



**Submission from African Rights Monitor
to the Committee on the Elimination of All Forms of
Racial Discrimination, 8 August – 2 September 2011,
Geneva**

*Related to the discussion of the country situation in Kenya
and its performance in upholding the
Convention on the Elimination of All Forms of Racial
Discrimination*

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Executive Summary

The following submission to the Committee on the Elimination of All Forms of Racial Discrimination in review of the adherence of the Republic of Kenya to the provisions of CERD has been completed by African Rights Monitor, a non-governmental advocacy organization created to monitor human rights violations in conflict and post-conflict African territories. The report is intended to act as a complement to Kenya's official submission to the Committee, and to underscore various violations and issues that remain unreported by the Government.

While Kenya has adopted the provisions of CERD into its national Constitution and multiple legal codes, gross violations of the Covenant's principles occur unchecked throughout the country, particularly in regards to the situation of Somali refugees. Kenya has received over 350,000 Somalia refugees over the past few years. Due to increasing pressure of drought, rising food costs, and the conflict in Somalia, the past few months have seen an influx of arrivals, up to 1,300 arriving in the Dadaab camp alone each day¹. Many Kenyan residents are routinely marginalized politically and socially based on racial background, ranging from language used in advertising to mass displacements and physical harm. The largest of these issues persists from land disputes arising out of post-colonial independence. "Though a colonial problem, successive regimes have also exacerbated the problem through illegal acquisition of public lands, poor land policies and tribal clashes over land caused by dwindling land resources, population pressures and poor land use."² The government of Kenya is violating the CERD through a critical lack of *de facto* implementation of the *de jure* measures made to ensure racial equality. Discrepancies between policy and reality exist under articles 1, 2, 4, 5 and 6 of CERD, guaranteeing civil, political, economic, social and cultural rights to its citizens and a government actively pursuing a diverse, yet equally protected society regardless of ethnicity.

Introduction

Background of the author

The following submission to the CERD Committee has been completed by African Rights Monitor (ARM), a Washington, DC-based non-governmental advocacy organization created to monitor human rights violations in conflict and post-conflict African territories. Currently ARM is conducting monitoring projects in Ethiopia, Somalia, and Kenya, with plans to expand to Sudan and the Great Lake Countries next year (2011). With the understanding that democracy is underpinned by the participation of robust civil society, ARM strives to educate civil society groups on democracy, human rights and the rights of the press through workshops and seminars that address these issues as related to Africa. The organization aims to advocate for the protection of human

¹ BBC News Africa. "Somalia fleeing to Kenya in large numbers." 28 June, 2011.

<http://www.bbc.co.uk/news/world-africa-13937486>

² Ido, Abduba Mollu, a Nairobi-based management and institutional development consultant...with extensive hands-on experience in conflict and development practice in East Africa and the African Horn, including Somalia and his native Kenya, information obtained through personal correspondence.

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rights in African countries by investigating and exposing human rights violations and holding abusers accountable for their actions. ARM can be contacted by telephone at (+1) 202.642.4493, or through mail at 200 Yoakum Parkway, #915, Alexandria, VA, 22304, United States of America.

African Rights Monitor has recently focused on the situation for human rights in Kenya and has produced this report to assess the Republic of Kenya's fulfillment of their international treaty obligations under the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD). There is substantial documentation of various rights abuses committed at the hands of Kenyan officials and citizens by other human rights organizations including Human Rights Watch, the International Crisis Group, and Amnesty International. In addition to the reporting from international non-governmental organizations (NGOs), ARM contributes an extensive understanding of violations of women's rights in nation states within a legal background and framework and is in a unique position to report on the reality of the situation in Kenya. ARM grew out of the intellectual and grassroots civil societies movement from Africa and was founded to offer an African perspective to international human rights bodies and forums.

Overview of Racial Discrimination in Kenya

As a signatory to the ICERD, Kenya is in agreement with the idea that human rights are founded on human dignity and equality and therefore, should not be withheld from any individual as stated in the preamble of the Convention and in the Universal Declaration of Human Rights. This covenant recognizes the imperative need to eradicate racial discrimination as a barrier to the realization, exercise and enjoyment of all human rights.³

With at least 42 recognized ethnicities⁴ in Kenya, and a history of ethnic related conflict and corruption, the country and its individuals struggle not only to reconcile past human rights violations along ethnic lines, but also to address present ethnic-based conflicts, and implement preventative measures for the future. While the government has made commendable progress in forming national legislation in opposition to ethnic discrimination, there is a disconnection between these policies and the actions of the state officials that requires attention and swift action of the government. Since independence, Kenya has sustained decades of violence, corruption and chaos due to the intertwined issues of land, political power and ethnicity, stemming from the British colonization. The government's failure to reconcile these issues at the root causes and follow through with promises and recommendations from regional and international actors continues to foster a system full of impunity, a lack of security and teetering on the brink of widespread violence.⁵ The discrimination existing in politics, land usage and ownership, and access

³ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, Preamble.

⁴ The Kikuyu is the largest ethnic group. The next largest are the Luhya, Luo, Kamba and Kalenjin.

⁵ IDMC (Internal displacement monitoring center). "Kenya: Speedy reform needed to deal with past injustices and prevent future displacement". A profile of the internal displacement situation. 10 June, 2010. Available at www.internal-displacement.org.

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to legal service threatens Kenyans and other nationalities alike, undermining democracy and human rights.

This submission will focus on the key areas of elections⁶ and politics, refugees, land and legal redress. In light of the lack of progress in these areas, African Rights Monitor suggests the following recommendations be pursued by the Kenyan government in order to remedy the continuing racial discrimination in their country:

1. Foster a political environment, which strengthens and promotes the human security of all Kenyans regardless of ethnic ratios in the government.
2. Continue to pursue reconciliation for past human rights violations.
3. Complete widespread investigations and prosecutions of offenses in IDP camps and relating to violence spurred by political and ethnic tensions.
4. Consider the factors pushing the police force to act illegally and seek to address the causes of their motivations for violating human rights and national laws.
5. Invest in training on issues of human rights and refugee law for police officers and other state officials working in areas with high refugee traffic.
6. Resolve remaining land debates to enable return of internally displaced persons, foster development, harmony and respect for human rights, and reduce the likelihood of violence over land issues.
7. Improve implementation and enforcement of the relevant legal statutes.
8. Increase access to legal redress in racial discrimination cases.
9. Support civil society and grassroots initiatives, which encourage and promote the rights of refugees and ethnic minorities.
10. Utilize the international community for assistance in fulfilling requests for increased staff, training, and resources.

Methodology

African Rights Monitor has prepared this report using extensive research of data and eyewitness accounts collected by UN bodies, academia, international organizations, civil society, and government reports.

The State's Accomplishments

The Republic of Kenya has endeavored in recent years to create various and comprehensive formal legislation to fight discrimination. Following its accession to the International Covenant on the Elimination of all forms of Racial Discrimination in 1984, Kenya submitted its first four reports to the committee in January 2011, outlining its accomplishments. The national constitution declares rights without regard to race or ethnicity in section 70 and 82. Kenya has established a national commission for human

⁶ Election time has been consistently correlated with rising tribalism and violence by both the public and government officials in many places in Africa, including the Kenya elections of 1992, 1997, 2002 and 2007. Ashforth, Adam. *Ethnic Violence and the Prospects for Democracy in the Aftermath of the 2007 Kenyan Elections*. *Public Culture*. 2009, 21:1. Eifert, Benn, Edward Miguel, and Daniel N. Posner. *Political Competition and Ethnic Identification in Africa*. *American Journal of Political Science*, Vol. 54, No. 2, April 2010, Pp. 494-510.

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rights, created by the parliament in 2002 (www.knchr.org). But the Commission's website, contains very little news or publications since 2007 and no status report on the country's human rights situation has been produced since 2004. They have produced a strategic plan for 2009-2013, which recognizes racial discrimination as an issue in politics and democracy and lists addressing it as a key concern for the Commission. However, the conclusions for Commission's actions involve network building and partnerships and focus on "constitutional review, institutional reforms and transitional justice."⁷ Research, documentation and monitoring are essential for understanding the nature of discrimination, but this is wasted if the information is not used to form strategic implementation and enforcement mechanisms.

The National Cohesion and Integration Act, created in 2008 by the Parliament, is mandated "to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes."⁸ The act focuses on discrimination on ethnic grounds in the work place and public distribution of services and resources and housing. Its goals include eliminating all forms of racial discrimination and promoting positive peace, understanding and harmony through investigation, monitoring, notification, and reporting.⁹ The report also vaguely mentions some affirmative action initiatives and training on discrimination issues.

According to reporting by civil society and international organizations, these initiatives lack implementation and enforcement of these standards among the public and officials. The ICERD provides that State parties are required to pursue the elimination of racial discrimination arising out of either purpose or effect.¹⁰ Therefore, while Kenya's legislative movements in the right direction are very commendable, racial discrimination is still occurring. We implore the Kenyan authorities to use the legal backing they have established to pursue other forms of remediation to this problem.

Biggest Challenges

African Rights Monitor has identified four areas where improvement can be made in regards to racial discrimination in Kenya.

1. Politics
 - a. Election campaigning

⁷ Kenya National Commission on Human Rights. Strategic Plan 2009–2013. p. 5–6; 10–11; 32–33.

⁸ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1–4, 27 October, 2010, General Introduction, p. 8.

⁹ National Council of Churches Kenya, NCKK Communications. *National Cohesion and Integration Act, 2008 Simplified Version*. 24 June, 2009. Available at <http://www.ncck.org/index.php/publications/117-cohesion.html>

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, article 1.

- b. Elected officials behavior
 - c. Voting
2. Treatment of Somali Refugees
 - a. Lack of protection
 - b. Physical and emotional harm
 - c. Refoulment
3. Access to Legal Services for Racial Discrimination
4. Resolution of Past Land-Ethnic Issues
 - a. Planning for land return or compensation for the many groups who have lost land
 - b. Return of internally displaced groups

Politicized Ethnicity

Politicized ethnicity threatens democracy and development, as votes, candidate choices and appointments are given to those who share historical ties or are less likely to skew the legislative, judicial and executive atmospheres negatively for certain groups rather than being based around sound policies, equality and human rights. The State's report to the CERD states that it encourages the prevalence of ethnicity in government proceedings, for example: dress code.¹¹ Reducing discrimination amongst government employees is important for creating an efficient, collaborative and fair work environment. However, this trend needs to be continued into the public sphere, beginning with a transformation in the communication between the politicians and the public, for example: during campaigning. Human Rights Watch and Amnesty International have concluded, in agreement with Kenya's National Commission on Human Rights that campaigning heavily revolves around ethnic issues and dialogue. The Commission's Strategic Plan refers to negative ethnicity as one of the core problems needing to be addressed:

“Kenya's ethnic diversity should be celebrated. Instead, by giving rise to ethnic-based discrimination it has become one of the challenges the country must confront. Ethnic polarization has been worsened by political entrepreneurs who mobilize by playing on ethnic related grievances and insecurities. Based on past experience, many view the ascendancy of their own ethnic kin to the presidency as the best assurance of access to rights especially economic ones. Efforts to counter ethnic jingoism will be a key area of focus by the Commission.”¹²

This threat to human security that many Kenyans fear during election time stems from the ethnic struggles following independence, resulting in the loss of land and marginalization of certain people groups. “The Kenya of today is marked by increased tension between ethnic groups. Tension that goes back to the days when Jomo Kenyatta was president (1964-1978) and the Kikuyu dominated Kenyan politics. The extent of Kikuyu

¹¹ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, article 1.

¹² Kenya National Commission on Human Rights. Strategic Plan 2009-2013. p. 5-6

domination came to alienate the Luo and other ethnic groups within the country. [...] Daniel Arap Moi belongs to the Kalenjin group. In Kenya, 'Democratization has resulted in reaffirmation of ethnic identities, with political parties emerging along ethnoregional criteria rather than ideological ones'.¹³ However, the use of ethnicity in campaigning and voting is only further institutionalizing this effect, making it more difficult to address the causes. Candidates may appoint a running mate or give other high profile jobs to members of larger groups in hopes of securing the public's votes. An academic study concluded from 2007 election data, that voting is not necessarily reflective of one's personal ethnicity, commonly called an "ethnic head count," but it is based on the candidate's attitude and treatment of the voter's ethnic group and that groups often vote in solidarity.¹⁴ This use of ethnicity in voting decisions and the candidates' campaigning are serious threats to democracy and reduction of racial discrimination. Candidates should not be evaluated by their racial background or relationships and should not behave or speak in a way that threatens citizens' human security based on ethnic foundations. Article 2(e) of the ICERD says States are to "discourage anything which tends to strengthen racial division."¹⁵ Article 6 states that all persons under a State's jurisdiction is entitled to the rights declared in the Universal Declaration of Human Rights and therefore should feel secure that any person elected to a government position will equally protect and serve all residents. National leaders have the unique opportunity to lead the way for the nation's refocus on a non-discriminatory future. Kenya has vowed in their CERD report to "ensure that official action is taken against systems and practices contributing to discrimination."¹⁶ African Rights Monitor invites Kenyan officials to examine their language and behavior both during campaigning and while in office and recognize the negative effects and poor example it gives concerning human rights norms.

Somalian Refugees

Kenya has received over 350,000 Somalia refugees over the past few years. Due to increasing pressure of drought, rising food costs, and the conflict in Somalia, the past few months have seen an influx of arrivals. There have been up to 1,300 arrivals documented in the Dadaab camp alone each day.¹⁷ Human Rights Watch (HRW) has a 92-page report specifically addressing the treatment of Somali refugees by the Kenyan police and border control, with 102 interviews with Somalia refugees in Dadaab from March 2010. Each of

¹³ Internal Displacement Monitoring Centre (IDMC). 'Kenya: Speedy reform needed to deal with past injustices and prevent future displacement'. A profile of the internal displacement situation. 10 June, 2010. p. 32. Available at www.internal-displacement.org.

¹⁴ Bratton, M and Kimenyi M. "Voting in Kenya: Putting Ethnicity in Perspective." University of Connecticut Economics Department Working Paper Series. March 2008.

¹⁵ *International Convention on the Elimination of All Forms of Racial Discrimination* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, article 2.

¹⁶ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, article 2.

¹⁷ BBC News Africa. "Somalia fleeing to Kenya in large numbers." 28 June, 2011. <http://www.bbc.co.uk/news/world-africa-13937486>

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the interviewees cited an account of physical and/or emotional abuse by either a police officer or a private individual en route to or within the Dadaab camp (in which investigation or prosecution were not carried out). HRW also engaged in numerous interviews with local and international NGOs, UN agency staff, and Kenyan police officials. African Rights Monitor strongly urges the Kenyan government officials to read this document's excerpts from the interviews, which describe in detail the full depth and scope of these harmful acts. Following is an example of the accounts collected:

“A 38-year-old woman from Mogadishu traveling with her three children—aged three and a half, five, and 10 years old—left Doblely on February 20, 2010 and traveled for a full night and day in a minibus towards the Dadaab camps through the bush, together with three men and two women with their young children. She said:

*‘At the end of that first day, we drove onto a big road. Soon after that, about ten men with their trousers tucked into their boots and with small guns stopped us. I could not see the color of the clothes. I just remember their boots and belts. The driver later told me they were speaking Swahili. They told us to get out of the car and then they split up the men from the women and children. Four of the men took us three women about 300 meters away and then they attacked us. All four of them pulled my hair, tried to strangle me, tore my clothes, and punched me. Then all four raped me, one after the other. I lost consciousness during the rape. They didn’t say anything to us while they were attacking us. They just threatened us with their guns. After it was over, they just left. A short while later the men and driver and children found us and we drove to Dagahaley camp’.*¹⁸

The human rights violations against the Somali refugees are widespread, diverse and serious. During their journey from the Kenya/Somalia border to the camp in Dadaab and during their residency, the authorities clearly take advantage of the refugees' vulnerable situation with actions ranging from intimidation to wrongful imprisonment or violence. A worker in Garissa told Human Rights Watch that the police often call Somalis “mbuzi,” meaning goats.¹⁹ The National Strategic Plan for the Elimination of Discrimination and the State's report to the CERD are adamant in declaring protection against discrimination for non-citizens equal to the protection granted to citizens. The State's CERD report declares that Kenya “has seen to the provision of” human rights protection in the case of refugees”, implying that protection has been successfully fulfilled.²⁰ However, this is not the case. The following human rights violations occur on a regular basis:

- Violence and rape.
- Theft, bribery and extortion.
- Unlawful detention in unacceptable conditions

¹⁸ Human Rights Watch. “Welcome to Kenya” Police Abuse of Somali Refugees. June 2010, p. 44–5.

¹⁹ HRW, p. 22.

²⁰ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1–4, 27 October, 2010, article 2.36.

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- No investigation or enforcement of laws broken by State employees or private individuals
- Violation of the principle of non refoulement

Numerous accounts of these actions committed by Kenyan police and border patrol have been documented through interviews by organizations such as Human Rights Watch, Amnesty International, and International Crisis Group. Somali refugees have reported beatings, slaps, whipping, kicking and random gunfire. They often separate the men and women from each other, raping the women. Money and/or possessions are often stolen. There are also numerous cases of family members being held until a ransom is paid for their release. Some are taken to the Liboi, Garissa or Dadaab police stations and packed into small cells with little food, water or bathroom access until someone pays for their release. Refugees are either taken to camps fit for a quarter of the number of people living there or returned to Somalia.²¹

These actions taken against the Somali refugees violate the International Covenant on Elimination of all forms of Racial Discrimination as the violations against these refugees are based on their national origin. “Somalis are Cushites while majority Kenyans are either Bantus or Nilotic tribes with distinctive physical features. Religious and cultural practices also make Somalis different and easily identifiable. It is therefore much easier to pick out a Somali refugee than say, a Congolese or Ugandan”.²² Marginalisation of the Northern Frontier Districts has continued since the ‘Shifta War’²³ in the ‘60s and suspicions have been compounded by the “War on Terror” and Al Shabaab sentiments, jealousy of prosperous Somali residents, resentment of refugee burden. “For this historical and identity reasons, non-Somali refugees are not the primary target for explicit discrimination. However, those non-Somali refugees found on the wrong side of the law, will often be mistreated.”²⁴ Article 1.2 explicitly states that citizenship status should have no bearing on the protection of rights.²⁵ Therefore, Somalis seeking asylum in Kenya should be protected and aided in their journey. Refugees are a very vulnerable population, especially given those fleeing Somalia are 80 percent women and children escaping from persecution in their homeland, often forced to leave behind the majority of their possessions.²⁶ Stealing from them, while illegal, also increases the pressure on the overwhelmed camps trying to meet their basic needs.

²¹ Human Rights Watch, “UN Security Council: Letter Regarding Upcoming Trip,” May 2011.

²² Ido, Abduba Mollu.

²³ “During colonial times, Somali (and indeed all pastoralist regions were administered separately in what was referred to as ‘closed districts or Northern Frontier Districts’ (NFD). Secondly, at the time of independence, British colonialists, through a referendum asked the people of NFD whether they wanted to remain within Kenya, remain separate entity as NFD or secede to Somalia. The NFD people chose to secede to Somalia. The reasons for secession was political, religious, social and cultural ties between the Kenyan and Somalia – Somalis. This decision was rejected by the new Kenya government and a war popularly known as ‘Shifta War’ broke out. Marginalisation of NFD set in and continues to date.” Quoted from Ido, Abduba Mollu.

²⁴ Ido, Abduba Mollu.

²⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, article 1.2.

²⁶ Human Rights Watch. “Welcome to Kenya” Police Abuse of Somali Refugees. June 2010, p. 4.

Endowed with human dignity as stated in every human rights covenant, refugees in Kenya are entitled by article 5(b) of the ICERD to “the right to security of person and protection by the State against violence or bodily harm, whether inflicted by a government official or by any individual group or institution.” Article 5(di) guarantees “the right to freedom of movement and residence within the border of the State.”²⁷ Many of the other rights, such as access to public spaces, participation in politics, education and housing are also at a loss in these situations.

According to the Convention and Protocol relating to the Status of Refugees, the police officers who force Somalia refugees back to Somalia are in violation of International Migration Law and International Human Rights Law²⁸ determining that those fleeing from persecution in their home country must be accepted and treated lawfully. “The principle of *nonrefoulement* is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return (“*refouler*”) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.”²⁹

However, widespread misunderstanding of this concept among the Kenya police and border control has resulted in the authorities using the Kenyan Immigration Act to justify the unlawful arrest, detainment and return of refugees. “Police arresting newly arrived Somali asylum seekers incorrectly tell them they are unlawfully in Kenya and charge them with offenses under Kenya’s Immigration Act which prohibits entry into Kenya without documents and a visa. But the Act does not apply to asylum seekers who, under Kenya’s Refugee Act, have 30 days from the moment they enter the country to register as refugees with the authorities at the nearest office of the Kenyan Refugee Commissioner. For Somalis crossing overland from Somalia, that means the Dadaab camps.”³⁰ Higher-level police officials also either do not understand the situation or are covering up these offenses. A Human Rights Watch interview with the Minister of State for Provincial Administration and Internal Security indicated that regional authorities do not perceive the detainment and ill treatment as a rights violation if they are released and make it to the camp eventually.³¹ But this is a tragic misinterpretation of the law and neglect to actively protect human rights. The African Rights Monitor invites the Kenyan government to ensure that all levels of police and officials working in the border areas correctly understand the national and international immigration laws, human rights standards and their role.

²⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, article 5.

²⁸ The Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December, 1948, Article 14. and UNHCR. Convention and Protocol relating to the status of refugees. December, 2010.

²⁹ UNHCR, p. 3.

³⁰ Human Rights Watch. “Welcome to Kenya” Police Abuse of Somali Refugees. June 2010, p. 5.

³¹ HRW, p. 7.

The police also often justify their discriminatory actions by claiming the refugees are from the Islamic group, Al-Shabaab. However, there is no established procedure for determining whether a person is an Al-Shabaab supporter or not. It is liberally applied to justify stealing and violence, establishing an environment of hatred and superiority of race. The refugees are victims of the terrorist group as well, suffering trauma on many levels. Accusations, frustrations and abuses compound an already terrible situation. Furthermore, it should be recognized that violating human rights of Somali people is unlikely to be a successful strategy to discourage terrorist attacks from Somali extremists. Violating human rights is much more likely to undermine national security. The Minister of State for Provincial Administration and Internal Security was also quoted saying, “any unlawful action that may have been taken by a police officer is not a reflection of government policy.”³² This should raise tremendous alarm for government officials. The police force should not be committing unlawful acts and they should be a reflection of government policies as well as a mechanism for enforcement. Articles 2.1 and 4(c) of the CERD affirm that the State has a responsibility to ensure that all of its public authorities act in conformity to its obligations by ceasing to abuse and take advantage of refugees and take appropriate measures against private individuals threatening them.³³ African Rights Monitor suggests that the state investigate the factors (economic, social, etc) that are pushing police to disobey the national and international laws and seek to eliminate them. Kenya and the UNHCR have recently met and agreed to 320 million shillings to address issues with Somalia refugees in Kenya.³⁴ This deal is an enormous opportunity to make positive changes for the well-being of the refugees and alleviate strain on Kenya. Also, it is imperative that thorough investigations into the human rights violations need to take place.

Land and Conflict

Land issues stem from the thousands displaced from the highlands during the colonial period and the inability to simply give the land back to its prior owners following independence (due to the over pricing of the formal British “owners” placing it out of reach for anyone but the rich).³⁵ This issues surrounding ethnicity and land ownership/use has carried on, manifesting itself in renting standards, political vendettas, and violent removal of large groups of people from certain areas. Researchers from the Forced Migration Studies Program in South Africa note that, “discourses of indigeneity” are used to exclude rivals from economic and political resources as rights in Kenya are inextricably tied to territorial origins. This leads to ethnic conflict and social and

³² HRW, p. 7.

³³ *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106

(XX) of 21 December 1965, entry into force 4 January 1969, articles 2 and 4.

³⁴ Daily Nation on the Web. “Somalia: UN urged to move refugee camps” All Africa, 20 April, 2011.

³⁵ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the

Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, article 4 and Landau, Loren B., and Jean Pierre Misago (2009), Who to Blame and What’s to Gain? Reflections on Space, State, and Violence in Kenya and South Africa, in: Africa Spectrum, 44, 1,102.

institutional exclusion.³⁶ This violates the ICERD articles 1 and 5 as use of this language and practice (some have named the more extreme uses of the ideology, Majimboism)³⁷ is at least exhibiting distinction and preference in matters of human rights based on racial identity. Some leasing agencies and landlords have formed a coalition to agree to not advertise or refuse occupancy or customers based on race. The government has a great opportunity to provide incentives for more to join this movement. They can also encourage and support similar initiatives. This issue is one to be closely monitored, especially in light of the violence that followed the 2007 elections. Other racially tense areas of the world have formally banned the use of racial descriptions in media and advertising in order to promote a national identity and decrease stereotyping. Kenya's Human Rights Commission has stated support for this kind of measure and is developing legislation against hate speech.³⁸

Internal displacements over land have been occurring across Kenya since independence.

“In October [2010], inter-ethnic violence over land led to the displacement of hundreds of people in Garissa District of North Eastern Province.”³⁹ The fertile Rift Valley Province is host a large quantity of these clashes over ethnic ownership of land.

“Long-unresolved issues related to the shifting ownership and tenure of (and large-scale evictions from) the province's more fertile land tend to erupt into violence around the time of elections as campaigning candidates pledge to correct past “injustices” to win support...”⁴⁰ “The Rift Valley area is not only the country's most fertile farmland but also accounts for the largest number of seats in Parliament. Not surprisingly, ethnic groups that Majimboism proponents proposed to expel from the Rift Valley are those perceived to support the political opposition’.”⁴¹

African Rights Monitor would like to encourage the government of Kenya to continue working on strategies it has been discussing over the years to resolve this intricate spatial, political and ethnic issue and begin implementing measures to ensure the distribution of economic development, political power, and housing for all Kenyans is not based on ethnicity. Most importantly, the removal of groups of people from areas of the country based on ethnic indicators /or historical instances must cease immediately while internally displaced persons must be aided in acquiring a home once again.

³⁶ Landau, 99–110.

³⁷ Majimboism is “rule by ethnic majority according to region or ‘ethnic regionalism.’ iDMC, ‘Kenya: Speedy reform needed to deal with past injustices and prevent future displacement’” p. 12.

³⁸ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1–4, 27 October, 2010, article 2.71

³⁹ iDMC website. Country page: Kenya. [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountries\)/6E38F8898D53EB58802570A7004B4BCB?OpenDocument&expand=2.1&link=26.2.1&count=10000#26.2.1](http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/6E38F8898D53EB58802570A7004B4BCB?OpenDocument&expand=2.1&link=26.2.1&count=10000#26.2.1).

⁴⁰ iDMC, ‘Kenya: Speedy reform needed to deal with past injustices and prevent future displacement’ p. 57

⁴¹ iDMC, ‘Kenya: Speedy reform needed to deal with past injustices and prevent future displacement’ p. 27

Access to Legal Redress

The previous issues deal mainly with the proactive protection of rights, but it is also essential to have access to legal service for justice and remediation regarding racial discrimination cases. Currently, these types of cases can only be heard in the highest court.⁴² However, there is no digital and very little written documentation of legal cases in Kenya to evaluate this statistically. The state acknowledges the need for greater access to justice in their CERD report, stating, “The Government of Kenya has taken a number of initiatives and laid emphasis on the need for an active and widespread legal aid system that enables law and justice to reach the people, rather than requiring people to reach out to the law. Lack of access to justice is, in and of itself, a form of discrimination to the extent that it denies people the equal protection of the law.”⁴³ African Rights Monitor applauds the government for such understanding and recognition. We look forward to seeing these initiatives adequately staffed and financially resourced for success. The State’s report notes that the National Legal Aid (And Awareness) Scheme is a key component to solve this issue. Implementation of mobile court in Kakima and Dadaab intends to address the lack of investigations and prosecutions for the crimes committed against refugees, which has fostered an atmosphere of impunity. According to article 6 of the CERD, everyone is entitled to protection and remedy under the law. There needs to be an enforcement of the national laws and the police force should be a legitimate body of justice and protection of all peoples. This includes sufficient staffing for gender sensitive cases, such as rape.

African Rights Monitor would like to conclude its observations with an acknowledgement that although Kenya has established a good formal legal foundation for the issues discussed in this report, unfortunately, the cultural norms, individual level acceptance, and enforcement is lacking. The State’s report to the CERD states that the Covenant has been fully domesticated into legislation. However, if you compare the written guarantee of rights to refugees recorded in items 35 and 36 (a-e) of the State’s report⁴⁴ to the accounts given by observers in the region of wide spread abuse and discrimination of Somali refugees and internally displaced Kenyans, you will see that the law is not legitimate. “Indeed, the countries’ respective economic capitals – Nairobi and Johannesburg – have global reputations for lawlessness and gangsterism.”⁴⁵ “New regimes have either not been able to shake off such “heavy” institutional legacies and still

⁴² Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, Article 5.95.

⁴³ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, Article 5.98.

⁴⁴ Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by States parties under article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination: Combined initial through fourth periodic reports of States parties: Kenya*, United Nations Convention on the Elimination of all Forms of Racial Discrimination CERD/c/Ken/1-4, 27 October, 2010, Article 1.35-6.

⁴⁵ Landau, p. 103.

use the same ‘technologies of alienage’, or have been authors of new forms of marginalisation that are reinforcing a localised/territorialised, nationalistic and ethnic understanding of rights. Such an understanding is in turn leading to a violent ‘nativist revivalism’.”⁴⁶ The State’s report to the CERD Committee this year lists its responses and accomplishments in fighting racial discrimination. The sections in their report are heavily focused on administrative, legislative, and constitutional guarantees. “Kenya’s archives are already littered with weighty and often well-intentioned reports into a variety of abuses, from land-grabs to forced displacement and killings. Many have never been publicly released. None has led to successful high-level prosecutions.”⁴⁷ The truth commission created after the 2008 election violence, heavily criticized for its failure to reconcile reconciling perpetrators and victims, can still become an opportunity for resolving deep issues that can source new violence. But as Ronald Slye stated, its recommendations are “only as powerful as law enforcement.”⁴⁸ The next step in fighting racial discrimination in Kenya is to ensure intended measures are communicated to the public and officials, training offered, enforcement procured and acceptance attained.

Recommendations

African Rights Monitor offers the following recommendations for the Republic of Kenya:

1. Foster a political environment, which strengthens and promotes the human security of all Kenyans regardless of ethnic ratios in the government.
2. Continue to pursue reconciliation for past human rights violations.
3. Complete widespread investigations and prosecutions of offenses in IDP camps and relating to violence spurred by political and ethnic tensions.
4. Consider the factors pushing the police force to act illegally and seek to address the causes of their motivations for violating human rights and national laws.
5. Invest in training on issues of human rights and refugee law for police officers and other state officials working in areas with high refugee traffic.
6. Resolve remaining land debates to enable return of internally displaced persons, foster development, harmony and respect for human rights, and reduce the likelihood of violence over land issues.
7. Improve implementation and enforcement of the relevant legal statutes.
8. Increase access to legal redress in racial discrimination cases.
9. Support civil society and grassroots initiatives, which encourage and promote the rights of refugees and ethnic minorities.
10. Utilize the international community for assistance in fulfilling requests for increased staff, training, and resources.

⁴⁶ Landau, p. 104.

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⁴⁸ IRIM. Analysis: Truth and Consequence in Kenya. 23 May 2011.