

# **KENYA COALITION ON CIVIL AND POLITICAL RIGHTS (KCCPR)**

## **Alternative Report to the UN Human Rights Committee in Consideration of Kenya's Third Periodic Report**

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## **EXECUTIVE SUMMARY**

The Kenya Coalition on Civil and Political Rights (KCCPR) is a coalition of twelve civil-society organisations that have jointly collaborated on the ensuing report. This report aims to demonstrate the prevailing environment for civil and political rights in Kenya in light of various developments, the most significant being the promulgation of the new Constitution. The report is a partial review on Kenya's implementation of the International Covenant on Civil and Political Rights (hereinafter, the Covenant) illuminating a limited number of contemporary concerns. The report interrogates a number of articles under the Covenant, citing several instances and examples of violations by the state while making recommendations to ameliorate the situation in each instance. The following are the issues raised within the report and we make the following recommendations:

### **1. Rights of Minorities and Marginalised Communities**

- *1.1 - Failure to protect the land rights of Marginalised Communities (Articles 1 and 27)*
  - i. That the government implements the decision in *CEMIRIDE (on behalf of the Endorois Community) versus The Government of Kenya* in accordance with the recommendations of the African Commission on Human and Peoples' Rights.
  - ii. That the enactment of the legislation on community land is undertaken without further delay to provide the legal framework for the use, transfer and management of community land in line with the Constitution.
  - iii. That the enactment of the Evictions and Resettlement Guidelines Bill 2011 is undertaken without further delay to provide the legal framework, including guidelines for evictions that accord with the Constitution and internationally accepted standards; and provide for protection against inhumane and unlawful evictions.
  - iv. That the National Land Commission is duly constituted with a membership that complies with constitutional provisions on diversity, leadership and integrity and has requisite competencies on ascertaining the historical land rights of marginalised communities.
  - v. That the government places a moratorium on creation of any new protected areas, new natural resource extraction and development licensing, extension of existing land and natural resource leases, or large scale development in lands falling within Article 63 of the Constitution for a minimum of two years to allow filing and adjudication of community claims.
  - vi. That the government institutes an implementation and reparations framework for all recommendations emanating from state-sanctioned inquiries and commissions impacting on historical land injustices for marginalized communities.
- *1.2 - Citizenship based discrimination*
  - i. That the government of Kenya upholds the constitutional entitlement of every citizen to a Kenyan passport and any other documents of registration and identification without discrimination.

- ii. That the government of Kenya publishes the rules and regulations to the Citizenship and Immigration Act, 2011 without further delay to prescribe an application process for registration of stateless persons as citizens and introduce non-discriminatory procedures for registration of persons.
- iii. That the government of Kenya undertakes awareness campaigns on the procedure and timelines for registration of stateless persons as citizens<sup>1</sup>.
- iv. That the government of Kenya fully implements the recommendations issued to it by the African Committee of Experts on the Rights and Welfare of the Child in the case of *IHRDA and Open Society Justice Initiative (OSJI)(on behalf of children of Nubian descent in Kenya) v Kenya*.
- v. That the government of Kenya up-scales administrative efforts to avail any document of identification to all eligible Kenyans, especially minority and marginalized communities.
- vi. That the government of Kenya institutes a national campaign on the importance and the process of accessing identification documents.
- *1.3 - Failure to protect and promote the cultures of indigenous communities (Article 27)*
  - i. That the government enacts legislation on culture in line with the Constitution and the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.
  - ii. That the government of Kenya undertakes the extensive preliminary surveys to ascertain the status of all forms of Intangible Cultural Heritage and documents such instances in order to develop a national plan for safeguarding these communities. It should utilize this in development of programmes such as cultural tourism to the benefit of the communities.
  - iii. That the government of Kenya through the National Museum of Kenya develops operational guidelines for research and documentation of intangible cultural heritage in line with the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.
  - iv. That the government of Kenya promotes the infusion of Kenya's intangible cultural heritage within the education syllabus.

## **2. Protection of Refugees and Asylum Seekers**

- *2.1 - The right to asylum (Article 13)*
  - i. The state must honour its national and international obligation to protect the security of persons. Judicial and law enforcement officers need to be continuously sensitised on the provisions of the Refugees Act to prevent the criminal treatment of refugees and asylum seekers.
  - ii. The state should create space for dialogue on matters affecting refugees and other forced migrants in Kenya to facilitate a better understanding of the obligations in the various instruments and enable actors to address the challenges affecting service delivery better.

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<sup>1</sup> Applications for citizenship by stateless persons under sections 15 and 17 of the Citizenship and Immigration Act 2011 shall be made within a period of five years from the date of commencement of the Act and may by notice in the gazette be extended by the Cabinet Secretary for an additional period of three years.

- iii. The state must capacitate the Department of Refugee Affairs to effectively take over registration and refugee status determination from UNHCR, setting up a system that adequately gives effect to its obligations under the Refugees Act, conforms to international standards but is also agreeable to other Government departments.
- iv. The state should investigate the complaints made against security forces for the use of excessive force, prosecute suspected perpetrators and publish periodic reports.
- v. The state should clarify when a situation of emergency or situations in the interests of national security exist and the scopes of the relevant derogations to justify the raids made in response to instances of insecurity.
- vi. The state should ensure all immigration departments being set up countrywide include staff with the relevant competencies on refugee protection and ensure access to legal aid and interpretation services for refugees and asylum seekers who come into conflict with the law.
- vii. The state should improve border management practices that facilitate access to asylum and the protection of asylum seekers while addressing other state concerns such as re-opening the Kenya-Somalia border, re-establishing the reception and transit centres and creating a refugee protection unit within the police force to deal exclusively with refugee protection.
- *2.2 - The absence of freedom of movement for refugees (Article 12)*
  - i. The state should adopt a Refugees Policy that clarifies the legal status of refugees outside of camps and options for durable solutions for refugees.
- *2.3 - Specific protection needs of refugee women and children (Articles 23 and 24)*
  - i. The state should re-establish transit and reception centres to enable vulnerability screening for unaccompanied minors.
  - ii. The state should provide adequate security for agencies working in refugee camps and thereby provide an enabling environment for service delivery to refugees.
  - iii. The state should support actors working on family tracing and reunification through closer engagement or partnerships with them and through the promotion of awareness creation on these services.

### **3. Non-discrimination and Equality before the Law**

- *3.1 - The lack of a comprehensive anti-discrimination law (Article 2.2)*
  - i. The Government should enact a comprehensive anti-discrimination law that consolidates all the legal provisions on equality and freedom from discrimination as well as provide for sanctions and remedies.
- *3.2 - Protection of vulnerable groups (Article 2.1)*  
Sexual and gender minorities
  - i. The Government should repeal all legislation that is discriminatory including sections 162,163 and 165 of the Penal Code and Sexual Offences Act, notably the ambiguity surrounding section 6 on the nature

of indecent acts, which contradict the spirit and provisions of the Constitution.

- ii. In addition, there is a need for tolerance training for public officials, particularly law enforcement agents and healthcare providers, in regards to sensitivity and equal treatment of members of the LGBTI community.
- iii. The government should ensure the security of members of the LGBTI community and that of sexual and gender minority rights activists, and should in particular take the necessary measures to deal with the harassment of these human rights defenders through measures such as investigations and prosecutions of such instances.

#### Persons with disabilities

- i. There have been complaints on the management of funds allocated for persons with disabilities specifically raising the issue of discrimination against persons with mental disabilities. This has been challenged through litigation<sup>2</sup>. Such issues involve the establishment of the funds, distribution of funds, and representation in the management of the funds<sup>3</sup>.
  - ii. Whereas article 54 of the Constitution enshrines the rights of persons with disabilities, the government has not fully implemented the provisions of the Persons with Disabilities Act of 2003<sup>4</sup>.
- 3.3 - *Equality before the law* (Article 27)
    - i. The National Legal Aid and Awareness Programme (NALEAP) which has perpetually remained in a pilot phase should be fully operationalised. The government needs to adopt additional measures to ensure that justice is accessible to all within the Republic.
  - 3.4 - *The lack of adequate support for transitional justice* (Article 2.3)
    - i. Kenya should demonstrate its ability to adhere to its obligations under the Rome Statute and cooperate with the ICC. The Human Rights Committee should strongly urge the Government of Kenya to refrain from political protectionism. The government should desist from subverting the process of the ICC.
    - ii. The government should also establish a credible local judicial mechanism to deal with the middle and low-level perpetrators of the post-election violence and also to address the needs of the victims of the post-election violence, who have not yet received any justice or compensation.
    - iii. There is a legitimate framework in regards to the TJRC, thus the government should harmonize all existing frameworks designed to address priorities such as land issues, equitable distribution of resources,

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<sup>2</sup>High Court of Kenya Constitutional Petition no. 155 A of 2011 Kenya Society for the Mentally Handicapped vs. the Attorney General and 5 others in which the petitioner accuses the state and its organs of violating the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services.

<sup>3</sup> Sections 32, 33, and 34 of the Persons with Disabilities Act

<sup>4</sup> Sections 18 (access to education), 21 (accessibility and mobility requiring all building proprietors to comply within 5 years), 22 (requiring all public buildings be accessible to persons with disabilities), and sections 29 and 30 (providing for assisted voting and accessibility of polling stations).

marginalization, and facilitate the appropriate environment for national dialogue and redress through those existing mechanisms<sup>5</sup>.

- 3.5 - *Extraordinary renditions and lack of a legal framework on counter-terrorism* (Articles 4 and 26)
  - i. The government of Kenya should stop the extraordinary renditions of suspects to other nations based on suspected terrorist activity. Any emerging legislation on terror should ensure justice while safeguarding the rights of persons subject thereto and provide a framework that would curb the issue of extraordinary renditions. The government of Kenya should also internally investigate terrorist acts before extraditing suspects to other nations.

#### **4. Slavery, Servitude and Forced Labour in Practice**

- 4.1 - *Discriminatory labour practices* (Article 8)
  - i. Kenya should ratify ILO Convention 183 and 103. Additionally, it should domesticate the conventions that it has ratified, in particular, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The government should ensure that there are fair labour practices in all sectors, in particular EPZs and the cut-flower industry.
- 4.2 - *Lack of a comprehensive legal framework and enforcement of laws to protect employees* (Article 8)
  - i. The government should expedite the review of the existing labour laws to enhance mechanisms of accountability and fortify protections for certain vulnerable persons. Additionally, labour laws need to conform to international law and regulations, especially labour regulations and conventions. The government should put in place enforcement procedures to ensure compliance with the revised labour laws in both the public and private sectors.
- 4.3 - *Poor working conditions for domestic labourers* (Article 8)
  - i. The state, through the Ministry of Foreign Affairs (MFA), should liaise with various departments and embassies to establish a framework that clearly assists in the documentation and registration of Kenyans abroad. Additionally, there needs to be further scrutiny and investigation of local agencies prior to registration and their applications for renewal to ensure that they do not propagate labour rights violations. The government should also create awareness on the importance of Kenyans reporting to the Kenyan embassies in the countries of employment.
- 4.4 - *Failure to adequately address instances of trafficking* (Article 8)
  - i. The state should ensure the protection of all of its citizens against counter-trafficking by enforcing the Counter-Trafficking in Persons Act.

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<sup>5</sup> The National Cohesion and Integration Commission subject to submissions made in this report, The National Land Commission, The Commission on Revenue Allocation, The National Gender and Equality Commission among others.

## 5. Right to Privacy

- *5.1 - Lack of sufficient safeguards within various laws (Article 17.2)*
  - i. The government should enact the Data Protection Bill 2012 without further delay, so as to ensure that peoples' private information and communication are not accessed arbitrarily.
  - ii. The government should amend the proposed NIS Bill 2011 so that it conforms to international standards on peoples' right to privacy. More specifically, the bill should clearly outline the limitations to sections 19(3) and 31(10), as they are not explicit and could be subject to abuse.

## 6. Freedom of Opinion and Expression; Assembly; and Association (Articles 19, 21 and 22)

- *6.1 - Restrictive regulation of the media (Article 19)*
  - i. Review exiting laws and institutional frameworks pertaining to media regulation and ensure conformity to constitutional and international standards on freedom of expression. This would include: ensuring the independence of the Media Council of Kenya and Communications Commission of Kenya from state control; reviewing the powers of the Communications Commission of Kenya to impose content restrictions; promoting media self-regulation and deleting provisions on registration or education requirements for journalists.
- *6.2 - Legislative limits on freedom of expression (Article 19)*
  - i. The State should decriminalize defamation completely ;
  - ii. The State should set out objective criteria to determine the circumstances that would amount to “propaganda of war”;
- *6.3 - Incidents of threats, attacks, acts of harassment and intimidation against journalists and human rights defenders (Article 19)*
  - i. The government should carry out thorough, independent and impartial investigation into the cases of extrajudicial killings, acts of intimidation and harassment of journalists and human rights defenders, the result of which must be made public, in order to bring all those responsible before a competent, independent and impartial tribunal and apply penal, civil and/or administrative sanctions as provided by law;
  - ii. The government should put an end to all acts of both state and non-state harassment against journalists and human rights defenders and take all necessary measures to guarantee, in all circumstances, their physical and psychological integrity so that they are able to carry out their work without hindrances;
  - iii. The government should comply with Resolutions 119 (2007) of the African Commission on Human and Peoples' Rights on the Situation of Human Rights Defenders in Africa<sup>6</sup>.

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<sup>6</sup>The resolution calls on calling on States to “take all the necessary measures to ensure to all human rights defenders an environment conducive to carrying out their activities without fear of any acts of violence, threats, reprisals, discrimination, pressure and any arbitrary acts by State or non-State actors as a result of their human rights activities” and to “ take specific measures to ensure the physical and moral integrity of their peoples,

- iv. The government should comply with all the provisions of the United Nations Declaration on Human Rights Defenders, in particular with its Article 1<sup>7</sup>
  - 6.4 - *Lack of comprehensive protection of freedom of information* (Article 19)
    - i. Adopt, without further delays, and implement the Freedom of Information (FOI) law
  - 6.5 - *Disruption of public demonstrations and political gatherings* (Article 21)
    - i. The government should review existing mechanisms and institute checks and balances against abuse of police discretion in regards to peoples' right to peaceful assembly.
  - 6.6 - *Threats to the leadership and members of trade unions* (Article 22)
    - i. The government should at all times uphold the right of workers to form and join trade union and to demonstrate as provided for in the Constitution of Kenya at Articles 36 and 41 without any infringements.
- 7. Protection against Propaganda, Discrimination and National, Religious or Racial Hatred**
- 7.1 - *Lack of adequate support for the National Cohesion and Integration Commission (NCIC)*
    - i. The government allocate adequate resources to support the programmatic work of the Commission.
    - ii. The government develop a procedural mechanism involving the NCIC, the Police and the Attorney General's Office on how complaints under the NCI Act are to be investigated and prosecuted with requisite feedback channels.
  - 7.2 - *Failure to adequately enforce the Political Parties Act*
    - i. The Office of the Registrar should publish a list of all sitting members of Parliament deemed to have contravened the Political Parties Act by either being members or affiliating with more than one political party.
    - ii. The Office of the Registrar should issue notifications to the Independent Electoral and Boundaries Commission regarding members of Parliament whose conduct has contravenes the Political Parties Act.
- 8. Electoral Rights**
- 8.1 - *Uncertainty of the election date and lack of adequate pre-election planning*
    - i. The government should unequivocally state its policy on the election date in light of the High Court's decision in John Harun Mwau and Others v. The Attorney General and Others.

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*especially those of human rights defenders, to enable the latter to fully play their role in the promotion and protection of human rights".*

<sup>7</sup>everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels", as well as with Article 12.2 ("the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration").

- ii. The government should ensure that the IEBC receives proper funding to effectively conduct free, fair, and transparent elections.
- 8.2 - *Security threats, voter intimidation and ethnic balkanization*
  - i. The government should ensure that there is adequate security prior to, during and after the elections.
  - ii. The government should put all measures in place to ensure that there are free and fair elections and that all eligible voters are able to do so.
- 8.3 - *Lack of a legal framework for the 2/3 gender principle*
  - i. The government should provide policy directions and enact necessary legislation to facilitate the realisation of the 2/3 gender principle; this should be done before the next elections.
  - ii. Notwithstanding the absence of such enabling legislation, the government should, in its administrative practices, adhere to the principle, particularly in respect of public appointments.

## **INTRODUCTION**

### **Organisational Profiles**

#### **KHRC**

The Kenya Human Rights Commission (KHRC) was founded in 1992 and registered in Kenya in 1994 as a national level Non-Governmental Organisation (NGO). Throughout its existence, the core agenda of the Commission has been campaigning for the entrenchment of a human rights and democratic culture in Kenya through monitoring, documenting and publicising rights violations. The KHRC also works at community level with 27 human rights networks (HURINETs) across Kenya. It links community, national and international human rights concerns. KHRC's strategic plan aims to 'Secure civic-driven, accountable and human rights-centred governance. Its founders and staff are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya. The South Nyanza Human Rights Network, Isiolo Human Rights Network, Trans Rift Human Rights Network and Eastern Human Rights Network participated in the compilation of this report.

#### **ICJ-Kenya**

Established in 1959, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-partisan, not for profit making, membership organisation registered in Kenya. With a membership drawn from the Bar as well as the Bench, it is a National Section of the International Commission of Jurists whose headquarter is in Geneva. It is however autonomous from the ICJ Geneva. Over 300 jurists members comprise the organisation which is dedicated to the legal protection of the rule of law, good governance and human rights in Kenya, and the African region in terms of the general mandate for national sections defined by Article 4 of the ICJ Statute.

### CEMIRIDE

The Centre for Minority Rights Development (CEMIRIDE) was established in 2000 to advocate for the policy inclusion and capacity enhancement of minority and indigenous peoples' activists and their organisations in Kenya and East Africa. Its policy advocacy work has focused on five themes germane to minority and indigenous rights, including: 1. fight against discrimination on the basis of ethnicity, livelihoods, citizenship and descent; 2. pastoralists development issues including land rights and national parks; 3. political participation of minorities including pastoralists women and youth; 4. conflict mapping, monitoring and mitigation, and; 5. policy recognition of indigenous knowledge.

### PDNK

Pastoralists Development Network of Kenya (PDNK) is an advocacy NGO established in 2003. Its mission is to lobby for the inclusion of the pastoralist agenda in mainstream development with the vision of a prosperous pastoralist community. The network comprises pastoralists' individuals, NGOs and CBOs and non-pastoralist organisations and individuals supporting pastoralists' development process in Kenya. It draws its membership from Turkana, Samburu, Baringo, Moyale, Tanariver, Pokot, Marsabit, Isiolo, Garissa, Ijara, Mandera, Wajir, Kajiado, Narok, Transmara, Keiyo, Nakuru, Marakwet, and Laikipia regions.

### CJPC

The Catholic Justice and Peace Commission (CJPC) was formed in 1988 as the executive arm of the Kenya Episcopal Conference (KEC) on matters of peace and justice. The CJPC works to fulfil one of KEC objectives, that is, to promote justice and challenge oppressive structures in society. CJPC's broad aim is to sensitise individuals, communities, and the whole nation on justice, peace issues and their respective roles and duties in addressing peace development, human advancement and human rights.

### Article 19

Article 19: Global Campaign for Free Expression is an international, non-governmental human rights organisation established in 1986 that works around the world to protect and promote the right to freedom of expression and information, including by making submissions to the UN on countries' performance in implementing established freedom of expression standards. ARTICLE 19 has observer status with ECOSOC.

### FIDH

FIDH is an international NGO defending all civil, political, economic, social and cultural rights, set out in the Universal Declaration of Human Rights. It acts in the legal and political field for the creation and reinforcement of international instruments for the protection of Human Rights and for their implementation. It is a federalist movement that acts through and for its national member and partner organisations.

## RCK

The Refugee Consortium of Kenya (RCK) was established in 1998 as a national non-governmental organisation to promote and protect the rights of refugees and asylum seekers in Kenya and the wider East African Region. RCK was conceived as a response to an increasingly complex and deteriorating refugee situation in Kenya and the East African Region. Commonly referred to as — Haki House (Rights House) by refugees, RCK employs a rights-based approach in advocating for humane management of the refugee interventions in Kenya. RCK's main approach is provision of legal aid services to refugees, engaging in advocacy for policy and legislation reforms in line with international instruments and standards on management of refugees and other forced migrants, and through research and information dissemination for awareness-raising on the plight and rights of refugees in Kenya and the region.

## The National Victims and Survivors Network (NVSN)

The National Victims and Survivors Network-NSVN was formed in the year 2008 through the initiative of local Human Rights Non-Governmental organisations chief among them being the Kenya Human Rights Commission as an umbrella organisation representing a number of victim categories and groups. The Network is now registered as a Trust and has been undertaking several transitional Justice oriented initiatives among them being the support for public-interest litigation for victims of the former Nyayo House Torture Chambers, former servicemen of the defunct '82 Airforce, Internally displaced persons, and survivors of the Mau Mau war atrocities. The network is also involved in the documentation and profiling of victims of various gross violations of human rights and other historical injustices and is currently documenting the assassination of a leading Kenyan politician and patriot Josiah Mwangi Karikui popular known as JM.

## **Methodology**

This report has been prepared by the Kenya Coalition on Civil and Political Rights (KCCPR) comprising of 11 national and international organisations and institutions working on human rights and development concerns. The Coalition was facilitated by the Kenya Human Rights Commission and held its first meeting on 5<sup>th</sup> June, 2012. To facilitate the preparation of the Report the stakeholders were sub-divided into various thematic clusters including rights of minorities and marginalised communities; protection of refugees and asylum seekers; non-discrimination and equality before the law; slavery, servitude, and forced labour in practice; right to privacy; freedom of opinion and expression, freedom of assembly and association; protection against propaganda, discrimination, and national hatred; and electoral rights. Two drafting retreats were facilitated on 7<sup>th</sup> and 8<sup>th</sup> of June and then 12<sup>th</sup> – 14<sup>th</sup> of June, 2012. The information gathered by each cluster on areas of critical human rights concern was then collated and validated into the Kenya Coalition on Civil and Political Rights Alternative Report to the Human Rights Committee.

## **Contextual Background**

During the Post-Election violence in 2007 and 2008, Kenya experienced a state of turmoil, uncertainty, and increasing rights violations. Following the unprecedented levels of violence, a National Dialogue and Reconciliation process was initiated and resulted in the formation of a

grand coalition government and a comprehensive reform agenda designed to address the root causes of the post-election violence and overall national discord. This culminated with a referendum for a new Constitution, which was initiated and passed into law on 27<sup>th</sup> August, 2010. The Constitution thus heralded in a new era of governance based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law within Kenya. However, the fledgling Constitution has been faced with the immense task of repealing, updating, and nullifying certain laws which are now in conflict with the new Constitutional dispensation. This has been further complicated by the fragmented leadership of the coalition government which has resulted in an ineffective and uncoordinated approach to reforms<sup>8</sup>. Additionally, there are numerous cases of suspension, ignorance, and even disregard for rights and freedoms guaranteed under the Constitution of Kenya, 2010. These cases demonstrate the lack of behavioural change in state organs required to actualize the principles and national values entrenched in the Constitution. This report seeks to articulate some of these cases and provide appropriate recommendations.

The failure by successive governments to adequately deal with land-related historical injustices has led to minority and marginalized communities being adversely affected in terms of their land tenure security and exposed them to subsequent violations associated with conservation initiatives and other large-scale development projects. Further discrimination has been experienced in the arena of identity and citizenship-based rights. The non-dominant position of these communities has seen their cultural heritage disappear from national prominence in the absence state efforts to promote and protect intangible cultural heritage in Kenya. Constitutional safeguards on recognition have now been availed through the definition of the terms “marginalized community” and “marginalized group”.<sup>9</sup> The land tenure system in Kenya has been overhauled and categorized into public, private and community land. Community land is recognized to vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest<sup>10</sup>; thereby correcting the adverse legacy of the trust land system. The constitution further recognizes the access to a Kenyan passport and any document of registration or identification as a constitutional right for every citizen. The State is mandated under the constitution to promote all forms of national and cultural expression and recognize its role in the development of the nation.

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<sup>8</sup> South Consulting (2009), ‘The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, Status of Implementation of Agenda Items 1-4, 4th Review Report’, Kenya: South Consulting; and Kenyans for Peace with Truth and Justice (KPTJ) submissions to the National Dialogue and Reconciliation Team in October, 2009 summary.

<sup>9</sup> Constitution of Kenya (2010) Article 260. The term “marginalized community” means “(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are : (i) nomadic (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole...”

The term “marginalized group” means “a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4)...”

<sup>10</sup> The Constitution of Kenya (2010) Article 63 (1)

Despite these advancements, discrimination of minority and marginalized communities continues to occur in contravention of article 27 of the ICCPR and article 27 of the Constitution. This has been occasioned by administrative practices that frustrate constitutional and legal provisions; a failure to uphold or implement judicial decisions and a failure to enact enabling legislation that further elaborates constitutional provisions- instances that are referred to below.

Refugees and asylum seekers in Kenya have characteristically been managed from a security perspective despite the Refugees Act of 2006 which clearly provides for the right to asylum. Kenya remains host to a substantial population of refugees (525,893 at 31/5/12, UNHCR), most of whom have been living in the camps for a protracted period. This *de facto* policy of encampment is merged with restrictions on their movement.

In October 2011, the Kenya Defense Forces commenced a military operation in Somalia dubbed *Operation Linda Nchi* (“Protect the Nation”), with the reported motive of eliminating the Al-Shabaab threat to Kenya’s national security. Since the incursion, instances of insecurity have increased both in the refugee camps and in Nairobi and coincided with increasing allegations of excessive use of force and human rights abuses by security forces in North Eastern province. Legislative reform introduced on refugee protection and immigration in response to implementing the Constitution, threatens to retract the protection gains made by the Refugees Act 2006. The proposed Refugee Bill, 2011 wrongfully creates a nexus between criminal activity and the revocation of refugee status. The Constitution introduces a new structure in the management of citizens and foreign nationals with the enactment of the Kenya Citizens and Foreign Nationals Management Service Act 2011 (Service). It makes no reference, however, to the current Department of Refugee Affairs (DRA) and the concern is whether refugee issues will be adequately profiled in a structure that manages all citizenship and immigration matters. Further, persons in the Appeals Tribunal in the Service are not required to have competencies in refugee law<sup>11</sup>, unlike what is required for persons in the Appeals Board<sup>12</sup> under the Refugees Act. Competencies in refugee law are of importance as Kenya plans to resume the refugee status determination process from the United Nations High Commissioner for Refugees (UNHCR). The Kenya Citizenship and Immigration Act of 2011 however, does not exclude refugees from applying for citizenship, thereby expanding the possible options for durable solutions to include local integration.

The Constitution enshrines equality and freedom from discrimination. Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Additionally, Article 27 (4) provides the protected grounds which includes among others sex, race, pregnancy, marital status, health status, ethnic or social origin, age, colour, disability, religion, conscience, belief, culture, language, dress or birth. Article 10 provides for equity, social justice, equality, non-discrimination and protection of the marginalized among the national

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<sup>11</sup> Section 23 (2) The tribunal shall consist of... (a) chairperson... qualified to be appointed a judge of the High Court and (b) two persons qualified and experienced in... public administration, immigration or demography.

<sup>12</sup> Section 9: Membership constitutes a chair who is an advocate of not less than 10 years standing and members with competencies in refugee law, immigration, foreign affairs, national security, local administration and refugee affairs.

values and principles of the governance that is to be used in applying and interpreting the Constitution and other laws and in making or implementing policy decisions; Article 20(4)(a) of the same Constitution lists equality and equity as values to be promoted in interpreting the Bill of Rights. Further, Article 21(3) creates a duty on State actors and all public officers to address the needs of vulnerable groups in society which include women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities and members of particular ethnic, religious or cultural communities. Article 20 binds state and non-state actors in their duty to uphold the protection offered by the Constitution.

There have been attempts at enacting legislation in regards to the full realisation of the rights enshrined in the Constitution. These attempts are evidenced through the tabling of bills, some of which have since been enacted and some of which are still pending. One of the bills that has been pending for a lengthy period is The Equal Opportunities Bill of 2007. However, Parliament is yet to pass any comprehensive anti-discrimination law and as such legal provisions on the protection of equality and freedom from discrimination are fragmented into various pieces of legislation<sup>13</sup>.

The National Cohesion and Integration Commission has faced numerous challenges and has had its efficacy questioned particularly in its ability to address inequality and discrimination. It is crippled by its limited scope of focus which is inherent in the constituting act. Ethnic balance and equality in terms of appointive and elective office has been continually overlooked and neglected by the Commission rendering its mandate ineffective. It recently released a report on ethnic balance in public institutions; however, it has failed in addressing some glaring cases of ethnic imbalance in appointive office as was witnessed in the Kenya Ports Authority incident<sup>14</sup> and the appointment of County Commissioners by the President.

In spite of these efforts, there still exist in Kenya's statute books laws that are discriminatory in nature and therefore an impediment to the enjoyment of the right to equality and freedom from discrimination. For instance, the National Land Policy of Kenya gives spouses equal rights to land with sons and daughters. Women would also be represented in land administration institutions. The policy calls on the government to adhere to and enforce non-discrimination against those with diseases and to put in place mechanisms that protect the rights of AIDS orphans and widows. Despite the existence of this policy, there is a need for the government to enact legislation on land that will further protect the equal right to own property.

The Economic Stimulus Programme that was put into place in 2009 as well as the Constituency Development Fund have so far been riddled with allegations of corruption and mismanagement in the distribution of funds. Further there have been challenges in accessing the funds that are supposedly available for the benefit of the different Constituencies.

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<sup>13</sup> The Elections Act of 2011, Independent Offices Appointment Act of 2011, The Kenya Citizenship and Immigration Act of 2011, National Gender and Equality Commission Act, Kenya National Commission on Human Rights Act, The Political Parties Act, The Employment Act and the Persons with Disabilities Act.

<sup>14</sup> [http://www.standardmedia.co.ke/?articleID=2000057651&story\\_title=Coast-leaders-allege-bias,-want-PS-censured-over-KPA-appointments](http://www.standardmedia.co.ke/?articleID=2000057651&story_title=Coast-leaders-allege-bias,-want-PS-censured-over-KPA-appointments) (Accessed on 14<sup>th</sup> June, 2012)

Although the Judiciary has benefitted from new leadership in the form of a new Chief Justice and Deputy Chief Justice, access to justice remains elusive for rural communities because of the inaccessibility of courthouses because the devolution of judicial services is yet to take form. A strategy plan was revealed in May 2012 that will, if implemented, enhance accessibility of the judiciary. Some pieces of legislation that should be enacted in order to improve access to justice such as a Legal Aid Bill and Small Claims Court Bill remain pending to date. In August 2011, the Chief Justice launched the Commission on Administrative Justice<sup>15</sup> to replace the Public Complaints Standing Committee and additionally receive complaints in regards to administrative malpractice by public officers.

Five years following the post-election violence, the government has failed to establish a credible judicial mechanism to address the numerous human rights violations that occurred and to bring justice to the victims. The victims continue to languish in deplorable conditions with little or no recourse to vindication. These victims continue to face different forms of discrimination in their enjoyment of their rights in contravention of the state's obligations under the covenant.

Article 30 of The Constitution of Kenya provides for the freedom from: slavery, forced labour, and servitude. Kenya is also a state party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as various international labour organization regulations. The gaps in the implementation of these regulations and lack of enforcement mechanisms have resulted in incidences of slavery, servitude, and forced labour in Kenya.

Women employees in Kenya's multi-million shilling cut flower industry are clear victims of these gaps in implementation. A report by the Kenya Human Rights Commission reveals that some employers withhold salaries while the employees are on maternity leave and only pay the dues a whole month after they resume duty. This contravenes the employment act which states, "A female employee shall be entitled to 90 days maternity leave without loss of benefits" and is just one of the abuses faced in the industry. These issues are also prevalent in the Export Processing Zones (EPZs). The practice in the EPZs has resulted in mass-labour rights violations; the corporations are allowed to relocate at any time and there is little or no government oversight and regulatory role in the industry. Of contextual relevance is the need to interrogate the necessity of a rights based framework that can supervise these industries as well as those that export skilled and unskilled labour to ensure that any such action is conducted in a manner that protects the constitutionally enshrined rights of the involved Kenyan citizens.

There is emerging legislation that threatens to erode the Constitutional safeguards on the right to privacy. The National Intelligence Service Bill proposes measures on tapping and monitoring peoples' private conversations in the interest of national security without providing adequate safeguards for such discretion. State agencies such as the Kenya police, the Communications Commission of Kenya, and the National Cohesion and Integration Commission have continued to engage in monitoring of communications without a framework for their accountability on the use of the information obtained.

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<sup>15</sup> As created by the Commission on Administrative Justice Act of 2011.

The post-election violence of 2007-08 has seen greater attention accorded to instances of hate speech and ethnic polarization. The National Cohesion and Integration Act of 2008 was passed to outlaw discrimination on ethnic grounds and establish the National Cohesion and Integration Commission (NCIC). With a mandate to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between ethnic and racial communities in Kenya, and to advise the Government on the same; the NCIC is yet to realize its full potential having not received adequate support.

Despite constitutional safeguards on assembly and association, there continued instances of public protests and political rallies arbitrarily disrupted by the state. Trade unions continue to be stifled in the course their operations with undue threats to the leadership and membership of trade unions initiating industrial action.

Electoral rights have been adversely affected by cases of election-related violence the most significant being the post-election violence of 2007-08. The independent Electoral and Boundaries Commission has voiced its concerns at the lack of sufficient pre-election planning and allocation of resources in anticipation of the next general election. Politicians and political parties continue to operate in contravention of the Political Parties Act as illustrated by the numerous instances of politicians being members of more than one party.

## **ISSUES UNDER CONSIDERATION**

### **1 - RIGHTS OF MINORITIES AND MARGINALIZED COMMUNITIES**

#### **1.1) Failure to protect the land rights of Marginalized Communities (Articles 1 and 27)**

The land rights of marginalized communities in Kenya had previously been curtailed by constitutional provisions on Compulsory Acquisition of Land and Setting Apart of Trust Land that led to the privatisation of their ancestral lands. Furthermore, conservation efforts such as the establishment of gazetted forests and wildlife parks have likewise led to the expulsion of such communities from their traditional lands and the outlawing of subsistence hunting by indigenous communities. Emerging development projects further threaten to extinguish the land rights of marginalized communities.

The promulgation of the new Constitution of Kenya (2010) has however seen major progressive advancements: the definition of marginalized communities (article 260) the replacement of the trust land system with that of community land (article 63); the introduction of devolved government and its protection of the interests of marginalized communities in the event it holds unregistered community land on behalf of the community (article 63(3) as read with article 174); and the establishment of the National Land Commission whose mandate includes the investigation of historical land injustices. Other progressive developments include the Truth, Justice and Reconciliation Commission also with a mandate to investigate historical land injustices; and the development of Evictions and Resettlement Guidelines Bill 2011.

Despite these advancements, land-related concerns from marginalized communities remain unaddressed. The decision by the African Commission on Human and Peoples' Rights (ACHPR) in *CEMIRIDE and Minority Rights Group International (on behalf of the Endorois Welfare Council) versus The Government of Kenya*<sup>16</sup> is yet to be implemented by the Government of Kenya. The members of the Ogiek community evicted from the catchment and biodiversity hotspots within the Mau Forest Complex continue to await resettlement in line with the recommendations of a government-sanctioned taskforce.<sup>17</sup> Marginalized communities including the Awer, Sanye, Orma, Wardei, Samburu, Turkana and El Molo have voiced concerns regarding the impact of the Lamu Port-South Sudan- Ethiopia Transport Corridor (LAPSSET) project on their land rights, cultures and livelihoods. This is further compounded by the lack of sufficient dialogue and consultation between the State and these communities.<sup>18</sup> The failure to adequately address land historical injustices in the Coastal region has led to challenges in state legitimacy as epitomized by the rise of the Mombasa Republican Council (MRC).<sup>19</sup>

The exploration and exploitation of natural resources identified within the lands of marginalized communities continues in the absence of requisite safeguard mechanisms as the legislation on community land is yet to be enacted. The TJRC has sought a statutory amendment to enable it to complete the compilation of its report which was due on May 3, 2012.<sup>20</sup>

#### *Recommendations:*

- i. That the government implement the decision in *CEMIRIDE (on behalf of the Endorois Community) versus The Government of Kenya* in accordance with the recommendations of the African Commission on Human and Peoples' Rights.
- ii. That the enactment of the legislation on community land is undertaken without further delay to provide the legal framework for the use, transfer and management of community land in line with the constitution.
- iii. That the enactment of the Evictions and Resettlement Guidelines Bill 2011 is undertaken without further delay to provide the legal framework, including

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<sup>16</sup> Communication 276/2003. The African Commission recommended that the Respondent State: (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land. (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. (c) Pay adequate compensation to the community for all the loss suffered. (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve. (e) Grant registration to the Endorois Welfare Committee. (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations. (g) Report on the implementation of these recommendations within three months from the date of notification.

<sup>17</sup> Government of Kenya (2009) Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex

<sup>18</sup> International working Group on Indigenous Affairs (IWGIA) (2012) Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) and Indigenous Peoples in Kenya

<sup>19</sup> Kenya Civil Society Strengthening Programme (KCSSP) (2011) The Mombasa Republican Council Conflict Assessment: Threats and Opportunities for Engagement

<sup>20</sup> Kenya Gazette Supplement No. 34 (Bills No.17) The Statute Law (Miscellaneous Amendment) Bill 2012 Section 20

guidelines for evictions that accord with the constitution and internationally accepted standards; and provide for protection against inhumane and unlawful evictions.

- iv. That the National Land Commission is duly constituted with a membership that complies with constitutional provisions on diversity, leadership and integrity and has requisite competencies on ascertaining the historical land rights of marginalised communities.
- v. That the government places a moratorium on creation of any new protected areas, new natural resource extraction and development licensing, extension of existing land and natural resource leases, or large scale development in lands falling within Article 63 of the Constitution for a minimum of two years to allow filing and adjudication of community claims.
- vi. That the government institutes an implementation and reparations framework for all recommendations emanating from state-sanctioned inquiries and commissions impacting on historical land injustices for marginalized communities.

### **1.2) Citizenship based discrimination (Article 27)**

Minority and marginalized communities alike in Kenya have faced citizenship-based discrimination on the basis of laws, policies and administrative actions perpetuated by the state. The Nubian community has in particular, had their citizenship status questioned and they have grappled with the prospects of being declared stateless persons. This matter was adjudicated upon in respect to Nubian children by the African Committee of Experts on the Rights and Welfare of the Child in case of *IHRDA and Open Society Justice Initiative (OSJI)(on behalf of children of Nubian descent in Kenya) v Kenya*.<sup>21</sup> The Kenyan Somali and other communities in the border regions of northern Kenya have been subjected to extraordinary screening and vetting exercises by the government as a precondition to accessing identification documents as epitomized by the following case studies<sup>22</sup>:

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<sup>21</sup> 002/09. The decision of the African Committee was as follows: 1) Recommends that the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth. 2) Recommends that the Government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognized are systematically afforded the benefit of these new measures as a matter of priority. 3) Recommends that the Government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth. 4) Recommends that the Government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfillment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities. 5) Recommends to the Government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

<sup>22</sup> Kenya Human Rights Commission (2008) *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya* at Pg. 35

### Case 1

*'I was born to Kenyan parents in Wajir. I went to primary school in Wajir and Starehe Boys Centre in Nairobi. I turned 18 years while in Starehe Boys Centre. A team of officials from the National Registration Bureau came to register students who had turned 18 years .Of all the students registered that day, I was the only one denied registration. I was referred back to Wajir for vetting before registration. The registration officials allowed me to register after I protested. Although I deserved registration as a Kenyan citizen, I was only given registration because I protested.'*

*Source: Field Research Interviews*

### Case 2

*"My cousin is from the Eastleigh neighbourhood of Nairobi. She was trying to get an ID card and she went to the registration office there...But they told her 'You are a Nubian; you can't get an ID card here.' She went back twice, once with her local councillor and once with her MP, but they told her that Nubians could only get ID cards at Kibera...But when she came here, she had to bring three other Nubians to the office with her to testify that they knew her. She did this last year, and even now she still doesn't have an ID"<sup>23</sup>.*

It is such procedures that have led to further violation of the rights of affected communities such as the right to vote, education and employment.

The Constitution of Kenya (2010) entitles every citizen of Kenya to a Kenyan passport and any document of registration or identification issued by the State to citizens (article 12). The Constitution further provides for the presumption of citizenship by birth for *foundlings* who appear to be below the age of 8 years (article 14). The Citizenship and Immigration Act, 2011 further defines stateless persons and provides for their pathway to accessing Kenyan citizenship<sup>24</sup>.

The government is, however, yet to publish the rules and regulations to the Citizenship and Immigration Act 2011, which would provide the requisite procedures to operationalize the provisions on stateless persons and an opportunity to repeal the discriminatory administrative practices of vetting select marginalized communities. The public and communities in Northern Kenya particularly, have complained of slow administrative procedures that have hindered

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<sup>23</sup> Open Society Justice Initiative (2010) The Nubian Predicament: A Story about Colonial Legacy, Discrimination and Statelessness. Available on <http://www.soros.org/voices/nubian-predicament-story-about-colonial-legacy-discrimination-and-statelessness> as accessed on June 11, 2012

<sup>24</sup>Section 15 (1) of the Citizenship and Immigration Act 2011 defines a stateless person as follows: "A person who does not have an enforceable claim to the citizenship of any recognized state and has been living in Kenya for a continuous period since 12<sup>th</sup> December, 1963, shall be deemed to have been lawfully resident and may, on application, in the prescribed manner be eligible to be registered as a citizen of Kenya....."

Section 17 (1) of the Citizenship and Immigration Act 2011 further states that: "A person who has attained the age of eighteen years and whose parents are or in the case of deceased parents were eligible to be registered as a citizen under sections 15 and 16 may, upon application in the prescribed manner be registered as a citizen of Kenya...."

access to identification documents.<sup>25</sup> The government has however committed to issue 5 million identification cards by the next general election.<sup>26</sup>

*Recommendations:*

- i. That the government of Kenya upholds the constitutional entitlement of every citizen to a Kenyan passport and any other documents of registration and identification without discrimination.
- ii. That the government of Kenya publishes the rules and regulations to the Citizenship and Immigration Act, 2011 without further delay to prescribe an application process for registration of stateless persons as citizens and introduce non-discriminatory procedures for registration of persons.
- iii. That the government of Kenya undertakes awareness campaigns on the procedure and timelines for registration of stateless persons as citizens<sup>27</sup>.
- iv. That the government of Kenya fully implements the recommendations issued to it by the African Committee of Experts on the Rights and Welfare of the Child in the case of *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*.
- v. That the government of Kenya up-scales administrative efforts to avail any document of identification to all eligible Kenyans, especially minority and marginalized communities.
- vi. That the government of Kenya institutes a national campaign on the importance and the process of accessing identification documents.

**1.3) Failure to protect and promote the cultures of indigenous communities (Article 27)**

The promotion of dominant cultures and stereotyping of minority communities as either primitive or backward has resulted in rapid deterioration of cultural heritage. This has further been exacerbated by the absence of specific national laws that help communities protect their knowledge in a manner that reflects their traditions and customs<sup>28</sup>. Communities such as the Suba, Yaaku and Segeju have been adversely affected, as their oral and traditional knowledge is being lost and by extension, their sense of identity.

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<sup>25</sup> National Assembly Official Report (November 18, 2009) Ministerial Statement- Registration of Kenyan Nationals Living in North Eastern Province

<sup>26</sup> Kenya: Cabinet Approves Issuance of 5 million IDs ahead of Elections  
<http://allafrica.com/stories/201204210061.html> as accessed on June 11, 2012

<sup>27</sup> Applications for citizenship by stateless persons under sections 15 and 17 of the Citizenship and Immigration Act 2011 shall be made within a period of five years from the date of commencement of the Act and may by notice in the gazette be extended by the Cabinet Secretary for an additional period of three years.

<sup>28</sup> Safeguarding Endangered Oral Traditions in East Africa

The Constitution of Kenya (2010) recognizes culture as the foundation of the nation (article 11), calls for the promotion, development and use of indigenous languages (Article 7(3)) and recognizes every person's right to use the language and participate in the cultural life of their choice. The Constitution further prescribes the enactment of legislation in respect of culture.

*Recommendations:*

- i. That the government enacts legislation on culture in line with the Constitution and the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.
- ii. That the government of Kenya undertakes the extensive preliminary surveys to ascertain the status of all forms of Intangible Cultural Heritage and documents such instances in order to develop a national plan for safeguarding these communities. It should utilize this in development of programmes such as cultural tourism to the benefit of the communities.
- iii. That the government of Kenya through the National Museum of Kenya develops operational guidelines for research and documentation of intangible cultural heritage in line with the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.
- iv. That the government of Kenya promotes the infusion of Kenya's intangible cultural heritage within the education syllabus.

## **2 - PROTECTION OF REFUGEES AND ASYLUM SEEKERS**

### **2.1) The right to asylum (Article 13)**

The Constitution of Kenya 2010 provides for the freedom and security of the person at Article 29. Despite Section 11 (3) of the Refugees Act 2006 which provides that no person claiming to be a refugee be declared a prohibited immigrant, detained or penalised in any way by reason of illegal entry; Section 13 which provides for the stay of proceedings for persons who have made *bona fide* applications for asylum or who have become refugees; and Section 18 which provides for the non-return of refugees, the Government of Kenya, through police officers, continues to arrest, detain and charge refugees and asylum seekers for unlawful entry and presence under sections 33 and 34 of the Citizenship and Immigration Act 2011 and magistrates continue to convict asylum seekers for these charges.<sup>29</sup>

Serving sentences of imprisonment for unlawful entry or presence amounts to unlawful detention and the prolonged stay in prisons or police cells (typically for durations of one to three months) brought about by the inadequacies in State resources to transport refugees and asylum seekers to the camps in a timely manner also amounts to unlawful detention. Further, the inability to

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<sup>29</sup> In the year 2011, RCK represented 244 asylum-related cases in court, facilitating the release of 457 individuals through dismissal of charges or reversal of court orders which may include orders for deportation, RCK Annual Report 2011.

reverse these orders before having served these sentences exemplifies the inability to access effective remedies. The deficiency of interpreters and access to legal assistance for refugees and asylum seekers result in miscarriages of justice as they plead guilty to charges they do not understand.

The Somali community (ethnic Somali Kenyans and Somali refugees) is particularly affected by these violations amounting to a breach of the right to non-discrimination under Article 27 (4) of the Constitution. The Government has routinely justified police and military raids on Somalis as preserving the interests of national security<sup>30</sup>. Between November 2011 – March 2012, there were reported to be an increase in abuses<sup>31</sup> including rape and attempted sexual assault, beatings, arbitrary detention, extortion, the looting and destruction of property, and various forms of physical mistreatment and deliberate humiliation, such as forcing victims to sit in water, to roll on the ground in the sun, or to carry heavy loads for extended periods.

The Government of Kenya maintains that the Kenya-Somalia border is closed which leads to the infringement of rights of many asylum seekers of Somali origin when they seek to enter Kenya including the right to recognition before the law. Thousands of refugees are reported to have been *refouled* since the closure<sup>32</sup>. Moreover, a continued policy of enclosure has prevented the effective screening of migrants for reasons of security, health and assessing vulnerability.

Refugees and asylum seekers are entitled to a refugee identity card under Section 14 (a) of the Refugees Act. Since the UNHCR undertook the refugee status determination (RSD) process from the Government in 1991, however, the Government has circumvented responsibility for this process and therefore Section 11 (5) and (6)<sup>33</sup> of the Refugees Act have never been applied. Since March 2011, the Government resumed the responsibility of registration issuing refugees with identity cards before referring them to UNHCR for RSD. The DRA, however, has confirmed a backlog in the issuance of over 60,000 identity cards and since the suspension of registration for new arrivals in Dadaab in October 2011<sup>34</sup>, several thousand asylum seekers remain undocumented<sup>35</sup> debilitating their access to social services and other assistance and their right to recognition before the law. The lack of documentation has protection consequences for

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<sup>30</sup> Human Rights Watch (2010), *Welcome to Kenya: Police Abuse of Somali Refugees*

<sup>31</sup> Human Rights Watch, (2012), *Criminal Reprisals: Kenyan Police and Military Abuses of Ethnic Somalis*

<sup>32</sup> Amnesty International, (2010), *From Life without Peace to Peace without Life: The Treatment of Somali Refugees and Asylum Seekers in Kenya*.

<sup>33</sup> (5) The Commissioner may consider all applications referred to him under subsection (4) within ninety days, of the application being so referred and may, within ninety days, make such inquiry or investigation as he thinks necessary into any such application and shall call upon the applicant to make an oral presentation.

(6) After considering the application referred to in subsection (4), the Commissioner –

(a) shall either grant refugee status to the applicant or reject the application; and

(b) shall, within fourteen days, notify the applicant concerned in writing of the decision and in the case of a rejection the applicant shall be informed of the reasons therefore.

<sup>34</sup> [http://www.kenyaredcross.org/index.php?option=com\\_content&view=article&id=262&Itemid=151](http://www.kenyaredcross.org/index.php?option=com_content&view=article&id=262&Itemid=151) accessed on 7/6/12.

<sup>35</sup> <http://csis.org/publication/dadaab-refugee-complex-powder-keg-and-its-giving-sparks> accessed on 7/6/12.

refugees and asylum seekers who are often subjected to harassment, exploitation and abuse by police and other actors without it.<sup>36</sup>

*Recommendations:*

- i. The state must honour its national and international obligation to protect the security of persons. Judicial and law enforcement officers need to be continuously sensitised on the provisions of the Refugees Act to prevent the criminal treatment of refugees and asylum seekers.
- ii. The state should create space for dialogue on matters affecting refugees and other forced migrants in Kenya to facilitate a better understanding of the obligations in the various instruments and enable actors to address the challenges affecting service delivery better.
- iii. The state must capacitate the Department of Refugee Affairs to effectively take over registration and refugee status determination from UNHCR, setting up a system that adequately gives effect to its obligations under the Refugees Act, conforms to international standards but is also agreeable to other Government departments.
- iv. The state should investigate the complaints made against security forces for the use of excessive force, prosecute suspected perpetrators and publish periodic reports.
- v. The state should clarify when a situation of emergency or situations in the interests of national security exist and the scopes of the relevant derogations to justify the raids made in response to instances of insecurity.
- vi. The state should ensure all immigration departments being set up countrywide include staff with the relevant competencies on refugee protection and ensure access to legal aid and interpretation services for refugees and asylum seekers who come into conflict with the law.
- vii. The state should improve border management practices that facilitate access to asylum and the protection of asylum seekers while addressing other state concerns such as re-opening the Kenya-Somalia border, re-establishing the reception and transit centres and creating a refugee protection unit within the police force to deal exclusively with refugee protection.

**2.2) The absence of freedom of movement for refugees (Article 12)**

There are 492,902 registered refugees (UNHCR, 31/5/12) in the camps and the Department of Refugee Affairs (DRA) confirms that the Government indeed pursues an encampment policy despite no express provision for it under the Refugees Act 2006.<sup>37</sup> The Act, however, makes

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<sup>36</sup>Pavanello, S. et al, *Hidden and Exposed: Urban Refugees in Nairobi, Kenya*, (2010).

<sup>37</sup>"Asylum Under Threat: Assessing the protection of Somali refugees in Dadaab refugee camps and along the migration corridor" Refugee Consortium of Kenya. June 2012

reference to designated places under Section 16 (2) and makes residence outside of a camp an offence punishable by a fine of up to Kshs 20,000 or imprisonment for six months or both under Section 25 (f). Section 17 (f) vests the issuance of movement passes for refugees wishing to move out of the camps with Refugee Camp Officers. These are for limited time periods and mostly issued on medical grounds, school attendance and visits to relatives outside of the camps. However, as of February 24, 2012, issuance of movement passes was suspended indefinitely (with exceptions). Freedom of movement facilitates access to opportunities and thus the promotion of self-reliance. Curtailing the freedom of movement and residence is contrary to Article 39 of the Constitution and only increases the vulnerability of persons.

The government from time to time imposes restrictions on movement through curfews during what are considered to be times of insecurity.<sup>38</sup> The government has not adopted a Refugees Policy to clarify the application of these provisions.

*Recommendations:*

- i. The state should adopt a Refugees Policy that clarifies the legal status of refugees outside of camps and options for durable solutions for refugees.

**2.3) Specific Protection needs of refugee women and children (Articles 23 and 24)**

Section 23 of the Refugees Act elaborates the rights of refugee women and children and the government's responsibilities to them in this regard. These include the provision of appropriate protection and assistance to refugee children or children in need of refugee status; facilitation for family tracing and reunification; and protection to children whose family members cannot be found in the same way as children who are temporarily or permanently deprived of family.

The suspension of registration in Dadaab since October 2011 has meant the inability for new arrivals to access social services and other assistance rendering women and children even more vulnerable and especially prone to exploitation and abuse. Security restrictions have meant the scaling the down of agency operations in Dadaab providing for an expanded reliance on refugee incentive workers which creates circumstances in which increased sexual exploitation and abuse can occur due to minimal monitoring<sup>39</sup>.

The closure of the Liboi transit centre in 2007 resulted in the lack of vulnerability screening. This responsibility has since been undertaken by agencies.

Other protection issues specific to refugee children include forced recruitment<sup>40</sup> and protracted encampment. Prolonged encampment effectively infringes on the realization of the rights of a child contrary to Section, 3 Children's Act 2001 and specifically to Sections 10 (Protection of Child Labour and Armed Conflict), 13 (Protection from Abuse etc), 14 (Protection from Harmful Cultural rites etc such as female genital mutilation and early marriages) and 15 (Protection from Sexual Exploitation).

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<sup>38</sup>[http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2012/03/27/feature-01](http://sabahionline.com/en_GB/articles/hoa/articles/features/2012/03/27/feature-01) accessed on 7/6/12.

<sup>39</sup>Interviews with NRC and CARE, March 2012

<sup>40</sup>17% of respondents in the Dadaab field survey listed fear of recruitment (particularly of children) as a key concern in the camps. "Asylum under Threat", RCK, 2012.

The Commissioner for Refugee Affairs is required under Section 23 (3) of the Refugees Act, as far as possible, to assist in the tracing and reunification of refugee children with their parents or other family members. Under Section 6(3) of the Children's Act, the Government shall provide assistance for reunification of the child with his family. These activities, however, have solely been undertaken by agencies whose tracing services have been described as lengthy and achieving minimal success.

*Recommendations:*

- i. The state should re-establish transit and reception centres to enable vulnerability screening for unaccompanied minors.
- ii. The state should provide adequate security for agencies working in refugee camps and thereby provide an enabling environment for service delivery to refugees.
- iii. The state should support actors working on family tracing and reunification through closer engagement or partnerships with them and through the promotion of awareness creation on these services.

### **3 – NON-DISCRIMINATION AND EQUALITY BEFORE THE LAW**

#### **3.1) The lack of comprehensive anti-discrimination law (Article 2.2)**

In October 2010 civil society proposed a statement of principles of equality to the government for adoption and as a precursor to enactment of a comprehensive law but the state declined the proposal.

In 2011, the state passed three pieces<sup>41</sup> of legislation in furtherance of article 59 of the Constitution on the establishment of the Kenya National Human Rights and Equality Commission. The effect of this tripartite approach was to further disintegrate the enforcement mechanisms of the right to equality and freedom from discrimination. Further, these bodies have been faced with serious problems including setting up, funding, and scope of their powers and functions.

*Recommendations:*

- i. The Government should enact a comprehensive anti-discrimination law that consolidates all the legal provisions on equality and freedom from discrimination as well as provide for sanctions and remedies.

#### **3.2) Protection of vulnerable groups (Article 2.1)**

##### **Sexual and Gender Minorities**

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<sup>41</sup> The Kenya National Commission on Human Rights Act, The Kenya National Gender and Equality Commission Act and the Commission on Administrative Justice Act.

To date, the state has not taken any specific legislative or administrative action to ensure the protection of vulnerable groups in particular sexual and gender minorities. Consensual same sex practices between adult males are still criminalized under sections 162,163 and 165 of the Penal Code (Cap 63). This is echoed in the Sexual Offences Act. A 2010 report by the Kenya Human Rights Commission<sup>42</sup> highlighted the level of discrimination suffered by sexual and gender minorities in Kenya. The report highlights vicious attacks on LGBTI persons and affiliates who were likened to drug addicts and paedophiles. Examples include former president Daniel arap Moi denouncing homosexuality as a scourge against Christianity, harassment by police including bogus charges and detention beyond constitutional allowance, and mob justice through violence, lynchings, and sexual abuse. There are further examples of instigation by politicians and religious leaders<sup>43</sup>. There has also been hate speech, violence, arbitrary arrest, and extortion of officials and police of the LGBTI community. This was supported by the Kenya National Commission on Human Rights (KNCHR) report in 2012 on sexual and reproductive health in Kenya<sup>44</sup>.

Additionally, Sexual rights defenders live in fear in Kenya. For instance, Denis Karimi Nzioka, a renowned LGBTI activist, was, in November 2010, forced to vacate his house after appearing on various occasions on television and radio advocating rights for LGBTI persons. He also received threats based on his work and was targeted by unknown persons with violence or death. Another LGBTI activist, and then general manager of GALCK (Gay and Lesbian Coalition of Kenya), reported physical violence on the night of February 25, 2011 when he was humiliated and injured when he intervened in favour of members of the gay community.

*Recommendations:*

- i. The Government should repeal all legislation that is discriminatory including sections 162,163 and 165 of the Penal Code and Sexual Offences Act, notably the ambiguity surrounding section 6 on the nature of indecent acts, which contradict the spirit and provisions of the Constitution.
- ii. In addition, there is a need for tolerance training for public officials, particularly law enforcement agents and healthcare providers, in regards to sensitivity and equal treatment of members of the LGBTI community.
- iii. The government should ensure the security of members of the LGBTI community and that of sexual and gender minority rights activists, and should in particular take the necessary measures to deal with the harassment of these human rights defenders

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<sup>42</sup>The outlawed amongst us. KHRC 2010

<sup>43</sup>For instance, on February 12, 2010, in Mtwapa, religious leaders issued anti-gay statements and requested the closure of the Kenya Medical Research Institute (KEMRI), a centre that conducts research and provides treatment on HIV/AIDS. On the following days, the centre was attacked by a crowd and one of the centre's volunteer was beaten while others were taken to custody by police reportedly to protect them. All were released without charge. Nevertheless, none of the attackers were arrested.

<sup>44</sup> "Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?" (2012) - KNCHR

through measures such as investigations and prosecutions of such instances.

### Persons with Disabilities

There have been complaints on the management of funds allocated for persons with disabilities specifically raising the issue of discrimination against persons with mental disabilities. This has been challenged through litigation<sup>45</sup>. Such issues involve the establishment of the funds, distribution of funds, and representation in the management of the funds<sup>46</sup>.

Whereas article 54 of the Constitution enshrines the rights of persons with disabilities, the government has not fully implemented the provisions of the Persons with Disabilities Act of 2003<sup>47</sup>.

#### *Recommendations:*

- i. The Council of Persons with Disabilities should ensure that the funds allocated to persons with disability reach all the targets.
- ii. The Government should fully operationalise the Persons with Disabilities Act and the Constitutional provisions on the rights of persons with disabilities. The state should implement Article 54 of the Constitution and all of its provisions and in particular should ensure the progressive implementation of the principle that at least five per cent of members of public and elective bodies are persons with disabilities.

### **3.3) Equality before the law (Article 26)**

Equality before the law and access to justice is guaranteed under Article 27(1) and Article 48 of the Constitution. These articles provide for equal protection and equal benefit of the law, which includes access to affordable remedies. There has been some progress in this regard, such as formation of The National Legal Aid and Awareness Programme (NALEAP) which is housed under the Ministry of Justice National Cohesion and Constitutional Affairs (MOJNCCA) and tasked with the creation and advocacy for enactment of a Legal Aid Bill in Kenya. However, it remains in a perpetual pilot stage since its inception in 2007. This raises questions as to the Government's commitment to enhancing the right of access to justice as contained In the Constitution.

#### *Recommendations:*

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<sup>45</sup>High Court of Kenya Constitutional Petition no. 155 A of 2011 Kenya Society for the Mentally Handicapped vs. the Attorney General and 5 others in which the petitioner accuses the state and its organs of violating the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services.

<sup>46</sup> Sections 32, 33, and 34 of the Persons with Disabilities Act

<sup>47</sup> Sections 18 (access to education), 21 (accessibility and mobility requiring all building proprietors to comply within 5 years), 22 (requiring all public buildings be accessible to persons with disabilities), and sections 29 and 30 (providing for assisted voting and accessibility of polling stations).

- i. The National Legal Aid and Awareness Programme (NALEAP) which has perpetually remained in a pilot phase should be fully operationalised. The government needs to adopt additional measures to ensure that justice is accessible to all within the Republic.

#### **3.4) The lack of adequate support for transitional justice (Article 2.3)**

Throughout the International Criminal Court's (ICC) process, all of the Kenyan suspects have submitted themselves voluntarily to the jurisdiction of the ICC, have complied with the rules and procedures of the ICC, and have lodged all complaints, appeals, and challenges through the appropriate court processes. In addition, the release of the confirmation decision, which was a very controversial topic in Kenyan media, did not result in any violence or conflict. However, the government has demonstrated on several occasions a lack of political will to support and cooperate in the ICC process. The government and some political elites have in the recent past engaged in several legal and political actions in a bid to undermine the ICC process and the fight against impunity including seeking deferral from the ICC hearings under article 16, which allows the Security Council to defer a case for 12 months under exceptional circumstances<sup>48</sup>. Examples include:

- Issuance of media statements by high level officials, such as by the President of Kenya on 24<sup>th</sup> of April 2012, that the "ICC cases need to be brought back to Kenya"
- Lodging of a case in the High Court of Kenya, seeking an injunction to prevent the four accused from returning to the ICC<sup>49</sup>
- Ethnic-based groups GEMA<sup>50</sup> and KAMATUSA<sup>51</sup> have stated in public that they are attempting to get "2-3 million signatures<sup>52</sup>" to petition the Government of Kenya to seek a deferral of the cases against Uhuru Kenyatta and William Ruto, respectively.
- Through its position on the East African Legislative Assembly, Kenya has successfully lobbied for the expansion of the jurisdiction of the East African Court of Justice to include certain criminal matters, including crimes against humanity, in an attempt to provide an alternative forum to hear the Kenyan cases currently at the ICC<sup>53</sup>.
- The Kenyan state has lobbied the African Union (AU) for the expansion of the jurisdiction of the African Court of Justice and Human Rights to include

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<sup>48</sup><http://www.hrw.org/news/2011/03/02/gabonnigeriasouth-africa-reconsider-support-deferral-icc-kenya-investigation>(Accessed on 14<sup>th</sup> June, 2012)

<sup>49</sup><http://www.nation.co.ke/News/politics/Chaos+victims+oppose+Govt+move+in+ICC+case/-/1064/1148596/-/qxalcxz/-/index.html>(Accessed on 14<sup>th</sup> June, 2012)

<sup>50</sup>Gikuyu Embu Meru Association

<sup>51</sup>Kalenjin Maasai Turkana and Samburu

<sup>52</sup><http://allafrica.com/stories/201203261553.html> , <http://westfm.co.ke/index-page-news-bid-5045.htm>(Accessed on 14<sup>th</sup> June, 2012)

<sup>53</sup>[http://www.eala.org/oldsite041111/key-documents/doc\\_download/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html](http://www.eala.org/oldsite041111/key-documents/doc_download/266-resolution-seeking-to-try-kenya-2007-general-elections-aftermath-accused-persons-at-eacj-not-icc.html)(Accessed on 14<sup>th</sup> June, 2012)

individual criminal prosecution. Whereas this move has been largely welcomed, the timing of it is speculative and is seen by some as a faint attempt at appeasement to quell dissent<sup>54</sup>.

- Additionally, while the ICC has issued two warrants of arrest against President Omar al-Bashir of Sudan, when he visited Kenya in 2010, the Kenyan government did not arrest him, and disregarded its obligations under the Rome Statute. Following this, Civil Society successfully petitioned the high court to issue arrest warrants against President al-Bashir in 2011<sup>55</sup>.

These actions speak to a more deep-seated agenda by members of the political elite towards non-cooperation with the on-going Kenyan cases at the ICC. While none of these particular interventions are likely to defeat the ICC's jurisdiction to take the four suspects to trial, the government's position goes against the interests of the nation and its obligations under the Covenant.

- The Truth, Justice, and Reconciliation Commission was established in 2008 to look into historical injustices from 1963-2008 (February); its work has been hampered by questions of integrity regarding the chair, the time limit, and funding. Although the Commission's work is coming to a close, its report is not likely to carry the necessary legitimacy for the implementation of the recommendations.

#### *Recommendations:*

- i. Kenya should demonstrate its ability to adhere to its obligations under the Rome Statute and cooperate with the ICC. The Human Rights Committee should strongly urge the Government of Kenya to refrain from political protectionism. The government should desist from subverting the process of the ICC.
- ii. The government should also establish a credible local judicial mechanism to deal with the middle and low-level perpetrators of the post-election violence and also to address the needs of the victims of the post-election violence, who have not yet received any justice or compensation.
- iii. There is a legitimate framework in regards to the TJRC, thus the government should harmonize all existing frameworks designed to address priorities such as land issues, equitable distribution of resources, marginalization, and facilitate the appropriate environment for national dialogue and redress through those existing mechanisms<sup>56</sup>.

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<sup>54</sup><http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat>(Accessed on 14<sup>th</sup> June, 2012)

<sup>55</sup><http://www.kenyalaw.org/kenyaLawBlog/?p=356>(Accessed on 14<sup>th</sup> June, 2012)

<sup>56</sup> The National Cohesion and Integration Commission subject to submissions made in this report, The National Land Commission, The Commission on Revenue Allocation, The National Gender and Equality Commission among others.

### **3.5) Extraordinary renditions & lack of a legal framework on counter-terrorism (Articles 4 and 26)**

The government of Kenya has not adequately responded to extraordinary renditions of its citizens to Uganda (in 2010). Following a bombing in Kampala, Uganda, a number of Kenyans were irregularly handed over to the Ugandan government to face trial for the alleged terrorist attack<sup>57</sup>. In addition to this, three human rights defenders were arrested in Uganda during a visit to the chief justice of Uganda to negotiate for the release of the Kenyans. While two of the three defenders were deported, one (Al-Amin Kimathi) was charged with engaging in funding terrorist activities<sup>58</sup> and was not released for a year. To date, some of those Kenyans continue to remain incarcerated in Uganda<sup>59</sup>. The Suppression of Terrorism Bill, 2003 has been criticised on account that some of its sections are a potential violation of the fundamental rights and freedoms guaranteed under the Kenyan Constitution and the International Covenant on Civil and Political Rights.

#### *Recommendations:*

- i. The government of Kenya should stop the extraordinary renditions of suspects to other nations based on suspected terrorist activity. Any emerging legislation on terror should ensure justice while safeguarding the rights of persons subject thereto and provide a framework that would curb the issue of extraordinary renditions. The government of Kenya should also internally investigate terrorist acts before extraditing suspects to other nations.

## **4 - SLAVERY, SERVITUDE, AND FORCED LABOUR IN PRACTICE**

### **4.1) Discriminatory labour practices (Article 8)**

Despite the state's obligation under ILO convention 103 to put in place measures that ensure that women do not get disadvantaged as a result of the increase in the maternity leave period, women are often forced to vacate pay until their return to work. Further, some women are forced to go through pre-employment pregnancy tests which are part of company practice. This also infringes on the employees right to privacy as well. The women are forced to work for long hours without contact with their families. In general, wages in the sector, like other labour intensive driven sectors, are too low to cater for workers basic necessities of housing, food, healthcare, child education, childcare, transport, water and clothing. The employees in the EPZs earn bare-minimum wages that are hardly sufficient to provide for daily needs.

#### *Recommendations:*

- i. Kenya should ratify ILO Convention 183 and 103. Additionally, it should domesticate the conventions that it has ratified, in particular, the Convention on the

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<sup>57</sup><http://www.bbc.co.uk/news/10593771> (Accessed on 14<sup>th</sup> June, 2012)

<sup>58</sup><http://www.hrw.org/news/2010/09/27/uganda-terrorism-charges-used-against-kenyan-rights-defender>(Accessed on 14<sup>th</sup> June, 2012)

<sup>59</sup>Omar Awadh, Idris Magondu, Hussein Hassan Agade, Mohammed Hamid Suleiman, Yahya Suleiman Mbuthia, Habib Suleiman Njoroge, and Mohammed Ali and others

Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The government should ensure that there are fair labour practices in all sectors, in particular EPZs and the cut-flower industry.

#### **4.2) Lack of a comprehensive legal framework and enforcement of laws to protect employees (Article 8)**

There is a weak legislative framework and enforcement of law regarding protection of employees. In particular, these include the Labour Relations Act, Work Injury Benefit Act and Employment Act of 2007. In 2009, several sections of the Work Injury Benefit Act were nullified and found to be in contradiction of then section 77 of the Constitution, because they infringed upon the rights of the employee to sue his employer for damages and injuries sustained in the workplace. The Labour Relations Act requires that all trade disputes be reported to the minister of labour to appoint a conciliator. Sometimes, this process takes a long time, which results in delays in settlements of labour disputes. The Labour Ministry lacks strong follow-up or enforcement mechanisms. The government should also ensure that the Industrial Court is well and properly constituted. The judges of the Industrial Court should be appointed as per the constitutional requirements. The government of Kenya also fails in ensuring that the employment rules are adhered to by private firms. This is directly illustrated by the recent case of Gertrude's Children's Hospital<sup>60</sup>.

#### *Recommendations:*

- i. The government should expedite the review of the existing labour laws to enhance mechanisms of accountability and fortify protections for certain vulnerable persons. Additionally, labour laws need to conform to international law and regulations, especially labour regulations and conventions. The government should put in place enforcement procedures to ensure compliance with the revised labour laws in both the public and private sectors.

#### **4.3) Poor working conditions for domestic labourers (Article 8)**

There are issues raised in regards to protection of domestic labourers in Kenya and abroad. Locally, domestic labourers face issues of mistreatment, poor working conditions, and unfair remuneration, oftentimes lower than the set minimum wage, as provided under the General Wages Order. This is contradiction of international labour laws, the Constitution of Kenya, the Labour Relations Act, and the Employment Act. The Employment Act defines forced or compulsory labour as any act which is undertaken under threat of any penalty, including the threat of the loss of rights or privileges which is not offered voluntarily by the person doing the work or performing the service. Additionally, in the recent past, there have been reports of

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<sup>60</sup> A female employee alleged that her employment terms had been changed from permanent to temporary upon discovery that she was pregnant. Her new temporary contract was set to expire at her time of delivery.

incidences of slavery, servitude, and forced labour of Kenyans in Saudi Arabia and other Middle Eastern countries<sup>6162</sup>.

*Recommendations:*

- i. The state, through the Ministry of Foreign Affairs (MFA), should liaise with various departments and embassies to establish a framework that clearly assists in the documentation and registration of Kenyans abroad. Additionally, there needs to be further scrutiny and investigation of local agencies prior to registration and their applications for renewal to ensure that they do not propagate labour rights violations. The government should also create awareness on the importance of Kenyans reporting to the Kenyan embassies in the countries of employment.

**4.4) Failure to adequately address instances of trafficking (Article 8)**

While the government has enacted the Counter-Trafficking and Persons Act, there are an increasing number of reports on trafficking of persons to foreign countries, most notably Arabic countries under the pretext of employment opportunities that turn out to be slavery and forced labour. Additionally, media reports have indicated the trafficking of albinos to Tanzania for sacrifice due to certain beliefs about medicinal benefits<sup>63</sup>. The government of Kenya does not fully comply with the minimum international regulations for the elimination of trafficking, specifically in regards to failure to implement its national plan of action, address trafficking complicity among law enforcement officials, or provide adequate anti-trafficking training to state officials, including diplomats, police, labour inspectors, and children's officers. Additionally, the government failed to investigate alleged trafficking by officials and high-ranking members of society<sup>64</sup>.

*Recommendations:*

- i. The state should ensure the protection of all of its citizens against counter-trafficking by enforcing the Counter-Trafficking in Persons Act.

**5 –RIGHT TO PRIVACY**

**5.1) Lack of sufficient safeguards within various laws (Article 17.2)**

Article 31 of the Kenyan Constitution provides for the right to privacy, however, state agencies such as the Kenya Police, Communications Commission of Kenya (CCK), the National Cohesion

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<sup>61</sup><http://www.standardmedia.co.ke/?id=2000042568&cid=159&articleID=2000042568>(Accessed on 14<sup>th</sup> June, 2012)

<sup>62</sup>“In the Quest for Oil Money; The Struggles and Violations of Kenyan Migrant Workers in Saudi Arabia” – Muslims for Human Rights (MUHURI), 2011

<sup>63</sup><http://www.independent.co.uk/news/world/africa/kenyan-jailed-for-trying-to-sell-albino-in-tanzania-2057770.html>(Accessed on 14<sup>th</sup> June, 2012)

<sup>64</sup> (US Department of State report) <http://www.state.gov/j/tip/rls/tiprpt/2011/164232.htm>(Accessed on 14<sup>th</sup> June, 2012)

and Integration Commission have admitted to monitoring peoples' private communications in the interest of national security and curtailing hate speech.<sup>65</sup> The bounds of such monitoring however remain unclear as it is not informed by an explicit legal framework. Out of this concern, seasoned bloggers in the Kenyan community have been avoiding use of certain words that are believed to raise red flags in the monitoring system<sup>66</sup>. The results of such monitoring remains unclear as the state is yet to successfully prosecute suspected perpetrators of hate speech.

The Communications Commission of Kenya (CCK) has also announced plans to install network monitoring software for internet traffic citing, among other reasons, the increased uptake of the internet as well as security threats.<sup>67</sup> This kind of monitoring poses a great threat to freedom of expression in the absence of legal safeguards.

The government is also in the process of enacting the National Intelligence Service Bill (2011) that seeks to authorize security agencies to tap and monitor peoples' private communication. Section 19 of the Bill proposes extensive limitations on the right to privacy, freedom of expression, the right to access information, freedom of association and the right to assembly that could easily be abused by the State. The Bill further proposes to grant the Director General of the NSIS discretionary powers to circumvent the requirement of a warrant of search, entry or seizure (Section 31(10)).

#### *Recommendations:*

- i. The government should enact the Data Protection Bill 2012 without further delay, so as to ensure that peoples' private information and communication are not accessed arbitrarily.
- ii. The government should amend the proposed NIS Bill 2011 so that it conforms to international standards on peoples' right to privacy. More specifically, the bill should clearly outline the limitations to sections 19(3) and 31(10), as they are not explicit and could be subject to abuse.

## **6 - FREEDOM OF OPINION AND EXPRESSION; ASSEMBLY; AND ASSOCIATION**

### **6.1) Restrictive regulation of the media (Article 19)**

The media laws in Kenya generally do not adhere to international standards. The Kenyan legal system continues to retain many laws, including the Official Secrets Act, the Public Order Act, the Defamation Act and an the Preservation of Public Security Act, that in one respect or another restrict or threaten freedom of expression. The Books and Newspapers Act, introduced in 2002 has not been repealed and continues to allow publications to be banned and vendors to be arrested. While the Preservation of Public Security Act (1967), which had previously been used

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<sup>65</sup><http://www.nation.co.ke/Features/smartcompany/CCK+considers+monitoring+to+curb+rising+cybercrime+/-/1226/1373996/-/k450ez/-/index.html>

<sup>66</sup>**Grace Mutung'u (2012) "New Media in Kenya: Time for Regulation**

<sup>67</sup><http://www.bizrika.com/featured/plans-to-install-internet-monitoring-system-stirs-war-in-kenyas-telecom-sector.html>; <http://kenyacentral.com/general/19598-spying-on-emails-needs-legal-safeguards-expert.html>

to allow the detention without trial of many Kenyans under emergency powers, was amended in 1997, the Act still permits the arrest and detention of people on grounds of ‘compromising public safety, public order, morality or internal defence’. This Act, if invoked by the government, could further restrict freedom of expression, association and personal liberties.

The Media Act, 2007, created the Media Council of Kenya (“MCK”) for the regulation of the conduct and discipline of journalists and the media and as a mechanism to provide self-regulation of the media. Unfortunately, it also created a mechanism for state control through financing and appointments for MCK. The Act mandates a council of 15 members with the chair being appointed by the Minister of Information and Communications. It also limits who can be a reporter by defining a journalist as someone who "holds a diploma or a degree in mass communication from a recognized institution of higher learning," and requiring all media practitioners to register with the council for accreditation. While this has not yet been implemented, it can be subject to abuse, should the state invoke it. This act could deny many journalists, especially those without the specified academic qualifications, from engaging in journalism. The state can also deny accreditation to those journalists considered to be critical, and thus infringing on freedom of expression.

The Communications (Amendment) Act, 2008, passed in December 2008 and effective from 2 January 2009, contains a number of provisions that run contrary to international standards. The Information and Communications Minister has powers to search and seize broadcast equipment, in addition to the right to intercept and disclose telephone calls, emails and letters. The Communications Commission of Kenya is granted the power to license and regulate broadcasting services and to prescribe the nature and content of media broadcasts. Moreover, the penalties for press offences - fines and imprisonment – provided by the Act could lead to an unjustified restriction on the right to freedom of expression.

The Act also gives the Information and Internal Security Ministries the authority over the issuance of broadcast licenses and the production and content of news programmes, as well as search and surveillance powers. Following a concerted campaign by civil society, on May 9, 2009, the Kenyan Government published amendments to the Communications Act, which will delete a controversial clause that allows the Government to raid broadcasting houses and destroy or confiscate equipment in the name of “public safety”. The amendments will also get rid of provisions granting the Government power to control content on TV and radio. The task will now fall under a new Broadcast Content Advisory Council, which will include the Permanent Secretary in the Ministry of Information and six other members to be appointed by the Information Minister. The amendments were agreed upon between the media and the Government as interim measures pending a further and more elaborate review of the law governing communications and the media. At the time of writing this, Parliament had still not examined the amendments.

#### *Recommendations:*

- i. Review exiting laws and institutional frameworks pertaining to media regulation and ensure conformity to constitutional and international standards on freedom of

expression. This would include: ensuring the independence of the Media Council of Kenya and Communications Commission of Kenya from state control; reviewing the powers of the Communications Commission of Kenya to impose content restrictions; promoting media self-regulation and deleting provisions on registration or education requirements for journalists.

## **6.2) Legislative limits on freedom of expression (Article 19)**

While Article 33 (1) of the Constitution provides for the right to freedom of expression, such freedoms do not extend to “propaganda for war”. This article however, fails to provide reasonable and objective criteria of what amounts to “propaganda of war”. Without such clear definition, this article may lend itself to abuse by the state, through arrests of people thought to have committed offences related to propaganda of war, thus resulting in hindrances to freedom of expression.

Furthermore, defamation remains a criminal offence in Kenya even after Sections 56, 57 and 58 (Sedition Laws) of the Penal Code were repealed by the Statute Law (Miscellaneous Amendments) Act 1997. Journalists continue to be charged with sedition or seditious libel under laws relating to defamation (under the Penal Code, Chapter 63, Article 194).

Section 198 of the Penal Code also offers special protection to the President, Cabinet Ministers and Parliament. However, international human rights courts have consistently held that public officials should tolerate more, not less, criticism than ordinary citizens. Vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. Alarming, courts continue to award public officials exorbitant amounts over the prescribed maximum fines for civil defamation. In August 2010, KISS FM was ordered to pay City lawyer, Nicholas Sumba, Kshs. 3million in damages for defamation. In July of the same year, Deputy Prime Minister, Uhuru Kenyatta, was awarded KSH 6 million in a defamation case against the Nation Media Group.<sup>68</sup>

Regardless of the isolated instances of criminal defamation, the possibility of criminal prosecution for defamation remains problematic a conviction under Kenya’s Defamation Act could result in a prison term of up to two years and/or a fine. This sanction undoubtedly has the potential to inhibit free speech and intimidate journalists or human rights defenders, thereby unduly restricting freedom of expression.

### *Recommendations:*

- i. The State should decriminalize defamation completely ;
- ii. The State should set out objective criteria to determine the circumstances that would amount to “propaganda of war”;

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<sup>68</sup><http://allafrica.com/stories/201007020879.html>(Accessed on 14<sup>th</sup> June, 2012)

### **6.3) Incidents of threats, attacks, acts of harassment and intimidation against journalists and human rights defenders (Article 19)**

#### *Journalists*

Even though the press enjoys relative freedom in Kenya, tensions between the government and the media remain and take the form of threats, insults and legal challenges resulting in the imposition of fines. Journalists investigating corruption have cited instances of threats or actual physical harm and attempts at bribery; all contributing to a culture of self-censorship.

Journalists reporting about and exposing human rights violations remain subject to acts of intimidation. For example, Mohammed Ali of the Standard Group continues to receive threats and in March 2012, was charged with stealing a phone. These charges are believed to be attempts by the state to deter him from doing his investigative work. The charges have since been withdrawn<sup>69</sup>.

In December 2011, a Bungoma based Standard Group journalists Robert Wanyonyi reported that his life was in danger because of his investigations into the Coffee smuggling scam in Bungoma and complained that the police did not investigate the matter even after he made the report.<sup>70</sup> Before that, a report from Frontline Defenders, an international organisation working on press freedom reported that a human rights defender, Wilberforce Wanyama Lumbuku had been subjected to a campaign of harassment, including detention, break-in and public stigmatization.<sup>71</sup> In December 17, 2010, Mr. Sam Owida, a reporter for the Daily Nation newspaper, received two anonymous threatening phone calls warning him that he could “share Nyaruri’s fate”. Mr. Sam Owida reported the incident to the police, who reportedly launched an investigation. Owida had reported about and publicized the murder of Mr. Francis Nyaruri, a journalist who wrote on corruption cases for the private Weekly Citizen, and who was found decapitated on January 29, 2009. Mr. Nyaruri had written a series of articles that exposed financial scams and other malpractice by the local police department. An investigation was immediately opened and one suspect was arrested, but the trial was postponed several times<sup>72</sup>.

#### *Human Rights Defenders*

Human Rights Defenders (HRD) denouncing human rights violations by police officers often face different kinds of reprisals.

As at the time of compiling this report, the investigation into the assassination of the late Oscar Kamau King’ara, a lawyer and Chief Executive Officer of the Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK), and John Paul Oulu, OFFLACK Communications and Advocacy Officer, remained unsatisfactory. The police had reached the conclusion that the two HRDs had been killed by common criminal gangs, possibly under the directions of the outlawed Mungiki. It is alleged that the police were not keen on conducting thorough investigations into these murders

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<sup>69</sup> <http://habarizanyumbani.jambonewspot.com/2011/11/15/ktns-jicho-pevu-reporters-lives-at-risk-rights-groups/> as accessed on June 14, 2012

<sup>70</sup> [www.allafrica.com/stories/201112200109.html](http://www.allafrica.com/stories/201112200109.html) (Accessed on 14<sup>th</sup> June, 2012)

<sup>71</sup> [www.frontlinedefenders.org/node/14365](http://www.frontlinedefenders.org/node/14365) (Accessed on 14<sup>th</sup> June, 2012)

<sup>72</sup> <http://www.fidh.org/KENYA-2010-2011> as accessed on June 14, 2012

given the fact that they had turned down assistance from the FBI. Additionally, the police had made threatening remarks against the two HRDs that attempted to link them to the activities of the outlawed Mungiki group<sup>73</sup>. The two defenders, who had been particularly active in reporting on police death squads and had provided information to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions during his mission in February 2009, were murdered in March 2009.

Human rights defenders who were instrumental in providing information related to the ICC investigation have also been at risk. For instance, since December 2010, five human rights defenders have been forced to relocate from their regions after being threatened due to their activities. Another human rights defender was threatened at the beginning of 2011, by receiving anonymous calls as well as having a note posted in her compound asking her why she was betraying her community. In addition, the human rights organisations that provided information in the framework of the ICC investigation saw their offices broken into in search of information and in some instance computers and hard drives were stolen, as for example in September 2010 in Nairobi and in November 2010 in Eldoret. Moreover, starting from mid-2010, human rights defenders working on other human rights issues were also being targeted and labelled as working for the ICC even when it was not the case<sup>74</sup>.

Human rights defenders and witnesses who attempted to denounce the abuses allegedly committed in Mount Elgon in 2009 by both the SLDF and the Government's security forces have faced intimidation. In particular, before, during and after the visit of the UN Special Rapporteur on extrajudicial summary or arbitrary executions in February 2009, human rights defenders were systematically intimidated by the police, military and Government officials in an attempt to silence all those who held information on human rights violations committed in this district by the authorities. In his report, the Special Rapporteur mentioned that human rights defenders were told not to bring witnesses or victims to meet with him, and not to personally testify about abuses committed by the police or military, but to speak only about abuses by the SLDF armed group. They were further warned by text message, telephone calls, and in person. During the Special Rapporteur's visit to Mount Elgon, National Security Intelligence Officers unsuccessfully attempted to obtain from NGOs the list of witnesses whom he was going to meet with. Civil society organisations were also repeatedly harassed for them to provide information about the programme and schedule of the Special Rapporteur, as well as details of the NGOs' involvement in the mission<sup>75</sup>.

#### *Recommendations:*

- i. The government should carry out thorough, independent and impartial investigation into the cases of extrajudicial killings, acts of intimidation and harassment of journalists and human rights defenders, the result of which must be made public, in order to bring all those responsible before a competent, independent and impartial tribunal and apply penal, civil and/or administrative sanctions as provided by law;

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<sup>73</sup> [www.aljazeera.com/news/africa/2009/03/20093613558801556.html](http://www.aljazeera.com/news/africa/2009/03/20093613558801556.html)

<sup>74</sup> <http://www.fidh.org/KENYA-2010-2011> as accessed on June 14, 2012

<sup>75</sup> [www2.ohchr.org/English/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf](http://www2.ohchr.org/English/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf)

- ii. The government should put an end to all acts of both state and non-state harassment against journalists and human rights defenders and take all necessary measures to guarantee, in all circumstances, their physical and psychological integrity so that they are able to carry out their work without hindrances;
- iii. The government should comply with Resolutions 119 (2007) of the African Commission on Human and Peoples' Rights on the Situation of Human Rights Defenders in Africa<sup>76</sup>.
- iv. The government should comply with all the provisions of the United Nations Declaration on Human Rights Defenders, in particular with its Article 1<sup>77</sup>

#### **6.4) Lack of comprehensive protection of freedom of information (Article 19)**

At present, although Article 35 of the Constitution of Kenya guarantees the rights of citizens to access information, there continue to be prolonged delays with the passage of the Freedom of Information Law. The Report by the Commission of Inquiry into Post-Election Violence (Commonly referred to as the Waki Report) recommended the passing of the FOI Law so as to enable state and non-state actors to have full access to information to contribute to the arrest, detention and prosecution of the perpetrators of the unprecedented violence following the 2007 general elections. The draft law was first drafted in 2005 but never tabled in Parliament. The latest draft of the law, 2012, is yet to be introduced to Parliament and remains under “stakeholder review” by the Constitutional Implementation Committee (CIC). In the absence of a legislative framework, persons including journalists endure problems of acquiring information. Although there now exists a constitutional guarantee – a legislation in line with international standards outlining procedures, exemptions and appeal processes is of particular importance to Kenya.

#### *Recommendations:*

- i. The government should adopt, without further delays, and implement the Freedom of Information (FOI) law

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<sup>76</sup>The resolution calls on calling on States to “take all the necessary measures to ensure to all human rights defenders an environment conducive to carrying out their activities without fear of any acts of violence, threats, reprisals, discrimination, pressure and any arbitrary acts by State or non-State actors as a result of their human rights activities” and to “take specific measures to ensure the physical and moral integrity of their peoples, especially those of human rights defenders, to enable the latter to fully play their role in the promotion and protection of human rights”.

<sup>77</sup>everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”, as well as with Article 12.2 (“the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration”).

### 6.5) Disruption of public demonstrations and political gatherings (Article 21)

Kenya continues to register several cases of public demonstrations and political gatherings being disrupted by the state in contravention of Article 21 of the Covenant and Article 37 of the Constitution. The following is an example of one such disruption experienced by *Bunge la Mwananchi* (local peoples' parliament – community initiated discussion)<sup>78</sup>:

*“On May 4, 2010, the Commanding Officer of the police department came to the Jeevanjee Garden in Nairobi where Bunge la Mwananchi was holding a meeting to discuss current issues in the country and the post-election violence. The officer ordered the 200 persons present at the meeting to leave and arrested four activists of Bunge La Mwananchi: Mr. Jacob Odipo, Mr. Francis Wetukha and Mr. Jebtekeny Tariq as well as Ms. Ruth Mumbi. They were subsequently released without charge after arriving at the police station”.*

A political meeting dubbed “Limuru 2b” was stopped from taking place by the police on April 19, 2012. While the organizers of the meeting stated that their intent was to speak against ethnic alliances that had endorsed the presidential candidature of Deputy Prime Minister Uhuru Kenyatta two weeks earlier, the police maintained that they had obtained intelligence which led them to believe the meeting was meant to advance criminal ideals.<sup>79</sup> The meeting's organizers led by Mr. Ngunjiri Wambugu subsequently sought legal redress and the High Court ordered the meeting to go ahead and instructed the police to provide security.<sup>80</sup> The meeting eventually took place on May 30, 2012.<sup>81</sup>

#### *Recommendations*

- i. The government should review existing mechanisms and institute checks and balances against abuse of police discretion in regards to peoples' right to peaceful assembly.

### 6.6) Threats to the leadership and members of trade unions (Article 22)

Members of different trade unions continue to face threats and in some cases, their employment contracts are terminated for engaging in industrial action. In May 2012, the Kenya Airports Authority sacked striking workers.<sup>82</sup> In March 2012, during the nurses' strike, the Minister for Medical Services threatened to dismiss over 25,000 nurses who had participated in the industrial action. Although the threat was never actualized<sup>83</sup>, these kinds of threats and intimidation impeded peoples' enjoyment of the right to freedom of association.

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<sup>78</sup> <http://www.fidh.org/KENYA-2010-2011> as accessed on June 14, 2012

<sup>79</sup> <http://allafrica.com/view/resource/main/main/id/00031377.html> as accessed on June 14, 2012

<sup>80</sup> <http://www.kbc.co.ke/news.asp?nid=76527> as accessed on June 14, 2012

<sup>81</sup> <http://www.youtube.com/watch?v=3DQZQwe8rjo&feature=related> as accessed on June 14, 2012

<sup>82</sup> The Standard Group (2012) KAA sacks striking workers at

<http://www.standardmedia.co.ke/?id=2000055892&cid=4&articleID=2000055892> (Accessed on 14<sup>th</sup> June, 2012)

<sup>83</sup> BBC (May 2012) Kenya sacks 25,000 nurses for striking at <http://www.bbc.co.uk/news/world-africa-17304127> (Accessed on 14<sup>th</sup> June, 2012)

*Recommendations:*

- i. The government should at all times uphold the right of workers to form and join trade unions and to demonstrate as provided for in the Constitution of Kenya at Articles 36 and 41 without any infringements.

## **7 - PROTECTION AGAINST PROPAGANDA, DISCRIMINATION AND NATIONAL, RACIAL OR RELIGIOUS HATRED**

### **7.1) Lack of adequate support for the National Cohesion and Integration Commission (NCIC) (Article 20)**

Ethnic polarization and hate speech were identified as some of the factors contributing to the outbreak of the 2007 post-election violence.<sup>84</sup> Under Agenda Item 4 of the Kenya National Dialogue and Reconciliation process the coalition government undertook to carry out the following: to finalize legislations on hate speech, ethnic and race relations; undertake civic education on ethnic relations; and inculcate a civic culture which tolerates diversity and encourages inter-ethnic cooperation through the school curriculum<sup>85</sup>. It is this agenda that was enshrined in the National Cohesion and Integration Act, 2008 and the National Cohesion and Integration Commission (NCIC) established to carry out this mandate.

The NCIC has however encountered difficulties in fulfilling its mandate owing to resource and structural constraints. The Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA) in its submission to the Departmental Committee on Justice and Legal Affairs regarding the 2012/2013 budget estimates noted that the NCIC had been underfunded despite its need to cover the whole country over the upcoming election period. Having been allocated Kshs. 253.5 million against a need of Kshs. 797.8 million, the ministry stated that the NCIC would be unable to implement legal and civic education, media campaigns and produce public education materials across all the 47 counties.<sup>86</sup>

The NCIC faces further difficulties in enforcing the provisions of the Act in as far as hate speech is concerned. In its annual report for 2009-10, the NCIC reported that it had identified 24 cases of hate speech, the peak period being July 2010 ahead of the referendum on the Constitution when 10 cases were recorded. Through its media monitoring project, the NCIC was able to gather evidence and institute legal proceedings against persons propagating hate speech during the referendum campaigns, the most notable being that involving Hon. Wilfred Machage- Member of Parliament for Kuria constituency, Hon. Fred Kapondi- Member of Parliament for Mt. Elgon and businesswoman Christine Nyagitha Miller. The three had been charged with hate speech under the NCIC Act as the following comments were attributed to them<sup>87</sup>:

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<sup>84</sup> Kenya National Dialogue and Reconciliation Mediated by H.E. Kofi Annan, Chair of the Panel of Eminent African Personalities: Statement of Principles on Long-term Issues and Solutions

<sup>85</sup> Ibid

<sup>86</sup> The Kenya National Assembly (May 2012): The Departmental Committee on Justice and Legal Affairs Report on the 2012/2013 Budget Estimates for Votes 117, 125, 126, 163, 134, 203, 201, 165, 168, 169 and 213

<sup>87</sup> <http://www.africareview.com/News/Kenya+MPs+acquitted+of+hate+speech+charges/-/979180/1289250/-/nmfq2uz/-/index.html> as accessed on June 14, 2012

- Dr Machage was accused of saying in Kiswahili: “You the Maasai, all your land in Rift Valley will be repossessed by the government”.
- Mr Kaponi said: “We inform them that with the passage of the proposed constitution, they must pack up and go.”
- Ms Miller, widow of former Chief Justice Cecil Miller, was accused of saying in Kiswahili “Why hasn’t the ‘Yes’ camp visited Central (province)? It is because they know at Githunguri we will pelt them with stones and tell them this is a ‘No’ zone.”

The High Court however declared them not guilty and acquitted them of the charges stating that the prosecution had failed to comply with the rules regarding electronic evidence.<sup>88</sup> The NCIC has also issued cessation notices to various political and public leaders such Hon. Jakoyo Midiwo- Member of Parliament for Gem constituency<sup>89</sup> and Hassan Omar- former vice-chair of the Kenya National Commission on Human Rights (KNCHR)<sup>90</sup> requiring them keep the peace and watch the use of language that is likely to inflame ethnic tension. These notices have not deterred politicians from engaging in abrasive rhetoric and have instead exposed the NCIC to accusations of being partisan in the enforcement of their mandate.

*Recommendations:*

- i. The government should allocate adequate resources to support the programmatic work of the Commission.
- ii. The government should develop a procedural mechanism involving the NCIC, the Police and the Attorney General’s Office on how complaints under the NCI Act are to be investigated and prosecuted with requisite feedback channels.

**7.2) Failure to adequately enforce the Political Parties Act (Article 20)**

The Political Parties Act 2011 was enacted to provide for the registration, regulation, and funding of political parties. The enforcement of these provisions by the Registrar of Political Parties, however, remains inadequate despite its function to monitor, investigate and supervise political parties to ensure compliance with the Act. The Office of the Registrar is yet to effectively respond to numerous instances of politicians ascribing to membership of more than one party, in contravention of the Act<sup>91</sup>. This state of affairs has led to a court action seeking to have more than 100 parliamentary seats declared vacant and by-elections held<sup>92</sup>.

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<sup>88</sup> Ibid

<sup>89</sup> <http://www.capitalfm.co.ke/news/2012/04/watch-your-mouth-midiwo-ncic/> as accessed on June 14, 2012

<sup>90</sup> <http://www.standardmedia.co.ke/index.php/videos/videos/ads/std/mag/InsidePage.php?articleID=2000058065> as accessed on June 14, 2012

<sup>91</sup> Section 14(4) and (5)

<sup>92</sup> The Star. 14 May 2012. Court told to declare 100 MP's seats vacant. Accessed at: [www.the-star.co.ke](http://www.the-star.co.ke)

*Recommendations:*

- i. The Office of the Registrar should publish a list of all sitting members of Parliament deemed to have contravened the Political Parties Act by either being members or affiliating with more than one political party.
- ii. The Office of the Registrar should issue notifications to the Independent Electoral and Boundaries Commission regarding members of Parliament whose conduct has contravenes the Political Parties Act

## **8 - ELECTORAL RIGHTS**

### **8.1) Uncertainty of the election date and lack of adequate pre-election planning**

Following the disputed results of the 2007 General Elections, the Independent Review Commission (commonly called the Kriegler Commission) was mandated to examine the 2007 elections with a view to recommending electoral and other reforms to improve future electoral processes. A key finding of the Commission was that the system of tallying, recording, transcribing, transmitting and announcing results was conceptually defective and poorly executed<sup>93</sup>. The government has since introduced a series of reforms which include the replacement of the defunct Electoral Commission of Kenya with the Independent Electoral and Boundaries Commission along with the introduction of new legislation governing electoral processes and conduct<sup>94</sup>.

Despite these advancements, the government of Kenya is yet to address fundamental aspects of election planning that threaten to contribute to a climate of uncertainty reminiscent of the 2007 elections. The date for Kenya's next General Election (and the first under the new Constitution) is yet to be unequivocally established and has been the subject of court action<sup>95</sup>. The High Court determined that the election could either be held in 2012 if the National Coalition Government were to be dissolved by written agreement between the President and Prime Minister; or, in March 2013, 60 days upon the expiry of the life of the 10<sup>th</sup> Parliament (15<sup>th</sup> January 2013). The government is yet to state its official policy position in regard to the two possibilities and this has adversely affected the planning of the IEBC. The IEBC has, in the absence of such policy direction, declared the election date to be 5<sup>th</sup> March 2012.

The limited funding of the IEBC further threatens to disrupt the election planning process. In its budgetary allocations for the 2012/13 financial year, the IEBC has been allocated Kshs. 17.5 billion against the stated need of at least Kshs. 31 billion. The projected ramifications for the

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<sup>93</sup> Government of Kenya (2008): "Report of the Independent Review Commission on the General Elections held in Kenya". Available at [www.dialoguekenya.org](http://www.dialoguekenya.org)

<sup>94</sup> The Elections Act (No. 24 of 2011), The Independent Electoral and Boundaries Commission Act (No. 9 of 2011) and The Political Parties Act (No. 11 of 2011)

<sup>95</sup> Constitutional Petition No. 65 of 2011 consolidated with Petitions no. 123 and no. 185 of 2011 between John Harun Mwau and Others v. The Attorney General and Others.

shortfall in funding have been stated to include a reduction in the number of polling stations; the extension of voting to two days from one; and failure to procure vehicles and biometric voter registration equipment<sup>96</sup>.

*Recommendations:*

- i. The government should unequivocally state its policy on the election date in light of the High Court's decision in John Harun Mwau and Others v. The Attorney General and Others.
- ii. The government should ensure that the IEBC receives proper funding to effectively conduct free, fair, and transparent elections.

**8.2) Security threats, voter intimidation and ethnic Balkanization**

Events leading up to the 2012/13 General Elections have raised concerns regarding the possibility of violence during these elections. The mock election exercise conducted by the IEBC in Malindi was disrupted by violent youth, alleged to be members of the Mombasa Republican Council (MRC)<sup>97</sup>. There have been further reports that rival ethnic who fought after the 2007 election are rearming in readiness for violence at the 2012/13 poll. Such reports described arms dealers selling sophisticated weaponry in the Rift Valley, which was an area hit-hard by the ethnic violence in early 2008<sup>98</sup>. The state, however, denies these allegations<sup>99</sup>.

Additionally, there have been reports of the MRC confiscating voter registration cards and identification documents of some citizens in the Coastal region. This hampers their right to participate in elections<sup>100</sup>.

*Recommendations:*

- i. The government should ensure that there is adequate security prior to, during and after the elections.
- ii. The government should put all measures in place to ensure that there are free and fair elections and that all eligible voters are able to do so.

**8.3) Lack of legal framework for the 2/3 gender principle**

Under the new Constitution, Article 27(8) establishes the principle that the government should take legislative and other measures to ensure that no more than 2/3 of the members of elective of appointive bodies shall be of the same gender. This is also provided for in Article 81(b).

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<sup>96</sup> Capital News. Budget cuts pose risk to Kenya poll -IEBC. May 23, 2012. [www.capitalfm.co.ke/news/2012/05/budget-cuts-pose-risk-to-kenya-poll-iebc/](http://www.capitalfm.co.ke/news/2012/05/budget-cuts-pose-risk-to-kenya-poll-iebc/)

<sup>97</sup>

<sup>98</sup> Security threats, voter intimidation and ethnic Balkanization  
BBC News. Kenyans rearming for 2012 poll. October 7 2012. [www.bbc.co.uk/2/hi/8293745.stm](http://www.bbc.co.uk/2/hi/8293745.stm).

<sup>99</sup> Network 54. October 2009. Saitoti: Kenya communities not rearming for 2012. [www.network54.com](http://www.network54.com).

<sup>100</sup> [www.youtube.com/watch?v=1wYixcxeqSc](http://www.youtube.com/watch?v=1wYixcxeqSc) through Nation Television (NTV)

However, there has been a decision by the court that this principle can only be realised progressively<sup>101</sup>. The Commission for the Implementation of the Constitution (CIC) however issued an advisory indicating it is of the view that the principles of affirmative action and gender ratio prescribed under Articles 27(8) and 81(b) are not progressive and that they demand immediate realisation if the letter and spirit of the Constitution are to be respected<sup>102</sup>. There is still a policy and legislative gap on how the 2/3 gender principle will be realised pursuant to the Constitution.

*Recommendations:*

- i. The government should provide policy directions and enact necessary legislation to facilitate the realisation of the 2/3 gender principle; this should be done before the next elections.
- ii. Notwithstanding the absence of such enabling legislation, the government should, in its administrative practices, adhere to the principle, particularly in respect of public appointments.

**CONCLUSION AND WAY FORWARD**

Kenya has indeed come a long way in regards to civil and political rights, especially since the tumultuous period following the post-election violence. The adoption of the new Constitution served as crucial turning point for the state to rededicate itself to upholding these rights and fundamental freedoms. However, numerous hurdles remain from the successful adoption of new laws to implement the Constitution to the need for extensive institutional reforms that enables citizens to enjoy their guaranteed rights. We hope that these issues and recommendations can provide a consolidated framework for the Human Rights Committee to note and the government of Kenya to answer to. A mutual relationship between civil society and the government could herald in a new freer, more democratic Kenya and provide guidance for a brighter future.

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<sup>101</sup> High Court Petition no. 102 of 2011 - Federation of Women Lawyers Kenya (FIDA-Kenya) and 5 others v. The Attorney General and one other. (2011 eKLR)

<sup>102</sup> [www.capitalfm.co.ke/eblog/2011/08/23/cic-advisory-on-the-two-thirds-gender-principle/](http://www.capitalfm.co.ke/eblog/2011/08/23/cic-advisory-on-the-two-thirds-gender-principle/)