

KENYA CSO FORUM ON THE AFRICAN CHARTER



JOINT CIVIL SOCIETY ORGANIZATIONS ALTERNATIVE REPORT TO THE COMBINED 8TH-11TH
PERIODIC REPORT OF THE GOVERNMENT OF THE REPUBLIC OF KENYA ON THE AFRICAN CHARTER
ON HUMAN & PEOPLES' RIGHTS

SEPTEMBER 2015

JOINT CIVIL SOCIETY ORGANIZATIONS ALTERNATIVE REPORT TO THE AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS

PREPARED BY KENYA CSO FORUM ON THE AFRICAN CHARTER: Article 19; Center for Minority Rights Development - CEMERIDE; Coast Women in Development - CWID; CRADLE - The Children's Foundation; East African Centre for Human Rights – EACH Rights Trust; Economic and Social Rights Centre - Hakijamii; Edmund Rice Advocacy Network – ERAN; Equality Now; Federation of Women Lawyers in Kenya (FIDA) - Kenya; Gay and Lesbian Coalition of Kenya – GALCK; Independent Medico Legal Unit - IMLU, Ipas Africa Alliance; Kenya Association for Intellectually Handicapped - KAH; Kenya Human Rights Commission – KHRC; Kenyan Section of the International Commission of Jurists - ICJ Kenya; Kituo Cha Sheria; National Coalition of Human Rights Defenders - NCHRD-K's; Refugee Consortium of Kenya – RCK; and Save the Children – Kenya.

Table of Content

Table of Content.....	ii
Abbreviations and Acronyms	iv
1 Introduction.....	1
2 Article 2 and Article 3: Prohibition of discrimination and Equal protection by the law.....	1
2.1 Sexual Minorities	1
2.2 Persons with Disabilities.....	3
3 Article 4: Right to life and personal integrity.....	5
4 Article 5: Right to dignity, prohibition of torture and slavery.....	8
4.1 Protection of Adolescent Girls in Cases of Sexual Violence.....	9
5 Article 6: Right to liberty and security of person.....	11
6 Article 7: Right to a Fair Hearing.....	12
7 Article 10: Freedom of Association	14
8 Article 11: Freedom of Assembly	16
9 Article 12: Freedom of movement.....	17
10 Article 14: Right to property.....	18
11 Article 15: Right to work under equitable and satisfactory conditions.....	20
12 Article 16: The Right to Health	22
12.1 Geographical disparities in accessing health care services	22
12.2 Lack of access to Palliative Care.....	22
12.3 Increased out of pocket spending for health services	23
12.4 Violations of the Right to Reproductive health	23
12.5.....	23
12.6 Right to the highest attainable standard of health.....	25
13 Article 17: The Right to Education and Culture	25
14 Article 18(3): Elimination of discrimination against women	27
14.1 Trafficking in Persons.....	27
14.2 Addressing Female Genital Mutilation	28
14.3 Discriminatory Legislation	29

15	Article 21 Right to freely dispose of their wealth and natural resources- including the right to lawful recovery and adequate compensation.....	31
16	Article 22: Rights of peoples economic, social and cultural to development	32
16.1	Realization of sustainable development.....	32
16.2	Water.....	34
16.3	Sewerage coverage	34
16.4	The Right to adequate housing.....	35
17	Article 23: Rights of peoples to peace and security	36
17.1	Forced eviction cases	37
18	Article 25: Duty to Promote Awareness of the Charter	38

Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples Rights
AIDS	Acquired Immunodeficiency Syndrome
ATPU	Anti-Terror Police Unit
AU	African Union
CAJ	Kenyan Ombudsman (The Commission on Administrative Justice)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COK	Constitution of Kenya
CSOs	Civil Society Organizations
CSW	Commercial Sex Workers
DHS	Demographic Health Survey
EIAs	Environmental Impact Assessments
EWC	Endorois Welfare Council
FBOs	Faith Based Organizations
FDSE	Free Day Secondary Education
FGM	Female Genital Mutilation
FPE	Free Primary Education
HIV	Human-Immunodeficiency Virus
HRDs	Human Rights Defenders
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural
IDPs	Internally Displaced Persons
IGAD	Intergovernmental Authority on Development
ILO	International Labour Organization
IPOA	Independent Police Oversight Authority
IMLU	Independent Medico Legal Unit
KDF	Kenya Defense Forces
KES	Kenya Shillings
KHRC	Kenya Human Rights Commission
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
LAPSSET	Lamu Port Southern Sudan-Ethiopia Transport
LASODET	Law and Social Development Trust
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MSM	Men Having Sex with Men
MTP	Medium Term Plan
NACC	National Aids Control Council
NASCOP	National Acquired Immunodeficiency Syndrome and Sexually Transmitted Infection Control Program
NGEC	National Gender and Equality Commission
NGOs	Non-Governmental Organizations

NLC	National Land Commission
NPS	National Police Service
NPSC	National Police Service Commission
NSSF	National Social Security Fund
NWSS	National Water Services Strategy
OOP	Out-of-Pocket
OPDP	Ogiek People Development Program
PAC	Post-Abortion Care
PBO	Public Benefit Organization
PWDs	Persons with Disabilities
PWID's	Persons with intellectual disabilities
RCK	Refugee Consortium of Kenya
SIA	Social Impact Assessments
SSR	Security Sector Reforms
STI	Sexually Transmitted Infection
TJRC	Truth Justice and Reconciliation Commission
USD	United Governments dollar
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Economic Socio-Cultural Organization

1 Introduction

1. The aforementioned Kenyan organizations have the honour to submit to the African Commission on Human and People's rights (African Commission) this joint alternative report in respect of the Kenya's combined 8th - 11th Periodic Report on the African Charter on Human and Peoples' Rights (The African Charter).
2. In accordance with Article 62 of the African Charter, State Parties to the Charter are required to submit every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter. The Government of the Republic of Kenya submitted to the African Commission, its combined 8th-11th periodic report covering the period 2008-September 2014, in conformity with Article 62.
3. Though the Government mentions in the State report that there was wide consultation between Government officials, Civil Society Organizations (CSOs) and independent national human rights institutions working in different thematic areas, there remain significant points of divergence that the Kenya CSO Forum on the African Charter has chosen to highlight in this alternative report. Kenyan CSOs have continued playing the critical role of monitoring and documenting various aspects of human rights and governance in the society. The CSOs have also worked in collaboration with the Government from time to time so as to ensure that there is protection and promotion of human rights in the country.
4. One key aspect of ensuring the promotion and protection of human rights is through monitoring, documenting and reporting so as to enable a country to take stock of its successes and its shortcomings. This report has used the methodology of addressing different human rights issues in accordance with the layout of the African Charter on Human and People's Rights. The issues are as outlined in the sections below.

2 Article 2 and Article 3: Prohibition of discrimination and Equal protection by the law

2.1 Sexual Minorities

5. Entitlement to equal treatment and freedom from discrimination in Kenya is premised on Article 27 of the Constitution of Kenya, Article 1 of the Universal Declaration on Human Rights (UDHR), Article 26 of International Covenant on Civil and Political Rights

(ICCPR), and Article 3 of the African Charter among other international law instruments to which Kenya is a party. The Constitution and the aforesaid international law instruments proscribe discrimination on the basis of sex, gender, disability or ethnicity. These three grounds of discrimination are the key areas of reporting under this chapter.

6. Despite the Government reporting that it is committed to ensuring the enjoyment of all rights and freedoms by all citizens, the Penal Code of Kenya criminalizes homosexuality and categorizes it as 'carnal knowledge against the order of nature'.¹ This law and its provisions on homosexuality have transcended all four presidential regimes in Kenya since independence.
7. Criminalization of homosexuality by Kenyan law is at variance with development in other comparable jurisdictions. For example in South Africa, in the *National Coalition for Gay and Lesbian Equality Case*,² the Constitutional Court found that statutory provisions and common law offences prohibiting sodomy were incompatible with the provisions of the country's Constitution (Sections 8 and 9 on equality and non-discrimination) which are similar to Article 27 of the Kenyan Constitution.
8. Flowing from the criminalization of homosexuality in Kenya, LGBTI persons suffer widespread violence and harassment at the hands of law enforcement officers. For instance in an apparent pursuance of Section 163 of the Penal Code, on February 12, 2010, the Police in Mombasa arrested 5 men on reports that they were planning a gay wedding.³ The police subsequently released the men without charging them due to lack of evidence.
9. A 2011 study by the KHRC⁴ also revealed that LGBTI persons are routinely harassed by the police and held in remand houses beyond the constitutional period under Article 49(1) (f) without charges being preferred against them.
10. The most reported forms of violence include, but are not limited to: physical violence or threats to violence (which include harassment, riots, beatings, lynching and mob justice); hateful printed publications (text messages, posters, books, printed and online publications); and hate speech. Physical violence perpetrated by the public was reported in the former provinces of Coast, Nyanza, Eastern, and Nairobi. Reports of

¹ Sections 162 to 165

² South African Constitutional Court 1999 (1) SA 6

³ BBC, 'Kenya's Gay Wedding Suspects Freed' <<http://news.bbc.co.uk/2/hi/africa/8520906.stm>> accessed 14th February 2014

⁴ KHRC, *The Outlawed Amongst Us: A Study Of The LGBTI Community's Search For Equality And Non-Discrimination In Kenya*, (KHRC, 2011)

physical violence mostly came from Nairobi where LGBTI persons reported to have suffered violence when their orientation was discovered especially in night clubs, in the streets, and neighborhoods.

11. The LGBTI community in Kenya has often times been denied the right to associate and form organisations to advance causes. The NGOs Coordination board denied, registration of the National Gay and Lesbian Human Rights Commission on the basis of homosexual relations being outlawed in the Penal Code .The High Court of Kenya, in⁵ a groundbreaking precedent, ruled on April 24, 2015, that lesbian, gay, bisexual, intersex, transgender and queer (LGBTIQ) persons can formally register their organizations and welfare groups; that popular morality should not be a basis for limiting rights in Kenya.

12.

Recommendations

We call on the Commission to urge the Government of Kenya to:

- a. Uphold its constitutional obligations on non-discrimination and further enact a comprehensive equality and anti-discrimination legislation on all grounds including on the basis on sexual orientation and gender identity;
- b. Sensitize the law enforcement and judicial officers on the rights of LGBTI persons and their right to access to justice and fair administrative practices.
- c. Ensure the safety, dignity and freedom of association and expression of LGBTI persons is guaranteed;
- d. Lead a legislative initiative to decriminalize homosexuality by repealing Sections 162, 163 and 165 of the Penal Code Cap 63 Laws of Kenya;
- e. Occasion a programme with the National Police Service to create special facilities (desks and dedicated toll free-lines) to attend to and respond to LGBTI related complaints;
- f. Train Police officers in handling LGBTI persons and cases;
- g. Ensure that the Registrar of Societies abides by the constitutional right to freedom of association as enshrined in Article 36 of the Constitution, and remove all un-procedural and illegal barriers to the recognition, registration, and permitting of events by LGBTI persons and/or affiliated organizations;
- h. Partner with Civil Society and Faith Based Organizations (FBOs) in undertaking extensive sensitization campaigns and awareness creation on LGBTI identities so as to mitigate and eliminate social stigma and discriminatory practices.

2.2 Persons with Disabilities

⁵ Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR

13. In 2009, the Kenya National Bureau of Statistics estimated Kenya to have about 1.3 million PWDs. It is further indicated that 67.7% live in the rural areas. Against the backdrop of militating factors that include lack of access to and control of resources, poor educational background and low literacy, they are largely overlooked in the development agenda.
14. The unprecedented levels of poverty among this group leads to secondary disability for those individuals already with a disability. For this reason, PWDs live in poor conditions, with poor access to healthcare, endangering employment as well as education opportunities. This experience is especially accentuated for children, women, youth and elderly PWDs who are ordinarily subjected to marginalization.
15. PWDs also lack sufficient representation in elective and appointive bodies. PWDs face a lot of challenges with respect to public means of transportation, which are not friendly and furthermore some buildings including government buildings are not designed taking regard to the PWDs rights.
16. Despite constitutional safeguards for PWDs the prevailing reality is that they have been hampered by the inconsistency in operationalizing the Persons with Disability Act as characterized by the delays in appointing the Board of Trustees to the National Development Fund for Persons with Disability; which is established by the Act. The constitutional requirement for legislation to promote the representation of PWDs among other marginalized groups is yet to be enacted.
- 17.

Recommendations

We call on the Commission to urge the Government to:

- a. Increase its efforts to ensure infrastructure, transport and communication are responsive to persons living with differentiated forms of disability;
- b. Develop and implement a sign language policy within the public service, so that sign language interpretation services can be provided in all government ministries and departments and in all media broadcasts;
- c. Budget for reasonable accommodation for all forms of disabilities to allow for their integration;
- d. Establish mechanisms that make it easy and convenient for persons with intellectual disabilities to access the relevant identity and nationality documents;
- e. Ensure that the issue of disability be made an integral part of data disaggregation in all national surveys.

2.3 Ethnic Discrimination

18. Kenya is a very diverse country comprising of persons of all races and mutli-ethnic backgrounds, however ethnic discrimination is still rampant particularly in employment within the public service in both the national and county governments. Huge ethnic and regional disparities are rife due to the irregular allocation of resources leading to some regions being left behind. The right to nationality in Kenya is heavily hampered by ethnic discrimination of certain communities like the Nubians, the Somali and the Makonde who are '*de facto* stateless' owing to the challenges in acquiring personal identification and registration documents that impedes their enjoyment of fundamental rights and freedoms.
19. Whereas Kenya made reforms to its nationality laws, the provisions in the Kenya Citizenship and Immigration Act of 2012 on stateless persons and immigrant workers remain unimplemented. This is because the provisions require stateless persons, immigrants' workers to present documentation indicating that they are stateless or immigrated into Kenya before 1963.
- 20.

Recommendations

We call upon the Commission to:

- a. Urge the Government to establish objective, transparent and non-discriminatory procedures for determining Kenyan Citizenship and registration of stateless persons;
- b. Recommend that the government enacts the National Registration and Identification of Persons Bill;
- c. Urge the Government to take measures to address ethnic discrimination in employment in the public sector.

3 Article 4: Right to life and personal integrity

21. Article 26 of the Constitution of Kenya provides for the Right to Life. Article 26(4) has not however, been articulated in its entirety in the ACHPR report presented by the government of Kenya.
22. The cases of extra judicial killings continue to be rampant in Kenya. In 2009, the UN Special Rapporteur on Extra Judicial Killings Prof Philip Alston during his mission to Kenya noted that killings by the police were widespread and were mostly carried out by

special units within the service.⁶ To date, specialized units such as the Anti-Terrorism Police Unit and the Kenya Wildlife Service (KWS) stand accused of extra judicial executions and enforced disappearance of persons suspected to have been involved in acts of terrorism,⁷ and poaching respectively. This is of particular concern when various senior security officers have been cited as calling on their officers to adopt a “shoot-to-kill” policy in combating increased instances of terrorism and general insecurity.⁸

23.

Recommendations

We call on the Commission to urge the Government to:

- a. Urgently undertake investigations and prosecutions with regard to reported instances of extra-judicial killings and enforced disappearances implicating members of the security forces;
- b. Unequivocally revoke arbitrary orders and policies such as “shoot-to-kill”, extra-judicial killings and enforced disappearances which are not considered permissible tactics in confronting security threats;
- c. Urgently enact of the National Coroner’s Bill which will go a long way in assisting the investigations of suspicious deaths including those of police officers.

24. Kenya has observed an informal moratorium on the death penalty since 1987 however the debate on whether to maintain it within our laws persists. The entry of the 2010 Constitution presented an opportunity for Kenya to revisit the question of the existence of mandatory death sentences for a series of criminal offences including murder, treason and aggravated robbery. In *Godfrey Nqotho Mutiso v Republic [2010] eKLR* the Court of Appeal held that the 2010 Constitution did not allow for a mandatory death sentence and that any law imposing such a sentence would contravene the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.

⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof Philip Alston available on <http://www.extrajudicialexecutions.org>

⁷ See Open Society Foundation (2013). ““We’re Tired of Taking You to the Court” Human Rights Abuses by Kenya’s Anti-Terrorism Police Unit. <https://www.opensocietyfoundations.org/sites/default/files/human-rights-abuses-by-kenya-atpu-20140220.pdf> Accessed on September 3, 2015.

⁸ In June 2015, the Kenya National Commission on Human Rights (KNCHR) cited the County Commissioner for Baringo County as having authorized his officers to undertake a “shoot-to-kill” policy in the face of increased instances of cattle rustling in the region. See: [http://www.knchr.org/Portals/0/Press Governmentments/Letter%20to%20County%20Commissioner%20Baringo-Mr%20Peter%20Okwanyo.pdf](http://www.knchr.org/Portals/0/Press%20Governmentments/Letter%20to%20County%20Commissioner%20Baringo-Mr%20Peter%20Okwanyo.pdf) . Accessed on September 9, 2015

25. It should be noted that at the time of this judgement, the then President of Kenya Mwai Kibaki had commuted all death sentences to imprisonment for a life term with respect to persons convicted of murder. A subsequent decision of the High Court in Republic V Dickson Mwangi Munene & Another [2011] eKLR however reversed this position, insisting that mandatory sentences were permissible under the current constitutional order and that the President's act of commuting the death sentences, "...was in utter disregard of his constitutional duties."
26. To date, the government's campaign for a repeal of the death penalty is embodied in its request for support towards undertaking a perception survey and sensitization campaigns with the public towards repealing the death penalty. It should be noted that some work on the aspect of a survey has been undertaken by the Kenya National Commission on Human Rights (KNCHR).

27.

Recommendations

We call on the Commission to urge the Government to:

- a. Lead a legislative and public outreach effort to abolish the death sentence from Kenya's laws and according sufficient resources towards this effort;
- b. Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.

28. In the period 2012-2014 there has been an alarming increase in the number of police fatalities at the hands of armed bandits, terrorists and other criminals. Some notable instances include: Those of Riketa in Tana River County, Baragoi in Samburu County and Kapedo in Baringo County in which a total of 75 police officers were killed.⁹
29. Kenya currently faces a sustained terror threat from the Al Shabab group whose actions have resulted in the death of over 400 people since April 2013. The most recent attack took place at the Garissa University College on April 2, 2015 and resulted in a reported 148 fatalities; making it the worst singular terror incident since the 1998 U.S. Embassy bombing in as far as reported deaths is concerned. This attack was unfortunately preceded by similar episodes in Nairobi where 67 persons were killed in the September 2013 attack on Westgate Mall; in Lamu County where up to 85 persons were killed in the period of June-July, 2014 and in Mandera County where a further 64 persons were

⁹ See KNCHR (2012). 29 Days of Terror in the Delta: A Report by the Kenya National Commission on Human Rights. Available on www.knchr.org. Also see Amnesty International. "Police Reform in Kenya: A drop in the Ocean". Available on www.amnesty.org

killed in the period of November-December 2014. These attacks while notable are only depictive of a wider crisis that also includes several sporadic grenade attacks.

30. In all these incidences, there are indications that the Kenyan security forces were ill-prepared in responding to the attacks and failed to respond promptly or effectively protect citizens from imminent threats of continued violence. Alternatively, security personnel on the ground lacked sufficient coordination, vehicles, communication and other tactical equipment that consequently left them exposed and occasioned high fatalities. The government has the sole responsibility of ensuring the security of its citizens as guaranteed under Article 29 of the Constitution of Kenya.

31.

Recommendation

We call on the Commission to urge the Government to:

- a. Fully commit to and invest in comprehensive security sector reforms governed by the rule of law. Such reforms include: a clear coordination framework for all security agencies that is respectful of the Constitution and related laws; the proper allocation and use of resources in responding to security threats; and a rapid improvement in the welfare of security personnel.

4 Article 5: Right to dignity, prohibition of torture and slavery

32. Freedom from torture and cruel treatment are constitutionally guaranteed rights, without any limitations. Nonetheless, the eradication of torture and ill treatment in Kenya is still hampered by lack of a comprehensive legal framework. There are a number of proposed laws, including the Prevention of Torture Bill 2011, which are yet to be enacted. If passed, it will strengthen the legislative application to the United Nations Convention against Torture (UNCAT).¹⁰ Instead, there have been some proposed amendments to various security laws that serve to undermine safeguards against torture and ill-treatment such as Security Laws (Amendment) Act 2014, which was later declared to be against the constitution and the international law obligation of Kenya¹¹

33. Incidences of torture and ill-treatment by the Government officials, in particular by law enforcement agencies continue to be reported especially in the context of security

¹⁰ Convention against Torture, Available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (Accessed February 13, 2014)

¹¹ Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another [2015] eKLR

operations. Reports include, houses being torched, torture, arbitrary arrests, acts of terror, rape, forced abductions, forceful evictions, domestic violence, enforced disappearances among others.¹² This is despite the existence of provisions against torture within the UNCAT framework and in the National Police Service Act. *Operation Usalama Watch*, a security operation which commenced in early April 2014 following a spate of terror attacks, saw members of the Somali community subjected to undue profiling, arbitrary arrests, harassment, extortion and ill-treatment. A joint report by Human Rights Watch (HRW) and Kenya Human Rights Commission (KHRC),¹³ revealed further violations in the aftermath of a security operation responding to terror attacks in Lamu County in June 2014. The report documented that security forces during this operation arbitrarily detained residents and subjected them to cruel, inhuman or degrading treatment, including rounding up men and boys, searching and ransacking homes and businesses, and beating male residents.

34.

Recommendations

We call on the Commission to urge the Government:

- a. To ensure political and material support for the Independent Policing Oversight Authority (IPOA) as it undertakes its mandate to investigate allegations of torture and ill-treatment levelled against police officers;
- b. Through the office of the Inspector General, to restrict the use of force and in particular, intentional lethal use of firearms only in strictly unavoidable instances in order to protect human life, in line with the Sixth Schedule of the NPS Act and international human rights law and standards;
- c. Through NPSC, NPS and IPOA to take disciplinary measures against police officers who abuse codes of conduct or any other policing norm;
- d. To ensure KDF are only deployed to a policing role when absolutely necessary, for a limited and specified duration, under a clear command, and with respect for international human rights law. This is especially with regard to the use of force, and accountability for human rights violations.

4.1 Protection of Adolescent Girls in Cases of Sexual Violence

¹² Universal Periodic Review, Annual Progress Report (September 2012- September 2013); An Assessment of Government's Performance In Implementation of UPR Recommendations

¹³ See HRW (2015). *Insult to Injury: The 2014 Lamu and Tana River Attacks and Kenya's Abusive Response*. Available on: http://www.khrc.or.ke/resources/publications/doc_details/104-insult-to-injury.html . Accessed on September 9, 2015.

35. In Kenya, the Sexual Violence Offences Act (2006) is the official legislation that deals with sexual violence. Sexual violence, especially towards adolescent girls, is a prevalent issue in Kenya. According to the 2008-09 DHS, 22% of girls below 15 years and 12.5% of girls from 15-18 years reported that their first sexual encounters had been rape. Additionally, 11.3% of girls aged 15-19 had experienced sexual violence in their lifetime. In its 2011 concluding observations, CEDAW stated that there was a culture of “silence and impunity” and cases of violence against women and girls were underreported. It urged the State to prioritise training for public officials in particular law enforcement personnel in order to ensure awareness of all forms of violence against women and provide adequate gender-sensitive support for victims.
36. Police conduct in cases of sexual violence has been scrutinized in recent years. It is bad enough that the girls have experienced a traumatic violation of their rights, but there are several cases where when reporting these violations, their rights are further violated by the police officers who fail to provide remedies or to prosecute the perpetrators. This was illustrated in the ‘160 Girls’ Case¹⁴ where the police officers at various station in Meru County were presented with several sexual violence cases and “neglected, omitted, refused... to conduct prompt, effective, proper and professional investigation into the petitioners’ complaints or record the petitioners’ complaints, visit the crime scenes ...”, or take any other steps that would have brought justice for the girls.¹⁵
37. Police impunity was further highlighted in the ‘Justice for Liz’ case. The 16 year old girl was gang raped in Busia County, and when she reported her case to the local police it was recorded as a mere assault and the perpetrators were released after concluding their ‘punishment’ of cutting grass at the police station. This brought about public outcry and a global campaign known as #JusticeForLiz with pressure from civil society which brought about the apprehension of 3 of the perpetrators who were charged and convicted in April 2015. The conduct of police was subsequently brought to the attention of IPOA.
38. In May 2015, a 16 year old disabled girl was defiled in Kakamega County, and her alleged defiler who was subsequently apprehended, died in police custody. This consequently brought about retaliatory attacks from family members and sympathisers of the alleged defiler, causing the girl’s family to flee their home. When this matter was reported to the police they failed to take up the matter and intervene. No assistance was provided

¹⁴ C.K (A Child) through Ripples International as her guardian and Next friend) & 11 others v Commissioner of Police/ Inspector General of the National Police Service & 3 others (2013)

¹⁵ http://kenyalaw.org/CaseSearch/view_preview1.php?link=14124008394810652963617

by the police and they omitted to record a statement with respect to the attack, and the girls.

39. It is important to emphasise that the State has a duty to protect its citizenry especially in cases involving vulnerable adolescents. This duty has been reiterated in the Maputo Protocol as seen the in Mildred Mapingure Case¹⁶, where it was stated that the Protocol calls upon State Parties to take appropriate and effective measures to “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.”¹⁷ Furthermore it was noted that Article 4 of the United Nations Declaration on the Elimination of Violence against Women, calls upon States to pursue a policy of eliminating violence against women.

40.

Recommendation

We call on the Commission to call on the Government:

- a. To urge the Independent Policing Oversight Authority (IPOA) should investigate cases of human rights abuses; and conduct of police officers who cause further violations of the rights of survivors of sexual violence either by act or omission.

5 Article 6: Right to liberty and security of person

41. Article 6 of the Charter spells out the right to personal liberty and protection from arbitrary arrest. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

42. In the midst of enhanced counter-terrorism measures by security officers, reports indicate that there has been a rise in the disappearance of youth of Somali decent. Human rights activists claim that more than 100 men are missing in Mandera County, 50 have disappeared without a trace in Garrissa County, the whereabouts of 36 young men in Wajir County is unknown and 20 ethnic Somalis from Eastleigh in Nairobi County have been abducted. The bodies of three young men who had gone missing were discovered in Muranga County in mid-August 2015.

¹⁶ Mildred Mapingure v Minister of Home Affairs, Minister of Health and Child Welfare, & Minister of Justice Legal and Parliamentary Affairs

¹⁷ Article 4 (f)

43. On 15 September 2015 the Kenya National Commission on Human Rights (KNCHR) released a report entitled “The Error of Fighting Terror with Terror”. The KNCHR reports that there are over 120 documented grave human rights violation by the Kenyan security agencies, 81 cases of forced disappearance and 25 cases of extra judicial killings. This recent report attests to the fact that the government of Kenya has refused to adhere to its international and national obligation especially on the security of person.¹⁸
44. The KNCHR further reports, that 40 youth have disappeared from the coastal town of Mombasa only in 2015.¹⁹ They claim most of them were last seen in the presence of security agents. Human Rights Watch also claims that 12 young men who were picked up by Anti-terrorism police unit (ATPU) officers in the coast and Nairobi have not been seen alive to date.
45. The Mombasa County Commissioner also laments that 200 youth released on bail in the coastal town of Mombasa are similarly unaccounted for; probably in hiding as they fear being targeted by security officers in the context of fighting terrorism. No inquests have been conducted on those killed.
- 46.

Recommendations

We call on the Commission to:

- a. Call on the Government to ensure conclusive investigations are undertaken with respect to missing persons in the affected counties and that inquests are commenced without delay with regard to those killed. Any member of the security forces deemed to be culpable should be effectively prosecuted in line with the law;
- b. Call on the Government to uphold all human rights obligations and abide by the Constitution when undertaking counter-terrorism security operations.

6 Article 7: Right to a Fair Hearing

47. The Government report states that the government has adopted a National Prosecution Policy which seeks to regulate and standardize how prosecutions are conducted to

¹⁸Press Release 15th September 2015 “The Error of Fighting Terror with Terror” Signed by Vice –Chair, George Morara Monyoncho Available at [http://www.knchr.org/Portals/0/Press Government/Press%20Government%20on%20Error%20of%20fighting%20terror%20with%20terror.pdf](http://www.knchr.org/Portals/0/Press%20Government/Press%20Government%20on%20Error%20of%20fighting%20terror%20with%20terror.pdf)

¹⁹The office of Kenya National Commission on Human Rights (KNCHR) Coast region reported on 12 August 2015 that more than 30 cases of missing young men and women mostly aged between 20 and 32 have been reported since February, this year.

ensure that the public is empowered and knows what to expect and demand fair, efficient and effective public prosecution services. This recent policy is yet to be fully implemented to achieve its goals. Further, the efforts towards reforming the Judiciary under the Judiciary transformation Framework, though promising, are yet to be fully realized.

48. Consequently, human rights defenders (HRDs) across the country continue to face malicious prosecution for their work. A notable case is that of Mr. Joel Ogada, a HRD and a resident of Marereni in Malindi, Kilifi County who had three matters pending against him in court on charges of arson²⁰, assault,²¹ and forcible retainer²². He was sentenced to seven (7) years imprisonment for an arson case but on appeal the sentence was reduced to two years. The other matters are still ongoing with total disregard for due process thus violating his right to a Right to Fair Trial.
49. In Nakuru County, a HRD Benard Macharia has two criminal matters pending against him in court. He is charged with conspiracy to defeat justice,²³ and being in possession of an imitation firearm²⁴. A cash bail of KES. 200,000 was paid to secure his release, however his file disappeared and thus his release could not be processed. It took the intervention of the Chief Justice to enable the file resurface and his release from remand.
50. Similarly in December 2014 when the Kenyan Parliament considered the passage of the Security Laws (Amendment) Act 2014, the Act also made it possible for persons to be held without charge for a period of up to 90 days. Eight contentious clauses of the Act were later declared unconstitutional by the High court in Nairobi. This provision allowed for detention without trial as a person was to be merely produced in court but NOT

²⁰ CR/41/2013 In The High Court of Kenya At Malindi (Malindi High Courts) Republic V. Joel Ogada

²¹ CR/ 677/2011 In The High Court of Kenya At Malindi (Malindi High Courts) Republic V. Joel Ogada

²² CR 713/2013 In The High Court of Kenya At Malindi (Malindi High Courts) Republic V. Joel Ogada

²³ Republic v. Bernard Macharia Mwangi Criminal Case No. 470/15

²⁴ Republic v. Bernard Macharia Mwangi Criminal Case No. 2891 of 2013

charged. This violates Article 49 (g), 25 (a) and (c) which provides that the right to be charged, not to be subjected to torture, cruel, inhuman or degrading treatment or punishment; and the right to a fair trial. These rights are non-derogable.

51. Measures to improve access to judicial remedies and address limited access to courts by individuals have not been implemented. The Legal Aid Bill, 2015, which seeks to give effect to Articles 48, 50 (2) (g) of the Constitution, to establish the National Legal Aid Service, to make provision for legal aid, and to provide for funding of legal aid and connected matters, is yet to be enacted by Parliament.²⁵ The Equal Opportunity Bill, 2007, which seeks to promote equality and eliminate discriminative practices, as well as the Small Courts Claims Bill, 2007, tied to questions of reduced or no cost for accessing the courts, are also yet to be published and tabled before Parliament.²⁶ Access to courts will improve if such bills are enacted and operationalized.

52.

Recommendations

We call on the Commission to urge the Government:

- a. To call on the Kenya Law Reform Commission (KLRC) and other relevant actors to review and revise the Penal Code and other legislation to ensure that their consistency with the Constitution, especially on the aspect of fair hearing;²⁷
- b. To Encourage the National Assembly to complete the enactment processes for the Equal Opportunity Bill, the Legal Aid Bill, and the Small Claims Court Bill, pursuant to the enabling provisions of the Constitution of Kenya, in order to promote access to justice;
- c. To allocate sufficient funds to the Judiciary for effective implementation of the Judiciary Transformative Framework;
- d. To call for the expeditious conclusion of the vetting process for magistrates by the Judges and Magistrates Vetting Board so as to facilitate improvement of the Judiciary;
- e. To call for the advancement of 'Court Users Committees' that have been used to enhance civic participation in the administration of justice.

7 Article 10: Freedom of Association

²⁵Commission for the Implementation of the Constitution, Legal Aid Bill, 2015 Available at http://www.cickenya.org/index.php/legislation/item/342-legal-aid-bill-2013#.UwWCL_mSyAU (Accessed on February 14, 2013)

²⁶ICJ Kenyan Section, Access to Justice, 2012 Available at <http://www.ici-kenya.org/index.php/ici-programmes/access-to-justice6> (Accessed on February 14, 2013)

²⁷Section 7 of the Sixth Schedule

53. Article 36 of the Constitution guarantees freedom of association. It states that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person shall not be compelled to join an association of any kind. It further adds that any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably. The freedom of association is further protected in national legislation in force, such as the Cooperative Societies Act and the Societies' Act. Kenyan Law also protects many professional associations and organizations, such as the medical association, the Bar Association, the Architectural Association of Kenya.
54. It is noteworthy that in the year 2014 the government undertook a series of measures that served to shrink the civic space and hamper the work of civil society specifically. The *Security Laws (Amendment) Act (SLAA)* assented to by the President gave the government expansive powers to restrict basic rights in the interest of national security. Among other controversial clauses, the legislation authorized the government to monitor and intercept communications, detain terrorism suspects without charge for up to one year, and restrict media reporting on terrorism and related issues. The above clauses were declared unconstitutional by the High court sitting in Nairobi giving a reprieve to the threat of violation of human rights. Soon after, the Non-Governmental Organizations Coordination Board deregistered more than 340 NGOs that it claimed had not submitted financial records, alleging that they were "vulnerable to abuse as conduits of terrorism finance and money laundering."
55. In late 2013, the government sponsored proposed amendments to the Public Benefits Organizations (*PBO*) Act that would have capped foreign funding of NGOs at 15 percent, among other provisions. It had been widely perceived that these amendments were tailored as punitive measures against civil society organizations that had been vocal on the matter of criminal accountability in the aftermath of the 2007-08 post-election violence. While these amendments were initially withdrawn, the bill was reintroduced in October 2014. Some estimates suggest that the cap could result in the loss of over 100,000 Kenyan jobs at the country's 8,500 registered NGOs. The NGO Board's December deregistration of more than 340 NGOs, including 15 with alleged ties to terrorist groups, adversely affected Christian groups, orphanages, and health and development organizations. Other groups, such as the international NGOs Doctors without Borders and Concern Worldwide, were not deregistered, but the government accused them of failing to submit financial audits and gave them a three-week deadline to do so.

56.

Recommendations

We Call on the Commission to recommend that:

- a. The Government and the NGO Board observes and uphold the rights of persons to associate;
- b. The Government should remove unnecessary barriers to registration and refrain from introducing new unnecessary and unreasonable barriers to registration in a free and democratic society;
- c. The Government urges the National Assembly to reject proposed amendments to the PBO Act and bring into effect the law;
- d. The Government especially the President to refuse to assent any Bill that threatens to encroach the rights of NGO's and other Civil Societies.

8 Article 11: Freedom of Assembly

57. Article 37 of the Constitution of Kenya allows every person the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities. In the recent past this right has been threatened by political inflammatory remarks that spark ethnic clashes. Kenya's security agencies have been criticized whenever they issue orders against public rallies due to security concerns. The issue remains one of balancing the exercise of the right to assemble on the one hand and securing citizens at any given time.

58. There have however been increased arrests and intimidation of HRDs in Kenya. Wendy Wanja Mutega, a human rights lawyer and chair of the Law and Social Development Trust (LASODET) was confronted by unidentified individuals on September 23, 2014 and warned to stop working with 3,000 members of the Atiriri Bururi ma Chuka Trust, a local environmental rights group.²⁸ On January 19, 2015, two prominent human rights defenders, Irungu Houghton and Boaz Waruku, were arrested during the "occupy playground" demonstrations as they advocated for the rights of school children who had been deprived of access to their playground after it had been wrongfully acquired by a private developer. They appeared in court on January 20, were charged with "incitement" and were later released on cash bail. More disconcerting in this case, was the use of teargas against school children who were part of the protest; while the

²⁸ CIVICUS, National Coalition of Human Rights Defenders Report on Attacks on Civil Society, march 2015

government through the Minister of Interior apologized for the incident, the promise of swift administrative action against the officers involved is yet to take place.

59. On December 18, 2014 security forces dispersed demonstrators peacefully proceeding towards Parliament to protest against the then debate on contentious amendments to security laws. Eight protesters were detained and charged for taking part in an unlawful assembly and incitement to violence.

60.

Recommendations

We call on the Commission to urge the Government to:

- a. Respect and uphold the right to freedom of assembly as guaranteed in the Constitution. In particular, we call for an end to the use of illegal, undue and excessive force in dispersing of public protests;
- b. Articulate clear guidelines on the policing of public protests premised on the rule of law, restraint and tactical options that allow for less lethal force as a measure of last resort.

9 Article 12: Freedom of movement

61. Recent actions by the Executive have brought into question Kenya's commitment to the protection and assistance of asylum seekers and refugees; contrary to its long-standing history on the same. During the April 2014 security operation *Usalama Watch*, refugees and asylum seekers in addition to arbitrary arrests and detentions, ill treatment and extortion; endured deportations and family separations through forced relocation from urban centres to camps. Cases of Somali refugees being refouled to Somalia were also reported.²⁹ Humanitarian access to places of detention was severely restricted, hampering detainees' access to healthcare and social assistance as well as adequate monitoring of the situation.

62. The Security Laws (Amendment) Act of 2014 was assented to by the President which had purported to introduce a cap to the number of refugees and asylum seekers permitted to stay in Kenya as not exceeding 150,000 persons at a time. This provision was subsequently held by the High Court to be unconstitutional as it violated the principle of non-refoulement as recognized under the 1951 United Nations Convention

²⁹ See UNHCR update on Operation Usalama Watch for the period July 1-15, 2014. Available on: https://www.humanitarianresponse.info/system/files/documents/files/Usalama%20Watch%20Update_15%20July_v4%5B1%5D.pdf . Accessed on September 15, 2015.

on the Status of Refugees which is part of the laws of Kenya by dint of Article 2 (5) and (6) of the Constitution.

63.

Recommendations

We call on the Commission to encourage the Government to:

- a. Maintain its long standing tradition of accommodating asylum seekers and refugees alongside their broader foreign policy objective of mediating conflict and brokering peace in the region;
- b. Desist from actions and policy directives that undermine its obligations on the protection of asylum seekers and refugees;
- c. Desist from enforcing a strict encampment policy that relocates refugees from urban Centre's to camps;
- d. Desist from utilizing undue profiling of asylum seekers and refugees in the context of security operations that exposes them to arbitrary arrests, detention, ill treatment and extortion;
- e. Desist from engaging in deportation of asylum seekers and refugees and thereby violating the principle of *non-refoulement*;
- f. Consider in light of the ongoing conflict in South Sudan, extending *prima facie* status to South Sudan refugees and no longer levying visa charges at the *Nadapal* border crossing points.

10 Article 14: Right to property

64. The Government reports commitment to ensuring that all citizens enjoy the right to property. To this end, the Government adopted the National Land Policy which provides a framework on land administration and management in Kenya. The Land Act Cap 280, Laws of Kenya under Section 107 and 110 regulates compulsory acquisition of land in Kenya. One has to be given notice and such acquisition has to be for public interest or purpose. Section 111 also deals with compensation which has to be just and prompt. To this end, the National Land Commission (NLC) is required to make rules for the assessment of just compensation. In *Musa Mohammed Daqane & 25 others v Attorney General & another [2011] eKLR* the court awarded compensation to a community whose land had been compulsorily acquired. Furthermore, significant progress has been made with regard to internal displacement courtesy of a broad-based resettlement assistance programme for Internally Displaced Persons (IDPs) from the 2007-08 post-election

violence and various forest evictees. A law on the protection and assistance of IDPs and affected communities was also enacted in 2012.

65. Despite the aforementioned progress, various communities continue to endure perennial and un-procedural episodes of evictions and displacement. The Ogiek community challenged their eviction from the catchment and biodiversity hotspots within the Mau Forest Complex and obtained provisional measures from the African Court on Human and Peoples' Rights (AfCHPR) that the government has not adhered to.³⁰ They have since obtained a judgement from the Kenyan Environment and Land Court which declared the eviction to be a contravention of their rights and required the National Land Commission to duly register members of the community and allocate them land for settlement.³¹ The Sengwer community has also been forcefully evicted from the Embobut forest despite the existence of a Court order prohibiting the exercise.³²

66. In regard to internal displacement, a significant number of integrated IDPs from the 2007-08 PEV and prior cycles of electoral violence have not received assistance or resettlement options from the government after being left out of the initial profiling exercise in 2008.³³ Concerns over genuine beneficiaries missing out on compensation,³⁴ and a lack of adequate consultation with IDPs in the selection of alternative lands for resettlement have been raised. Independent reports indicate that a combined total of 607,474 persons were newly displaced from 2012-2015 as a result of inter-communal violence.³⁵

67.

Recommendations

We call on the Commission to urge the Government to:

- a. Adhere to all orders issued by judicial bodies either at the local or regional level regarding the land rights of indigenous peoples. In this regard the Government should

³⁰See African Court website at: http://www.african-court.org/en/images/documents/Court/Cases/Orders/ORDER_of_Provisional_Measures-African_Union_v._Kenya.pdf . Accessed on September 9, 2015

³¹ See <http://kenyalaw.org/caselaw/cases/view/95729/> . Accessed on September 9, 2015.

³² Forest Peoples (2014) Kenya defies its own courts: torching homes and forcefully evicting the Sengwer from their ancestral lands, threatening their cultural survival Available at <http://www.forestpeoples.org/topics/legal-human-rights/news/2014/01/kenya-defies-its-own-courts-torching-homes-and-forcefully-evi> (Accessed on February 14, 2014)

³³ This is currently the subject of ongoing litigation in High Court of Kenya, Nairobi Petition No. 273 of 2011: Federation of Women Lawyers in Kenya and Others v. The Attorney General and Others.

³⁴ Also the subject of ongoing litigation in High Court of Kenya, Eldoret Petition No. 6 of 2013: David Kiptum Yator and Others v. the Attorney General and Others.

³⁵ See UN OCHA (2015) Kenya: Inter-communal conflict and AOG related incidents by county (January - June 2015) http://reliefweb.int/sites/reliefweb.int/files/resources/Kenya_0.pdf . Accessed on September 9, 2015

halt the illegal and forceful evictions of the Sengwer community from the Embobut forest and allow for amicable settlement of the matter;

- b. Speedily enact community land legislation to provide the legal framework for the use, transfer and management of community land;
- c. Conclude the enactment of the Evictions and Resettlement Procedures Bill should be concluded to provide for protection against inhumane and unlawful evictions;
- d. Support the National land Commission (NLC) in the investigation of land historical injustices and implement the recommendations of the Truth, Justice and reconciliation Commission (TJRC) with respect to land.

11 Article 15: Right to work under equitable and satisfactory conditions

68. Despite the reported increase in the number of jobs created through public and private sector initiatives, the Government admits to rising unemployment. The UN Committee on ESCR for instance revealed that Kenya's unemployment rate in 2011 was 40 percent, up from 12.7 percent in 2006. Further, the Government conceded that the right to work remains extremely tenuous for certain sections of society. For instance, despite the affirmative action provisions in the Constitution, and the Persons with Disabilities (PWDs) Act No. 12 of 2003, employment opportunities for PWDs remain extremely limited.

69. Poor working conditions are prevalent for flower farm workers, domestic workers, commercial sex workers, among others. A survey carried out by Oxfam in August 2013, in *Mukuru*, an informal settlement in Nairobi discloses that women domestic workers face serious livelihood challenges.³⁶ These include low and delayed pay, poor working conditions, sexual exploitation, as well as physical and psychological abuse. The survey further revealed that to a great extent, economic obstacles stood in the way of these workers dealing with the problems they face at work, and the Government had also failed to intervene. It is reported that 40.52 percent of women in *Mukuru* faced the risk of losing their jobs and income if they reported their employers and therefore preferred to suffer in silence. Additionally, 36.49 percent were not aware of any place where they could report or lodge their complaints. Lack of confidence in the outcomes of any interventions, or lack of money and other resources to pursue their complaints, were each mentioned by 10.81 percent of women as deterrents to their quest for justice.

³⁶ Oxfam, Report of a Baseline Survey of Women Domestic Workers in Mukuru Informal Settlement - Nairobi Kenya, (Oxfam, August 2013)

70. In 2012, the KHRC conducted a survey on the working conditions of women in 15 flower farms in Naivasha, Thika, and Athi River.³⁷ One of the key findings of the study was that on average, women in the farms work longer hours (12.9 hours per day) compared to their male counterparts (8.2 hours per day). Worse still, the women earn less because the additional hours they work are not remunerated. All in all, the hours of work in the cut-flower sector are way above the national average, with work-days amounting to as high as 16 hours, especially during peak seasons.

71. Commercial sex workers (CSWs) and Street Vendors (or hawkers) on the other hand continue to suffer similar if not worse conditions of work. The Government has retained systems and laws (such as Sections 153 and 154 of the Penal Code, Cap 63) that criminalize commercial sex work, by-laws on petty offences that limit opportunities for trade and essentially criminalize poverty. These Vulnerable groups are therefore subjected to unsafe and oppressive conditions. Despite the existence of an extensive Bill of Rights and in the absence of any legal framework in defense of these groups, they continue to be exposed to excessive pre-trial detention, torture, harassment, intimidation, exploitation, extortion and physical abuse, just as much as they are exposed to brutality in the hands of law enforcement agencies, especially County *askaris* (security agents) in urban and town centers.³⁸

72.

Recommendations

We call on the Commission to urge:

- a. The Government to ensure that the Ministry of Labour undertakes an urgent audit of the numbers and conditions of workers in flower farms, domestic workers and commercial sex workers in order to facilitate Government plans for strategic interventions;
- b. The Government and especially the Parliament to decriminalize commercial sex work by repealing Sections 152, 153, 154 and 155 of the Penal Code, Cap 63 Laws of Kenya and instead put in place regulatory measures;
- c. The Government to work with County governments and review petty offences in by-laws to ensure that they are in conformity with the international obligation of the Government;
- d. The Government to work with County governments to ensure that their law enforcement officers are properly trained, regulated and held accountable for their

³⁷ KHRC, *Wilting in Bloom: The Irony of Women Labour Rights in the Cut-flower Sector in Kenya*, (KHRC, 2012)

³⁸ It should be recalled that Article 6 of ICESCR places on the Government an obligation to take steps to safeguard the right to work which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept

actions;

- e. The Government to ensure that judicial reform should extend to magistrate's courts handling offences stemming from by-laws.

12 Article 16: The Right to Health

12.1 *Geographical disparities in accessing health care services*

73. In regards to Article 16 on the right to health, the Government omitted to report accurately on geographic disparities in access to health care in Kenya. The disparities are unacceptably high. For instance, in counties such as Wajir, only 12 percent of deliveries are assisted by a skilled health worker, compared to 94 percent in Nyeri, the best performing county. Likewise, only 47 percent of children were fully immunized in Wajir compared to 93 in the Nyeri in 2011.

74.

Recommendation

We call on the Commission to urge the Government:

- a. To undertake measures to address the inequalities in accessing health care by allocating enhanced and specific budgets for infrastructural development in marginalized areas.

12.2 *Lack of access to Palliative Care*

75. The Kenya National Patients' Rights Charter 2013 in chapter 1 States that 'every person, patient or client has a right to access health care which shall include promotive, preventive, curative, reproductive, rehabilitative and palliative care'. Palliative care is also recognized under international human rights law. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR), countries are obliged to take steps to ensure that patients have access to palliative care and pain treatment. Kenya is a signatory.

76.

Recommendations

We call on the Commission to urge the Government to:

- a. Take all measures to eliminate regulatory, educational and attitudinal obstacles in the bid to ensure that full access to palliative care;
- b. Take measures such as allocating more resources, sensitizing Kenyans current to ensure

- in order to overcome the challenges to palliative care in Kenya;
- c. Include palliative care in the National Health Bill 2014;
 - d. To make morphine available for use and allow nurses to prescribe morphine to patients.

12.3 Increased out of pocket spending for health services

77. A significant share of health expenditure is in the form of out-of-pocket (OOPs) payments; households account for about one third of total health expenditure. The review shows that total private spending on health increased from US\$ 17.5 per capita in 2001/02 to US\$ 21 in 2011/12. The contribution by donors, on- and off-budget, has also increased from US\$ 5.3 per capita to about US\$ 15 during this period. OOP payments are inequitable, are a major barrier to access, and contribute towards household poverty and impoverishment.

78.

Recommendation

We call on the Commission to urge the Government to:

- a. Advance policies that reduce reliance on out-of-pocket payments and move towards pre-payment financing mechanisms.³⁹

12.4 Violations of the Right to Reproductive health

79. The Constitution of Kenya has progressive provisions on access to reproductive health including safe legal abortion and in instances of emergency care or where it is considered that the health or life of the mother is in danger. A 2013 study commissioned by the Ministry of Health revealed that Kenya had a high abortion rate which stood at 48 abortions per 1000 women of reproductive age (15- 49 years). In 2012 about 120,000 received treatment for complications from induced abortions whereas the fatality rate stands at 266 deaths per 100,000 unsafe abortion procedures. Unsafe abortion were said to account for about 13% of Maternal Mortality Rates in Kenya.⁴⁰

80. The Government of Kenya, through the Ministry of Health however, in December 2013 withdrew the National Standards and Guidelines for the reduction of morbidity and mortality from unsafe abortion in Kenya. These guidelines had been drafted and applied

³⁹ Out-of-pocket (OOP) payments account for over a third of total health expenditure. The OOPs are inefficient, inequitable and contribute to households' poverty and impoverishment. Increasing the share of tax funds allocated to the health sector and promoting health insurance can offer financial risk protection for the population.

⁴⁰ Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 2013). Available on: <https://www.guttmacher.org/pubs/abortion-in-Kenya.pdf> . Accessed on September 14, 2015.

to conform with the Constitutional limits on access to safe abortion services. By clarifying the legal grounds under which abortion may be performed, these guidelines served a critical role in addressing the alarming numbers of women suffering injuries and death due to unsafe abortion. The Government, through the memorandum withdrawing the guidelines, also forbade any training on comprehensive abortion care and medical abortion, including those that are permissibly indicated under the Constitution and thus also ceased all trainings on post-abortion care and family planning, which are a part of the comprehensive abortion care approach.

81. Furthermore, Kenya's Penal Code under sections 157 and 158 continue to criminalize abortion by providing that the provision of abortion services is a felony and is liable to imprisonment for fourteen years, whereas the woman who seeks for abortion care services is guilty of a felony and is liable to imprisonment for seven years. These provisions place a blanket criminalization on abortion and contravene the exceptions permissible within the Constitution. Their continued existence has only served to fuel a lack of awareness and confusion especially on the part of law enforcement. There have since been cases of women and medical practitioners who have been arrested and charged pursuant to the Penal Code and thus violating their rights as guaranteed by Articles 26 (4) and 43 of the Constitution. The fear of prosecution has also led to the refusal to provide services by health providers.

82.

Recommendations

We call on the Commission to urge the Government to:

- a. Immediately put in place National standards and Guidelines for safe abortion and the training curriculum that provides for clinical guidance to health care providers on the skills and indications for safe abortion in Kenya;
- b. Amend the Penal Code so as to align it with the Constitution that recognizes the access to safe, legal abortion as well as the provisions of Article 14 2 (c) of the Maputo Protocol that protects the reproductive rights for women by authorizing for medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy constitutes a danger to the mental and physical health of the woman;
- c. Hasten the enactment of a Reproductive Health Law that will comprehensively lay out reproductive health rights as per the requirements of Article 14 of the Maputo Protocol.⁴¹

⁴¹ Laying the Foundation for a Robust Health Care System in Kenya; Kenya Public Expenditure Review, World Bank Group 2014
International Covenant on Economic, Social and Cultural Rights 1966
The Kenya National Patients' Rights Charter 2013
The Kenya Health Policy 2012-2030

- d. Lift the reservation on the Maputo Protocol Article 14 2 (c);
- e. Enhance the standard and guidelines on reduction of maternal mortality;
- f. Invest more in girl-child education. It has been noted that a more educated mother has increased acceptance to antenatal care;
- g. Increase support to mobile clinics for deliveries and antenatal care especially in rural areas;
- h. Heighten awareness campaigns to inform mothers to improve acceptance of antenatal care;
- i. Scale up provision of youth friendly services to provide education on risks of unsafe abortions and provide post abortion care in a friendly manner.

12.5 Right to the highest attainable standard of health

83. The Constitution's Bill of Rights espouses a right to the highest attainable standard of health including reproductive health and mental health for every person⁴². Aligned to this, national health policies such the Kenya National AIDS Strategic Plan III (2009-13) have noted that criminalization of homosexuality limits the ability of queer men and Men who have Sex with Men (MSM)⁴³ from accessing this constitutionally guaranteed right with regards access to HIV services. Four (4) health centers that provide reproductive health services for MSM were threatened with closure by non-Government actors between February and March of 2014, forcing temporary suspension of services for security reasons⁴⁴. This was within the context of MPs in the Kenyan parliament asking citizens to engage in arrests and raids of suspected 'recruitment' centers of homosexuality⁴⁵.

84.

Recommendation

We call on the Commission to require the Government to:

- a. Align all health policies with the constitutional right to the highest attainable standard and without discrimination.

13 Article 17: The Right to Education and Culture

⁴² Constitution of Kenya 2010 Article 43

⁴³ Penal Code of Kenya Sections 162-165

⁴⁴ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

⁴⁵ Mamba (2014), *Africa's Anti-Gay Crackdown: Is Kenya Next?*, viewed 14 August 2015

<http://www.mambaonline.com/2014/03/12/africas-anti-gay-crackdown-is-kenya-next/>

85. Despite the noted successes of Kenya's Free Primary Education (FPE) programme an October 2012 report by the United Nations Economic Socio-Cultural Organization (UNESCO)⁴⁶ states that, approximately one million children are still out of school in Kenya despite FPE and attempts at Free Day Secondary Education (FDSE) While this is almost half the number reported in 1999, it is still the ninth highest of any country in the world. The survey also raised concerns about the inaccessibility of free education and resulting benefits to poor and marginalized groups. It reports that 55 percent of poor girls and 43 percent of poor boys living in the North-Eastern regions have never been to school.
86. The quality of education has also come into question. According to a 2011 report by Uwezo Kenya,⁴⁷ 'only three out of 10 children in Class Three can read a Class Two story book [in English], while slightly more than half of them can read a paragraph. Four out of 100 children in Class Eight cannot read a Class Two story'. Further, Uwezo reported that 30 percent of Class Three children are unable to complete Class Two division, and 10 percent of Class Eight children cannot do Class Two division. The 2012 survey by UNESCO also revealed that among young men aged 15-29 years who had left school after six years of schooling, 6 percent were illiterate and 26 percent were semi-literate. The figures are worse for girls, with 9 percent illiterate and 30percent semi-literate after being in school for six years.
87. The current administration, through its campaign manifesto acknowledged the inequalities and poor standards of education in Kenya. It therefore pledged that the Government would increase the number of schools in disadvantaged areas, and restrict class sizes to a maximum of 40. It would further improve the student-teacher ratio to 1 teacher for every 40 students. The Government is yet to disclose any programs it has formulated to honour these pledges.

88.

Recommendations

We call on the Commission to urge the Government to:

- a. Prioritize investment in the education sector and as a matter of urgency embark on the construction of schools in marginalized areas, and employment of more teachers so as to improve the teacher to student ratio to 1:40;
- b. Ensure that provision is made for children with special needs under the Free Primary

⁴⁶ UNESCO 'Education for All Global Monitoring Report'

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ED/pdf/EDUCATION_IN_KENYA_A_FACT_SHEET.pdf

⁴⁷ Uwezo, Kenya 'Are Our Children Learning? Annual Learning Assessment Report, 2011' <http://www.pokot.org/wp-content/uploads/2012/05/Uwezo-20111.pdf>

Education (FPE) system;

- c. Effectively investigate, prosecute and punish instances of corruption within the education sector.

14 Article 18(3): Elimination of discrimination against women

14.1.1 Women's Political Participation and Representation

89. Despite the constitutional and legislative provisions for equal participation of men and women, and subsequent affirmative action quotas, Kenya is yet to achieve the Constitutional 33% minimum quota or the desired gender parity requirements of the African Union. There is currently a bill in Parliament seeking to further progress the realization of the constitutional principle that no more than two-thirds of either gender should hold appointive or elective office. This follows the 2012 Supreme Court advisory opinion that the principle could not be realized before the 2013 elections and requiring Parliament to enact enabling legislation to provide for the framework for implementation of the principle by August 27, 2015. Parliament has since extended this deadline by a year to August 27, 2016.

90.

Recommendation:

We urge the Commission:

- a. To call upon the Government to adopt an implementing legislation to realize the Constitutional two-thirds gender principle and further take affirmative measures towards the realization of the AU's gender parity aspirations.

14.2 Trafficking in Persons

91. Despite legislation and policy measures in place that address trafficking in persons, Kenya continues to be a source, transit, and destination country for men, women, and children subjected to forced labour and sex trafficking. Within the country, children are forced to labor in domestic service, agriculture, fishing, cattle herding, street vending, and begging. Children are also exploited in prostitution throughout Kenya, including in the coastal sex tourism industry. There are several reported cases of an increasing

number of Kenyan women who have been trafficked to the United Arab Emirates and Saudi Arabia for labour exploitation.⁴⁸

92.

Recommendations

We call on the Commission to recommend that the Government:

- a. Allocates adequate resources for the implementation of the Counter Trafficking in Persons Act 2010 as well as the National Plan of Action to Combat Trafficking in Persons (2013-2017);
- b. Takes concrete steps towards instituting investigations, prosecutions and reparations that would secure meaningful and speedy justice for the victims of trafficking in persons;
- c. Increases oversight of and accountability for overseas recruitment agencies; increase protective services available to adult trafficking victims, particularly those identified in and returned from the Middle East;
- d. Allocates resources to the National Assistance Trust Fund for Victims of trafficking.

14.3 Addressing Female Genital Mutilation

93. The 2014 Demographic Health Survey (DHS) for Kenya released on 8th April 2015 shows that the current prevalence rate for female Genital Mutilation (FGM) stands at 21 per cent. This is a 6 per cent drop from the 2008/9 prevalence rate that stood at 27 per cent. The survey shows that only 10% of adolescent girls in Kenya have undergone FGM, down from 15%. However there are significant regional variations with FGM rates as high as 98% in certain regions.

94. In its 2011 consideration of Kenya's report, the CEDAW Committee stated its concern for the "negative impact of harmful traditional practices, such as early and forced marriage, on girls' education," and "the continued prevalence of the harmful practice of female genital mutilation in some communities, which is a grave violation of girls' and women's human rights and of the state party's obligations under the Convention." They went on to call for effective implementation of the law, prosecution and punishment of perpetrators and awareness-raising and education. In its 2007 consideration of Kenya's report, the Committee on the Rights of the Child expressed concern that FGM "is still widely practiced, especially among certain indigenous and minority groups" and called

⁴⁸ United Governments Department of Government Trafficking in Persons Report 2015 at pg 204. See more at <http://www.Government.gov/j/tip/rls/tiprpt/2015/index.htm>

on Kenya to “strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced” as well as to conduct awareness-raising and sensitization campaigns.

95. Despite frequent reports about cases of FGM and child marriage and girls escaping to avoid these practices, there have been no known investigations or prosecutions to date in the Pokot region and the government has taken no steps to protect the girls who are running away to avoid being violated.

96.

Recommendations

We call on the Commission to encourage the Government to:

- a. Take urgent action in accordance with Kenya’s international, regional and domestic obligations, including the African Charter and African Protocol on the Rights of Women in Africa, to ensure that FGM is eliminated;
- b. Take Immediate steps need to be taken to protect, provide support and shelter to girls escaping FGM and child marriage and to ensure that at-risk girls are not subjected to FGM at any time and in particular during the school holidays;
- c. Ensure laws against FGM and child marriage are effectively implemented with proper investigation and prosecution of violations;
- d. Ensure concerned national and local level authorities work together to put into place protective measures within at-risk communities to protect girls from both child marriage and FGM, and to ensure that they are able to continue with their education;
- e. Ensure that Awareness-raising and education campaigns are conducted to change cultural perception and beliefs on FGM and child marriage and acknowledging the practices as human rights violations.

14.4 Discriminatory Legislation

97. Kenya in 2013 and 2014 passed two key laws, the Matrimonial Property Act No. 49⁴⁹ and the Marriage Act No. 4⁵⁰ respectively, that should ideally speak to the possibility of women in Kenya to enjoy full and equal rights in the context of marriage as provided for by the Kenya Constitution of 2010. However, key provisions in these laws are discriminatory and retrogressive in nature and a clear violation of Kenya’s Constitution as well as Kenya’s regional and international obligations and thus continue to be a source of great concern.

⁴⁹ Matrimonial Property Act No. 49 of 2013, *available at* kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MatrimonialPropertyAct2013.pdf.

⁵⁰ Marriage Act No. 4 of 2014, *available at* kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf.

98. Women's access to and ownership of land and property is essential to their economic empowerment as land serves as a base for income generation. Kenyan legal practice has often recognized spousal non-monetary contribution towards the acquisition of matrimonial property. However recent jurisprudence has reversed these gains in a manner that challenges the equality of rights in marriage and which portends violations of Articles 14, 18 and 19 of the Banjul Charter and the Maputo Protocol. ⁵¹The Matrimonial Property Act, defines matrimonial property as only property that is jointly owned by the spouses, and only allows women the right to matrimonial property upon the death or divorce of their spouse if they can prove their contribution to the acquisition of the property during the marriage. Given that many Kenyan women do not work in paid employment, many are unable to contribute financially in the acquisition of matrimonial property. Even though the Act recognizes non-monetary contribution in the context of matrimonial property, women's groups in Kenya have called for any such non-financial contribution to automatically be accorded equal value and for women to be entitled to an equal share in matrimonial property without having to prove such contribution.

99. In late March 2014, Kenyan Members of Parliament voted to include a provision in the new Marriage Bill that formally permits polygamy in customary marriages, and omits the critical long existing cultural context that permitted first wives to weigh in or veto a husband's choice. The Marriage Act received presidential assent on 20 April 2014. Polygamy undermines a woman's right to enjoy equal rights in and be regarded as an equal partner in marriage. Specifically in relation to girls, these laws have a particularly negative impact in light of the fact that child marriage is widespread in Kenya and girls will be far less able generally to negotiate any rights in marriage. It is imperative that the prevailing legal framework adequately protects women's and girls' right to assert control over their own lives and partner choices.

100.

Recommendations

We call on the Commission to urge the Government:

- a. To take urgent action in accordance with Kenya's international, regional and domestic obligations, including the African Charter and African Protocol on the Rights of Women in Africa, to ensure that all discriminatory provisions in the Matrimonial Property Act and the Marriage Act are repealed and the Children's Act that seeks to protect girls from child marriage is enforced.

⁵¹ http://www.kenyalaw.org/Downloads_FreeCases/Peter%20Echaria%20v%20Priscilla%20Echaria%20case.pdf
Accessed September 23, 2015

15 Article 21 Right to freely dispose of their wealth and natural resources- including the right to lawful recovery and adequate compensation

101. The pastoralist, hunter-gatherer and fisher-folk communities in Kenya have endured numerous human rights violations associated with the exploration and exploitation of natural resources. These violations have included, among others, violation of the right to life, forced displacement and destruction of the environment which have had an adverse effect on their livelihoods and cultures. As previously highlighted, the Endorois, Ogiek and Sengwer have been deprived of their ancestral lands and continue to pursue legal redress for the same.
102. The Lamu Port-South Sudan- Ethiopia Transport Corridor (LAPSSET) project continues with limited consideration of the concerns voiced by marginalized communities in regard to their land rights, cultures and livelihoods. Substantial aspects of the project commenced without the necessary Environmental Impact Assessment (EIA) being carried out.⁵² With regard to oil exploration, the Turkana have previously complained of discriminatory employment practices by a lead oil explorer company.⁵³
103. In the case of the Endorois, notable progress has been made such as the payment of royalties to the community by the Kenya Wildlife Service (KWS) having accrued from the extraction of bio-enzymes on from their land and the establishment of a Taskforce on the Implementation of the African Commission on Human and Peoples' Rights Contained in Communication No. 276/2003 (Centre for Minority Rights Development on Behalf of Endorois Welfare Council vs. Republic of Kenya).
104. Despite such laudable progress some substantive concerns remain; the Endorois had submitted preliminary concerns with regard to the Terms of Reference for the Task Force citing that they read as though they were introspective for the State rather one that is primed to engage in the actual process of implementation as prescribed in recommendation 1(f) of the decision which requires the State to, “***...engage in dialogue with the Complainants for the effective implementation of these recommendations.***” As

⁵² KHRC (2014) Forgotten in the Scramble for Lamu: A Position Paper on the LAPSSET Project in the case of the Aweer and the Fisherfolk. Available on: http://www.khrc.or.ke/resources/publications/doc_details/69-forgotten-in-the-scramble-for-lamua-position-paper-in-the-case-of-the-aweer-and-the-fisherfolk.html. Accessed on September 14, 2015.

⁵³ See: “Tullow temporarily halts Kenya work after protests” Available on: <http://www.ft.com/cms/s/0/682ea95a-3fe1-11e3-a890-00144feabdc0.html#axzz3mTPJbs9U> . Accessed on September 14, 2015

a result the initial attempt at outreach to the community by the Task Force was deemed to be unilateral and failed to have the desired effect. Furthermore, the Taskforce was plagued by a lack of resources that saw it fail to meet its objectives within its stipulated timeline of September 2015 and will now require an extension.

105. Additionally, Truth Justice and Reconciliation Commission (TJRC) report with extensive recommendations on land historical injustices and economic marginalization is yet to be implemented. The enabling legislation for the investigation and resolution of land historical injustices has similarly not been enacted.

106.

Recommendations

We call on the Commission to urge the Government to:

- a. Address the land historical injustices visited on marginalized communities without further delay and in line with the recommendations of the TJRC report and other decisions relating to this issue;
- b. To undertake the consultations on the implementation of the Endorois decision and other similar cases on the basis of transparency, participation and good faith; so as to obtain their free, prior and informed consent;
- c. Ensure that a rights-based approach is integrated in conservation efforts;
- d. To ensure that all development projects are preceded by effective consultations with communities, awareness campaigns and holistic environmental and social impact assessments. Furthermore clear equitable benefit sharing models should be included in such projects;
- e. To adopt the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratify ILO Convention No. 169;
- f. Enact enabling legislation that advances the resolution of historical injustices and preserves the livelihoods of marginalized communities.

16 Article 22: Rights of peoples economic, social and cultural to development

16.1 Realization of sustainable development

107. Pursuant to Article 10 (2) [d] of the Constitution of Kenya, the Government is mandated to put in place measures to fast-track realization of sustainable development through enactment of laws and formulation of policies. The Government is also mandated to put in place administrative actions, programs and projects to give effect to

the Constitution as well as the Kenya Vision 2030. These endeavors are geared towards sustainable democracy, devolution and improved service delivery to the present and future generations⁵⁴.

108. Kenya's combined 8th - 11th Periodic Report features efforts to continue making progress in sustainable development by mainstreaming the principle in its social, economic and political development and enforcing laws and policies on sustainable development. The report captures, the Public Financial Management Act, 2012 that has continued to provide a framework for budgeting as well as accountability mechanisms within the County Governments. The Government also reports on its work supporting the process of devolution by devolving power, resources and services to the counties. Further, the report denotes that the Government has operationalized the Inter-Governmental Relations Technical Committee and its Secretariat. Besides institutions, the Government also reports that it has continued to build human capacity for managing devolution⁵⁵.

109. Contrary to the Government reporting, the United Nations Human Development Index in 2014 shows that Kenya has stagnated compared 2012 and 2013 reports and also ranked low in human development index of 0.535 and at position 147, which has also stagnated over time.⁵⁶ The 2013 UNDP survey had ranked Kenya at 145th out of 187 nations.

110.

Recommendations

We call on the Commission to urge the Government to:

- a. Address the policy, procedural and administrative gaps that has led to the inability of the government both at national and county level, to account for approximately 450 billion Kenya Shillings;⁵⁷
- b. Undertake due diligence⁵⁸ especially in mega-projects⁵⁹ and ensure that those found culpable of corruption are brought to account;

⁵⁴ Special Issue GAZETTE NOTICE NO. 2117,31st March, 2015- Annual Report on Measures Taken and Progress Achieved in The Realization Of National Values and Principles of Governance, Government Printers.pg.720

⁵⁵ Ibid, pg.731

⁵⁶ UN Human Development Report, 2014 shows that Kenya has maintained number 141 out of 187 countries for 2012 and

⁵⁷ According to the Auditor General's report for 2014 annual budget.

⁵⁸ According to World Bank Group's report entitled " Doing Business-Going Beyond efficiency, 2015, Kenya ranks poorly according to her East African Neighbors in doing business by scoring 54.94% while, Rwanda scores 70.47% and Tanzania 56.38%.

⁵⁹ Mega Projects such as – The standard gauge railways, Lamu Port South Sudan Ethiopia Transport Corridor Project, Expansion of Jomo Kenya International Airport Green Field Terminal, Galana-Kulalu 1 million acre project are among the mega-projects that have been riddled by corruption claims and opacity in the tendering process.

c. Reconstitute and restructure the Ethics and Anti-corruption Commission giving it prosecutorial power.⁶⁰

16.2 Water

111. There is a big disparity in access to safe drinking water and sanitation especially for the unprivileged in urban and those in arid and semi-arid areas despite the Constitution's recognition of economic, social and cultural rights.
112. The national coverage for water and sanitation is currently at 55.9% of the total population of 44.1 million people. Access to safe and clean water in urban centers in Kenya stands at 65.4% against the MDG requirement of 80% is far from being achieved. Only 48% of people in rural areas have access to safe and clean drinking water in 2014. Since July, 2013 Kenya has been experiencing a dry spell that has seen 95% of the water sources dry up. This has resulted to an overall water crisis that has adversely affected particular groups in the country due to their political and socio-economic status.
113. All the Water Service Boards in Kenya registered net increase in water supply coverage except the Northern Water Services Board. This covers the arid and semi-arid areas of Laikipia, Samburu, Isiolo, Marsabit, Mandera, Wajir and Garissa Counties. Access to water in these areas remains a challenge. For example only 23.8% of residents in Garissa County have access to safe and clean drinking water.

16.3 Sewerage coverage

114. In respect to sanitation the government in its planning under the first medium term plan (MTP) was to increase access to sanitation of urban household with individual or shared access to toilet facilities from 30% to 50%, the government was to improve access to toilet facilities by the rural population from 5% to 8%, the government has lagged behind in the improvement of access to water and sanitation to its citizens.
115. The Government during the year 2013/2014, 431,729 people was connected to sewerage systems in urban areas. This raised the coverage by 1.6% from 20.6% to 22.1%. Note that the urban coverage for the financial year 2012/13 has been revised from 21.5% to 20.6% after Rift Valley WSB revised their coverage figures. This is still far below the National Water Services Strategy (NWSS) and Vision 2030 targets on sewerage coverage of 40%
- 116.

⁶⁰ According to Transparency International Corruption perception report, 2014, Kenya has continues to score poorly and is ranked at number 145 against 175 counties from the previous 2013 rank of 136 out of 175.

Recommendations

We call on the Commission to urge the Government to:

- a. Pass the Water Bill 2014 to give effect to Article 43 of the Constitution that guarantees the right to safe, clean drinking water in adequate quantities;
- b. Pass the National Water Policy needs to be adopted to enhance the management of the few water resources, deal with pollution and uncontrolled abstraction of water resources;
- c. Require county governments especially in arid and semi-arid areas to prioritize water and sanitation services in their budgets and development agenda;
- d. Call for county governments to entrench human rights principles and approaches in the development of County Integrated Development plans for easier planning and realization;
- e. Invest more in sewer development to improve the standard of living especially for people living in urban informal settlements in major towns;
- f. Follow through its first medium term plan (MTP) of Vision 2030 that had set a target that by the end of the first MTP Plan in 2012/2013 the urban households with access to piped water would have increased from 60% to 75% while access to water from protected sources for rural dwellers would have increased from 40% to 60%.

16.4 The Right to adequate housing

117. The right to adequate housing is qualified by seven pertinent aspects which include; legal security of tenure, affordability, habitability, waste management facilities, accessibility for disadvantaged groups, location and cultural adequacy and availability of basic services like water and sanitation. The right to housing is recognized under Article 43 (1) (b) of the Constitution of Kenya.
118. The Government of Kenya has conducted several evictions without following proper procedures and in a manner that respects human rights. The eviction of people from Mau forest had Kenyan security agencies burn houses without giving residents a chance to seek alternative housing.
119. Several IDPs are still in IDP camps without adequate housing. The IDPs especially those who were settled in Uganda are still without adequate housing. There were houses destroyed during ethnic clashes in parts of Moyale in Marsabit County. Up to now the owners are still struggling with no proper housing.
120. As a Government Party of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), Kenya is held under obligations and monitoring by the UN relating to the right

to housing and rights to human dignity. Under Article 11(1) of the ICESCR and Article 9(1) and 17(1) of the ICCPR, Kenya should guarantee the right to adequate housing and protection against arbitrary interference with privacy, family, and home. Under the African Charter on Human and Peoples' Rights, Kenya is also obligated to respect basic human rights, including life and dignity, liberty and security, and right to property. In its concluding observations of Kenya's periodic report, the Human Rights Committee emphasized that forced evictions interfere with privacy rights as guaranteed under Article 17 of the ICCPR.

121. The UN Special Rapporteur on adequate housing provided countries with procedural guidelines on forced evictions. Before evictions, all development project processes must involve all of those who may be affected by the change, and "must demonstrate that the eviction is unavoidable and consistent with international human rights commitments." Whoever will be affected by the eviction must be notified in a timely matter and given an opportunity to voice their concerns to authorities. Evictions must be carried out in a manner so that it does not violate "the dignity and human rights to life and security of those affected." Immediately after the eviction, evictees must be provided with restitutions including compensation and alternative housing as necessary.

17 Article 23: Rights of peoples to peace and security

122. Kenya has long faced incidents of insecurity, but the number and scale of incidents have increased since October 2011, when Kenya deployed forces to Somalia in response to increased kidnappings, gun and grenade attacks at the coast, in the northeast and Nairobi.⁶¹ The Kenyan government labeled Al-Shabaab, the Somalia-based armed Islamist group, "the enemy," and vowed to set up a "buffer zone" north of its border with Somalia to stop the attacks. There have also been concerns on the security situation within the North Rift Region which has led to loss of life, property, displacement, disrupted education and healthcare.

123. Pastoral communities have suffered inter-ethnic conflicts ,banditry attacks in the name of cattle rustling ,conflicts over grazing land, pasture, water points and

⁶¹ The population of Kenya's northeast region is predominantly Kenyan Somali and the area borders Somalia. The coastal region has a sizeable Muslim population and is in proximity to Somalia and northeast Kenya. For general background on the rising number of Al-Shabaab attacks in Kenya see "Kenya: Al-Shabaab – Closer to Home," Crisis Group, Africa Briefing No. 102, September 25, 2014, [http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/b102-kenya-al-shabaab-closer-to-home.pdf](http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/b102-kenya-al-shabaab-closer-to-home.pdf)

boundary, which have led to loss of lives, closure of schools, loss of livelihoods, and even mass displacement ,where communities living in affected areas have fled to nearby centers to seek refuge. The most affected is Baringo County, Isiolo, Turkana and West Pokot counties and areas such as Kapedo, Nadome, Kiserian, Mukutani, Logumgum, Arabal, Ng'elecha, Chebinyiny, Kasiela, Yatya and Loruk. . Independent reports indicate that a combined total of 607,474 persons were newly displaced from 2012-2015 as a result of inter-communal violence.⁶²

124.

Recommendations

We call on the Commission to urge the Government to:

- a. Put in mechanisms to ensure long lasting peace in the region and to promote peaceful co-existence of ethnic communities and that elders from the affected communities and local leaders develop lasting solutions to the conflict/s;
- b. Ensure that schools are provided with adequate security for learning. Further, other institutions that are also get affected, including health facilities be provided with the necessary security to provide services to communities;
- c. Criminalize cattle rustling /banditry;
- d. Urge the Government to recognize and urgently resettlement of IDPs in pastoral counties in Baringo south;
- e. Ensure Mapping of boundaries especially Tiaty and Baringo south;
- f. Strengthen Alternative dispute resolution mechanism;
- g. Safeguard that the requirements of political leadership and accountability be upheld against those adversely mentioned and implicated in illegal acts. Further necessary legal measures are taken against those suspected of being behind the ongoing attacks.

17.1 Forced eviction cases

125. *Ibrahim Sanqor Osman & 1,122 others v The Minister of Government for Provincial Administration and Internal Security & 10 others [2011] Constitutional Petition No. 2 of 2011, High Court at Embu.* In the early morning of 10 May 2013, residents of City Carton were woken by groups of young men who burst into their homes, with no prior warning, to forcibly evict them. Nearly 400 homes were destroyed with crowbars and sledgehammers, leaving the people of City Carton homeless and unable to salvage their possessions. In both of these cases, the government has deliberately halted the process of compensation as directed by the courts.

⁶² See UN OCHA (2015) Kenya: Inter-communal conflict and AOG related incidents by county (January - June 2015) http://reliefweb.int/sites/reliefweb.int/files/resources/Kenya_0.pdf . Accessed on September 9, 2015

126.

Recommendations

We call on the Commission to urge the Government to:

- a. Pass the Eviction and Resettlement Bill, the Community Land Bill and adopt the National Slum Upgrading and Prevention Policy;
- b. Urge the Government to compensate the affected communities as directed by the courts to expedite the justice process.

18 Article 25: Duty to Promote Awareness of the Charter

127. One of the main missions of the KNCHR as the Government report articulates is to provide human rights education, training and campaigns. The Commission routinely trains the police, prison officers and prosecutors on the respect of human rights. Human rights education is part of the Law Degree Syllabus taught at the various Law Schools. The National Police Service is the main institution charged with the responsibility of training police officers in Kenya on the respect for human rights and fundamental freedoms. The Service develops training policies, approves training curricula and reviews the curricula to ensure its relevance to policing standards. All law enforcement officers are trained on the respect of human rights that enable fair, just and humane treatment of the public.

128. Like the Charter, Kenya has ratified many of the core human rights treaties but this does not reflect the correct position of human rights state in the country. There is still a big gap between human rights in theory and in practice. The national body vested with the mandate to enhance the promotion and protection of human rights and in the promotion of awareness of the charter in country KNCHR faces continued inadequate funding from the Government despite its efforts to lobby for additional funding to enable it, to effectively and sufficiently discharge its mandate. The implication is that the Commission is unable to sufficiently discharge its mandate and is unable to recruit adequate staffing for its work.

129.

Recommendations

We call on the Commission to recommend that the Government:

- a. Allocates adequate funding to KNCHR and other constitutional commissions such as NGEC, CAJ in order to facilitate their mandate in promoting Human Rights in Kenya;

b. Enhances its support to the KNCHR to be firm on its independence mandate and be more vocal in the human rights discourse in Kenya.

The Secretariat to Kenya CSO Forum on the African Charter

KENYA HUMAN RIGHTS COMMISSION

Gitanga Road opp. Valley Arcade Shopping Center P.O Box 41079-00100, Nairobi Kenya.

Tel: +254-20 2044545 +254-20 2106709 Cell:+254-722-264497, +254-733-629034, Fax: +254-20 3874997 Email: admin@khrc.or.ke Website: <http://www.khrc.or.ke>



**KENYA HUMAN RIGHTS
COMMISSION**