCR attempted to apply the Comprehensive Refugee Response Framework through relocation of some refugees from Kakuma camp to Kalobeyi Integrated Settlement, the process encountered mishaps as the minority refugee groups who were being moved resisted the manner in which the process was carried out due to issues among them, lack of adequate consultation and participation; hostility from the host/local community; family separation and loss of job opportunities. This caused some of them to relocate back to the Kakuma camp. These issues prompted the government and UNHCR to extend the initially set timeline of September 2019 as the final date of relocation to Kalobeyi for the non – Somalis, to December 2019 to allow for room to deal with the identified sticking issues.

¹³² Para 29 (c) of Concluding observations on the combined third to fifth periodic reports of Kenya of 26 March 2019; Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KEN/CO/8&Lang=En/

The findings from the Commission's inquiry also paints a grim picture of the situation in the Kakuma and Daadab camps especially due to the slow moving Refugee Status Determination process resulting to estimated total of 15,000 undocumented refugees in camps which includes the new entrants as well as those who were repatriated and came back due to the hostility of the conditions back home. The situation is even made complex by the UNHCR statistics on Individual Asylum Applications and Refugee Status Determination trend in the country, revealing that there is an average of about 54,000 monthly pending applications in 2021 alone.¹³³ The Commission is concerned that the slow process denies applicants access to critical humanitarian services such as resettlement, health care, education and access to justice.

The National Assembly Departmental Committee on Administration and National Security, in consideration of a public petition regarding lack of access to citizen registration services by residents of Garissa and Wajir counties, observed that about 40,000 persons are multiple registered under UNHCR records, out of whom 19,272 had applied for regularization of their registration status. The Committee also noted that double and multiple registrations came about as some citizens and refugees registered as refugees and thus appearing in the records both of the National Registration Bureau and that of UNHCR. Their primary motivation being humanitarian and social assistance including free movement, business, jobs education, acquisition of citizenship and voting rights. The Committee further observed that double registration denied the deserving Kenyans access to government services as their details had been captured in the refugee database.

In view of the above, the Committee made recommendations, among others, that the Cabinet Secretary for Interior and Coordination of National Government expedites the adoption of the

¹³³ UNHCR-Kenya Statistics Package 31-October-2021. Available at: <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2021/09/Kenya-Statistics-Package-31-August-2021.pdf> pg. 7

report on the vetting of double registered persons, ensure regularization of the status of vetted persons and facilitate their registration as Kenyan citizens.¹³⁴

A recent study conducted by KNCHR on the status of migrants in Kenya's places of detention and holding facilities reveals that a third of the migrants have been detained for being in the country without proper documentation. The study also established that there were human rights violations committed as detained migrants were confined together with convicted persons who are serving various sentences. This comes at a huge cost to the individual, their families as well as the state. The study also discovered that it costs the Kenyan government approximately Kshs2 Billion annually to process migrants through the criminal justice system and afterwards repatriate them to their countries of origin. This cost does not include processing costs for migrants who qualify for registration as refugees or asylum seekers.¹³⁵

The number of registered refugees and asylum seekers in Kenya grew from 494,863 in 2016 to 504,854 in 2020. The proportion of male refugees and asylum seekers in 2020 was 51.1%. Additionally, the population of refugees and asylum seekers grew by 3.1% from 489,747 in 2019 to 504,854 in 2020. Child refugee population marginally increased from 267,908 in 2019 to 270,245 in 2020 while the adult refugee population increased from 221,839 in 2019 to 234,609 in 2020. The rise was as a result of 3.1%, 3.8% and 2.8% in Dadaab, Kakuma and Urban Centres, respectively. During the same period, 84% of all registered refugees and asylum seekers resided in Garissa and Turkana camps. Regarding the distribution of registered refugees and asylum seekers by country of origin, Somalia remained the country of origin with the highest number of refugees and asylum seekers accounting for 54% of all registered refugees in Kenya followed by South Sudan at 24.6%. Burundi recorded the highest increase of refugee and asylum seekers of

¹³⁴ National Assembly Departmental Committee on Administration and National Security Report. Available at: <http://www.parliament.go.ke/sites/default/files/2021-08/Report%20on%20Public%20Petition%20No.%2008%20of%202021%20regarding%20Lack%20of%20Access%20to%20Citizen%20Registration%20Services%20by%20Residents%20of%20Garissa%20and%20Wajir%20Counties.pdf>

¹³⁵ KNCHR, A Survey Report on the Status of Migrants in Places of Detention in Kenya. Available at: <https://www.knchr.org/Portals/0/A%20Survey%20Report%20on%20the%20Status%20of%20Migrants%20in%20Places%20of%20Detention%20in%20Kenya.pdf> p ix

7.6% from 15,098 in 2019 to 16,520 in 2020. Refugee and asylum seekers from other countries of origin also increased slightly from 795 in 2019 to 904 in 2020.¹³⁶

Proposed recommendations

- (i) The Government continues working together with UNHCR and other partners to find alternative solutions that are in line with the equitable responsibility sharing as prescribed by the Global Compact on Refugees (GCR).
- (ii) That the government commits to the full implementation of the Comprehensive Refugee Response Framework to enhance refugee self-reliance, increase access to solutions, and improve conditions in countries of origin for safe and voluntary returns.
- (iii) The Commission urges the government through the Refugee Affairs Secretariat to hasten the process of consideration of asylum and Refugee Status Determination applications.
- (iv) The Commission further calls on the government to fast track the de-registration of Kenyan citizens registered as refugees.

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¹³⁶ Kenya National Bureau of Statistics, Economic Survey 2021. Available at: <https://www.knbs.or.ke/wp-content/uploads/2021/09/Economic-Survey-2021.pdf> pg.344-346.