

GLOBAL HUMAN RIGHTS APPROACHES FOR HARNESSING RACIAL AND ETHNIC TOLERANCE IN KENYA¹

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Section I: Introduction

This paper seeks to do three things. First, it provides a context for understanding why international human rights norms, frameworks and mechanisms are essential bulwarks for ensuring racial and ethnic tolerance at the municipal state level. Second, it describes two parallel but non-exclusive international and regional mechanisms of currency in determining or influencing Kenya's actions regarding ethnic and racial tolerance. Finally, the presentation lists key recommendations which some of these international mechanisms presently expect Kenya to act on.

Section II: Value of International Norms, Mechanisms and Frameworks in Combating Racial and Ethnic Intolerance

Basis

States classically establish and enforce laws at the national and local levels. Yet human rights violations, as exemplified by Nazi Germany's World War II atrocities against its minority populations, illustrate how properly procedurally constituted national laws can disregard fundamental human rights. This is the context within which international human rights frameworks have been deployed to establish minimum normative standards to which municipal law must defer: it is the reason why states negotiate and then bind themselves into

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multilateral human rights instruments; and the basis for Kenya's 2010 Constitution providing that international instruments ratified by Kenya shall form part of its laws (Article 2 (6)).

As essential, international human rights norms establish common language of universal application which individuals, communities, states and the international community alike use to understand and name the beasts – in this case of racial and ethnic intolerance. Two concepts are particularly relevant to this discussion –intolerance and racial discrimination.

Tolerance

Article 1 of the 1995 UNESCO Declaration of Principles on Tolerance defines tolerance as:

“1.1 ... respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. ... Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance ... contributes to the replacement of the culture of war by a culture of peace.

“1.2 ... Tolerance is ... an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others. ... Tolerance is to be exercised by individuals, groups and States.

“1.3 Tolerance is the responsibility that upholds human rights, pluralism ..., democracy and the rule of law. It involves the rejection of dogmatism and absolutism and affirms the standards set out in international human rights instruments.

“1.4 ... the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others.”³

Discrimination

Discrimination is a key driver of intolerance. Its occurrence entails three critical elements:

³ Declaration of Principles on Tolerance, proclaimed and signed by member states of UNESCO on 16 November 1995, available at: www.unesco.org/cpp/uk/declarations/tolerance.pdf

- It occurs when a person on account of his or her identity is treated less favourably than another person in a similar situation where such treatment cannot be objectively and reasonably justified.
- Direct discrimination arises when a person because of having a particular status or identity is treated in a manner that causes him or her adverse impact when compared with the treatment given to persons not of that description:⁴ it is direct discrimination when an employer decides not to employ a woman merely on account of her gender; or not to employ a person because of his ethnicity.
- Indirect discrimination occurs where requirements, conditions or practices, imposed equally on everyone, say by a school or employer, have a disproportionate adverse impact on a particular group's possibility of gaining an education or a job.⁵

Racial Discrimination

Kenyans are usually perplexed by the idea that there should be local human rights focus on racial discrimination. They generally understand race to cover colour (white versus black). In fact, the normative context of racial discrimination is far broader and it has a continuing relevance for Kenya too.

Article 1, 1 of the International Convention on Elimination of All Forms of Racial Discrimination ('ICERD') of 1965 defines 'racial discrimination' as: "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."⁶ For Kenya's purposes, race includes colour (blacks versus whites); descent (for example by clan); national origin (Kenyan versus Ethiopian); or ethnic origin.

The following three exceptions though attach to the definition of 'racial discrimination'. First, it is conceivable that distinctions may be made between citizens and non-citizens (Article 1, 2). Second, a state may properly pass laws relating to nationality, citizenship and

⁴ See Article 5 of the Declaration of Principles on Equality, Equal Rights Trust, available at: <http://www.equalrightstrust.org/endorse/index.htm> (accessed on 11 November 2011)

⁵ Ibid

⁶ International Convention on Elimination of All Forms of Racial Discrimination, available at: <http://www2.ohchr.org/english/law/cerd.htm>

naturalisation; so long as such laws do not identify a particular nationality for specific discrimination (Article 1, 3). Finally, special measures taken to secure adequate advancement of certain racial or ethnic groups or individuals to enable their equal enjoyment or exercise of human rights do not amount to discrimination (Article 1, 4).

Section III: International Legal and Political Mechanisms for Combating Racial and Ethnic Intolerance

The international human rights framework within which protection against racial and ethnic intolerance is rooted involves two parallel but non-exclusive strands. First, are specific treaties which bind states that have ratified or acceded to them. Second, are state commitments which are guaranteed by international political or diplomatic pacts.

Specific treaties

International Covenant on Civil and Political Rights

Article 2, 1 of the 1966 International Covenant on Civil and Political Rights states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 then provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 19 of the ICCPR protects the right to hold opinions without interference as well as the right to freedom of expression. Article 20 then outlaws any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” Significantly, in its General Comment No. 18 on Non-Discrimination, the Human Rights Committee states that in order to uphold the principle of equality, states might be required to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant” (Paragraph 18). Article 27 provides that where ethnic, religious or linguistic minorities exist, they must not be denied the right to enjoy their culture, practice

their religion and use their own language. The Committee in General Comment No. 23 reiterates that Article 27 applies to non- citizens and non- residents of a state in as much as citizens (Paragraph 5.1); and that a state may have to take positive steps to ensure that the identity of individuals as well as the minority groups they belong to are protected (Paragraph 6.1-6.2).⁷

International Covenant on Elimination of All Forms of Racial Discrimination

As already stated, ICERD provides a more specific legal framework for combating racial discrimination. Kenya acceded to ICERD in 2001.

ICERD's key provisions are:

- Definition of 'racial discrimination' – Article 1;
- Condemnation of racial discrimination and commitment to eliminate racial discrimination in all its manifestations - Article 2;
- Condemnation of racial discrimination and apartheid – Article 3;
- Condemnation of all propaganda and organisations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempt to justify or promote racial hatred and discrimination – Article 4;
- Guarantee to everyone of equality before the law covering civil, political, economic, social and cultural rights as set out in the International Bill of Rights – Article 5;
- Assurance of effective protection and remedies via national tribunals and other institutions for everyone against racial discrimination – Article 6;
- Adoption of immediate and effective measures for combating prejudices that lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnical groups – Article 7;
- Establishment of CERD with the role of considering reports from States Parties covering the legislative, judicial, administrative or other measures adopted to give effect to the Convention – Articles 8 and 9; and

⁷ Regionally, the African Charter on Human and Peoples' Rights provides in Article 2 that: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

- Declaration by a State Party recognising CERD's competence to receive and consider a communication from an individual or group claiming to be victim to a violation of a right established in the Convention – Article 14. Kenya has not made this declaration.

Political/diplomatic means of combating racial discrimination

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

The third World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, established the Durban Declaration and Programme of Action Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Among other things, this Declaration:

- Recognised slavery and slave trade as crimes against humanity and acknowledged that Africans, Asians and indigenous people especially were and continue to be victims of these (Paragraph 16).
- Affirmed apartheid and genocide as crimes against humanity and major sources of intolerance (Paragraph 15).
- Noted that colonialism not only led to racism but that it also played a substantial role in creating social and economic inequalities especially in Africa and that this must always be acknowledged and remembered (Paragraph 14).
- Noted that measures should be taken towards eradication of poverty and realization of the right to development (Paragraphs 18-19).
- Noted that Alternate sources of intolerance relate to the inequalities in legal and political structures in some states.
- Listed victims of racism and intolerance to include Africans, Asians, indigenous peoples, migrants, those of mixed racial and ethnic origin, religious communities, women and HIV/AIDS infected people (Paragraph 38).
- Noted the positive contributions made by most victimized groups especially with regard to employment, education and health.
- Reaffirmed commitment to the protection of refugees, asylum seekers and internally displaced persons and the importance of international cooperation and burden sharing (Paragraph 55).
- Recommended, among other things, that:

- There be equality of opportunity in all spheres and full implementation and adherence to ICERD (Paragraphs 76-77);
- There be sufficient political will, stronger legislation and an end to prevalent racist attitudes and negative stereotyping (Paragraph 79); and
- There be provided human rights education; development of independent human rights institutions; elimination of illiteracy, racial profiling and work place bias; access to primary education for all; dialogue among civilizations; and cooperation among states.
- Identified key actors responsible for implementation of the aforementioned. For example, the media can play a key role in the fight against intolerance by abandoning negative stereotyping of vulnerable groups. Laws can punish, in light of human rights principles, any behaviour that discriminates on racial or ethnic lines. Political leaders and their parties can contribute towards the end of intolerance by encouraging diversity and condemning racial intolerance.

The Durban Review Conference of 2009 added further Perspectives to the conclusions of the Durban Conference. For example, the Outcome Document of the Durban Review Conference:⁸

- Reiterated the need for sharing of best practises by governments, regional and international organisations and other institutions (Paragraphs 49-50).
- Emphasised the role that the right to freedom of religion and expression and the right to freedom of information play in eliminating racism and related intolerance.
- Called on states to take comprehensive measures to combat racial discrimination as well as to carry out effective media campaigns to enhance the fight against racism and intolerance by disseminating and giving visibility to the Durban Declaration and Programme for Action.
- Called on governments together with their law enforcement agencies to collect reliable information on hate crimes as well as combat impunity for crimes of genocide (Paragraphs 59 and 65).

⁸ www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf

- Urged states to ensure that rights based strategies are used in finding lasting solutions for the internally displaced and to refrain from taking discriminatory measures and legislation that would arbitrarily deprive persons of their nationality.

The Universal Periodic Review

The Universal Periodic Review ('UPR') is a human rights mechanism which in a sense provides a common overall framework within which the exercise of human rights in a country can be planned, implemented and monitored. The UPR is a mechanism under which the Human Rights Council ('HRC') of the United Nations examines the situation of human rights in each state after every four years by reviewing the fulfilment of human rights obligations and commitments made by all the UN member states. It is a state-driven process in which non-governmental organisations (NGOs) have a limited role and the states under review have the right to accept or reject the recommendations made by other states during the review.

UN General Assembly Res. 60/251 of 15 March 2006 mandated the HRC to: "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states." The Resolution further stated that: "The review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies."

Res. 60/251 listed the following six objectives of the UPR:

- Improvement of the human rights situation on the ground;
- Fulfilment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state;
- Enhancement of the state's capacity and of technical assistance, in consultation with, and with the consent of, the state concerned;
- Sharing of best practice among states and other stakeholders;
- Support for cooperation in the promotion and protection of human rights; and

- Encouragement of full cooperation and engagement with the HRC, other human rights bodies and the Office of the High Commissioner for Human Rights ('OHCHR').

Section IV: Key Recommendations to Kenya by International Mechanisms for Combating Racial and Ethnic Intolerance⁹

ICERD

Article 9 of ICERD requires a State to submit to the Committee a report on the legislative, judicial, administrative or other measures adopted to give effect to the Convention. Kenya submitted its Initial to Fourth State Reports in 2010. Kenya presented its report before CERD in August 2011¹⁰ following which the Committee released its concluding observations.¹¹

Below are the key concerns and recommendations which the Committee raised with Kenya and on which the Committee expects actions by the State.

Holistic prohibition of racial discrimination

The Committee noted that while Kenyan law explicitly prohibits discrimination in areas such as employment, it does not do so for other fields of public life where discrimination occurs frequently, such as in housing. It recommended that Kenya should address racial discrimination in areas such as employment and housing.

The priorities for Kenya in this regard include preparing comprehensive civil, political, economic, social and cultural interventions on the basis of the provisions in Article 5 of ICERD. The Committee's concerns arising in this recommendation are particular in relation to economic and social rights, whose listing in Article 5 (e) covers the: right to work and

⁹ This paper limits its remarks under this section to ICERD and for example it does not review Kenya's UPR commitments. For a study of the UPR, see: *Accounting for Human Rights Protection Under the UPR: The Difference Kenya's Stakeholders Made*, KNCHR, 2011

¹⁰ See, UNOG – the United Nations Office at Geneva, available at: [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/0D9CCF4687BA22EDC12578EE004920CE?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/0D9CCF4687BA22EDC12578EE004920CE?OpenDocument) (last accessed on 11 November 2011)

¹¹ The Committee's concluding observations in relation to Kenya are available at: www2.ohchr.org/.../CERD.C.KEN.CO.1-4_en.pdf (last accessed on 11 November 2011)

rights at work; right to form and join trade unions; right to housing; right to public health, medical care, social security and social services; right to education and training; and right to equal participation in cultural activities. Article 5 of ICERD (as indeed the whole covenant) is part of Kenyan law by dint of Article 2 (6) of the Constitution of Kenya (2010) which provides that international treaties ratified by Kenya form part of its laws.

This Kenyan priority is to a great extent already embodied in law via Article 43 of the Constitution which establishes basic economic and social rights as justiciable. It is also articulated particularly in the economic and social pillars of Kenya's development blueprint, the Kenya 2030 Vision. Effective implementation of the Vision will therefore lead to realisation of the Committee's recommendations.

Justice and reparations for victims

The Committee was concerned that the limited awareness of rights by the population, and particularly the right not to be discriminated against, as well as the limited accessibility of judicial remedies, would continue to prevent victims from seeking justice and reparation through courts. It recommended that Kenya:

- Sensitise the population, through mass education, about the legal prohibition of racial discrimination and about its right to equality and non-discrimination;
- Ensure the provision of free legal aid throughout the country, including by rolling out the National Legal Aid Scheme which should involve the use of paralegal workers in rural and arid and semi-arid areas of the country; and
- Review judicial procedures as necessary to speed the processing of cases of racial discrimination in the courts, including through the reinforcement of the role of public prosecutors and members of the prosecution service in the initiation of judicial proceedings for racist acts.

Presently, judicial reforms are being implemented. An assessment of their effectiveness, particularly to indigent potential or actual litigants, should be undertaken. The Legal Aid Bill (2010), which is still being discussed by stakeholders, should be legislated on a priority basis.

National human rights institution

The Committee noted that Kenya is in the process of reviewing the institutional arrangements for its national human rights institution, in pursuance of the constitutional provision which provides for the establishment of the Kenya National Human Rights and Equality Commission (KNHREC). It encouraged Kenya to build on the positive experience of the Kenya National Commission on Human Rights (KNCHR) in deciding the most suitable institutional arrangement for its national human rights institution. It should ensure that the fight against racial discrimination continues to be at the core of the mandate of its national human rights institution, and that it remains fully compliant with the Paris Principles and is adequately resourced.

In August 2011, Parliament reconstituted KNHREC into three institutions: the Kenya KNCHR itself, the National Gender and Equality Commission, and the Commission on Administrative Justice. These three Article 59 Commissions will need to determine how they will synergise and leverage on their mandates so as to ensure effective protection against discrimination on the basis of race.

Prohibition of hate speech and incitement to hatred

While noting that the National Cohesion and Integration Act (No. 12 of 2008) and the Penal Code (Cap. 65) prohibit hate speech and incitement to hatred, the Committee was concerned that Kenya's legislation is narrow and does not cover all punishable offences as prescribed by Article 4 of ICERD and that relevant provisions condemn hate speech on only a limited number of grounds. It recommended that Kenya undertake the necessary legislative amendments in order to widen the scope of the existing legislation so as to give full effect to Article 4 of the Convention.

Section 13 of the National Cohesion and Integration Act criminalises hate speech relating to the stirring of ethnic hatred; but its definition of ethnic hatred limits protection to groups defined on the basis of their colour, race, nationality (including citizenship) or ethnic or national origins (sub-section 3). This definition is drawn from the grounds listed in Article 1 of ICERD's definition of racial discrimination. It is in fact necessary that the Section 13 protections be broadened to protect other groups including gender, disability and even sexual orientation. For example, KNCHR's experiences when it monitored the 2005 constitutional

referendum was that a lot of hate speech was crafted using language that denigrated women or persons with disabilities.

Punishing acts of incitement to ethnic hatred

The Committee noted with concern that politicians in Kenya continue to use incitement to ethnic hatred in statements and speeches. It urged Kenya to adopt a firm stand against the use of ethnic lines for political purposes, to strictly enforce the legislation on hate speech and incitement to hatred, and to investigate all allegations brought to its knowledge. Kenya should ensure that all those charged are properly prosecuted notwithstanding their station in life and that sanctions imposed take into account the gravity of these acts, when committed for political propaganda, insofar as they can lead to violence. Kenya should strictly enforce the relevant laws on the liability of the media when reporting or publishing racist statements.

Section 62 of the National Cohesion and Integration Act makes it an offense for a person to utter words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against a person, group or community on the basis of ethnicity or race. Three politicians who were charged on remarks they made during the campaign for the 2010 constitutional referendum were acquitted for lack of evidence,¹² and it will be instructive to see how future cases are handled.

Truth, justice and reconciliation

The Committee encouraged Kenya to continue to fully support the Truth, Justice and Reconciliation Commission (TJRC) established under the Truth, Justice and Reconciliation Act (No. 6 of 2008) until the completion of its work. Kenya should uphold its findings and implement its recommendations.

Parliament in 2011 extended the timeline within which the Commission should finalise its work to 2012. The public have been engaging with the TJRC in some regions more enthusiastically than in others; and grave concerns remain that the present truth-seeking

¹² See: <http://www.standardmedia.co.ke/InsidePage.php?id=2000048345&cid=159&>

(accessed on 20 February 2012)

process may be mortally compromised particularly in view of the ongoing long drawn-out impasse on the legality or legitimacy of the Commission's Chairperson, Bethuel Kiplagat. It is essential that a careful and candid assessment be made to ensure that victims seeking justice do get it; but this is something easy to say but very difficult to effect.

The post election violence

The Committee regretted that no victim of the violence which occurred following the 2007 elections had received reparation and the perpetrators were yet to be prosecuted. It called on Kenya to ensure that all victims of the post 2007 elections violence are effectively compensated and that the perpetrators of the violence are properly prosecuted.

Four individuals have been indicted to stand trial at the International Criminal Court (ICC) on charges of crimes committed during the post election violence. This process should be monitored not just so that culpable persons may be punished but, even more important, so as to anticipate and remedy any fallout or backlash following a positive or negative decision by the ICC. The overall message for Kenyans must be that impunity will at all times be punished. That is why alleged middle and lower level perpetrators of the violence also need to be prosecuted. Unfortunately that discussion seems to be in limbo, with no clear outcomes from the often repeated pledge by the State that these persons will be prosecuted locally under the terms of the Constitution of Kenya (2010).

Internally displaced persons

The Committee noted with great concern reports that some persons displaced by the violence following the 2007 elections have not been able to return to their homes nor received compensation. It recommended that Kenya give its fullest attention to the plight of internally displaced persons and to ensure that they return to their land or are otherwise properly resettled and provided with adequate reparation.

Again, even while relevant agencies have worked well to prepare a policy on internal displacement, this has not received approval from the Executive. IDPs continue to languish in camps; and some allotted resources have been misused.

Community grievances

The Committee noted with concern that Kenya has not acted upon the decisions of the African Commission on Human and Peoples' Rights (African Commission) regarding forced evictions of the Endorois and the Ogiek peoples from their lands and that people affected are still without any redress to date. It urged Kenya to respond to the decisions made by the African Commission and to ensure that all marginalised communities and peoples involved are redressed as ordered.

The Government remains extremely coy about actual implementation of the Endorois recommendations. The Government should prepare a multi-departmental plan to effect the recommendations.

Land issues

The Committee noted with concern that little progress has been made in resolving land issues over the years and that interethnic violence over land disputes continues to occur. It noted that Kenya has adopted a National Land Policy and that a National Land Commission is instituted by the new Constitution. It recommended that Kenya take measures without delay to operationalise the machinery and mechanisms for addressing land problems fairly taking into account historical contexts of land ownership and acquisition.

The key priority here is to pass the necessary laws which will lead to the establishment and staffing of the Land Commission. In the meantime, the status quo of land alienation should not be changed in a way that will defeat the Commission's functions.

Community land

The Committee noted with interest the introduction of the concept of community land in the 2010 Constitution which recognises the rights of marginalised and vulnerable ethnic minorities. It called on Kenya to take the necessary legislative measures and to adopt policies to implement the constitutional provisions on community land and minority rights.

The comments relating to land above figure here too.

Political governance

The Committee noted with concern that Kenya has been historically governed by representatives of the large ethnic groups. It encouraged Kenya to put into place without delay the mechanisms necessary for implementing the constitutional provisions on the ethnic representation in government bodies and offices. Kenya should ensure that its new laws concerning political parties and elections will enable the representation of ethnic minorities in elected organs, such as Parliament.

The Elections Act (No. 24 of 2011) and the Political Parties Act (No. 11 of 2011) should be reviewed to confirm the extent to which they ensure that smaller as much as bigger ethnic groups have fair possibilities in terms of representation. For example, the Political Parties Act provides that a prerequisite of registration as a political party is confirmation that an entity's membership is not drawn from one or a few counties. Obviously democracy assumes that the majority will prevail, but mechanisms to ensure the will of the minority is heard also do form part of the democratic ethos. The Constitution of Kenya (2010) includes mechanisms such as revision of electoral boundaries, candidacy of independent candidates and the specific representation of women, persons with disabilities, the youth and workers. An assessment on whether Kenya's next Parliament will be more diverse than the current one should be made in due course. The mechanism of devolved government also is a counter-weight to the potential for domination of the central government by a limited number of groups.

Discrimination of certain communities in nationality requirements

The Committee expressed concern at the discriminatory and arbitrary extra requirements for Nubians, Coastal Arabs, Somalis and Kenyans of Asian descent, in the recognition of nationality and in accessing identity documentation such as Kenyan Identity Cards, birth certificates and passports. It was further concerned that by introducing the possibility of revocation of nationality, the new Constitution imposes differential treatment of citizens according to the way Kenyan nationality has been acquired. It urged Kenya to make the necessary amendments to its legislation and administrative procedures to implement the new constitutional provisions on citizenship by ensuring that all citizens are treated equally and without any discrimination and receive identity documents. It also called upon Kenya to implement the decision of the African Committee of Experts on the Rights and Welfare of the Child in respect of the Nubian children's right to acquire national identity papers.

The Committee's concerns at least in part may have been resolved by provisions in the Kenya Citizenship and Immigration Act (No. 12 of 2011). Section 15 of that Act provides that stateless persons (and in Section 17 their descendants) living in Kenya continuously since 12 December 1963 shall be presumed to have been legal residents, and that they may be eligible to be registered as Kenyan citizens. Similarly, under Section 16, migrants to Kenya prior to 12 December 1963 (and their descendants – Section 17) may be eligible for citizenship. At the same time, Section 24 of the Act affirms every citizen's entitlement to a passport or other travel documentation.

Informal settlements

The Committee was concerned at the prevailing ethnic tension in overcrowded informal settlements and at the risk of escalation into ethnic clashes due to agitation by politicians. It urged Kenya to take measures to check the overcrowding of the slums of Nairobi and minimise the possibility of the situation in the slums being exploited in the political platforms of politicians, and to invest in efforts commensurate with the scale of the problems in order to address ethnic tensions in the slums.

In its current State of Human Rights Report, the Kenya National Commission on Human Rights recommended that: the Government should explore the potential of scaling up innovative housing financing initiatives, such as the Jamii Bora Housing Programme, which focuses on low income earners.¹³

Economic and social rights

The Committee noted with concern that measures previously taken by Kenya have not addressed the ethnic and regional disparities in the enjoyment of economic and social rights, which is one of the causes of resentment among ethnic groups. It encouraged Kenya to allocate the necessary resources to address the lack of provision of, and access to, public services in marginalised areas. Kenya should also adopt special measures so as to reduce in a tangible manner the inequalities among ethnic groups in fields such as employment and education. It should also anchor the fight against inequality and the development of marginalised areas in its poverty reduction policy and strategies.

¹³ *Third State of Human Rights Report: A Human Rights Assessment of Kenya Vision 2030*, Kenya National Commission on Human Rights, 2011, 4

The new constitutional dispensation offers a number of responses to inequality and economic and social disadvantage. In itself, the fact of establishing devolved governments at the county level brings with it resources which will be specifically targeted to counties. The Constitution introduces a specific resource facility, the Equalisation Fund, which will invest more resources into the poorest counties. At the same time, Article 43 of the Constitution legislates economic and social rights as justiciable rights which Kenyans must progressively enjoy. As always in these matters, the devil is in the detail of implementation.

Human rights education

While noting the inclusion of human rights education in school curricula and the various initiatives undertaken by the Ministry of Justice, National Cohesion and Constitutional Affairs ('MOJNCCA'), such as cohesion cafés and televised programmes, the Committee was concerned these measures are not sufficient to promote interethnic understanding and tolerance. It was further concerned that the targets of these initiatives as well as the types of media being used do not reach all segments of the population. It called on Kenya to step up educational efforts to promote national cohesion and reconciliation, including by ensuring that they effectively address ethnic prejudices and stereotypes as well as the history of interethnic violence in the country, utilising media that reach all segments of the population.

The NCIC has a specific awareness-raising mandate which it should fulfil even more vigorously. As it does this, the NCIC should seek partnerships with Article 59 constitutional commissions as well as with civil society organisations.

Refugees

The Committee noted with concern the grave conditions at the Dabaab Refugee Camp caused by overcrowding and lack of basic needs of life for refugees. It commended Kenya for the efforts it is making to alleviate this humanitarian catastrophe and encouraged it to invite the international community to discharge its responsibility towards refugees under the principle of burden sharing.

The Somali refugee problem is presently in flux in view of Kenya's invasion of Somalia. Assessments on the consequences of this invasion should be made on a continuous basis.

Statistical data

The Committee noted that the 2009 census gathered data on ethnicity as well as on some economic and social rights indicators. It invited Kenya to include in its next periodic report statistical data on the enjoyment of economic and social rights collected in the 2009 national census.

The key question here is whether statistical data disaggregated on the basis of ethnicity should be prepared or publicised. Arguments against this are based on the notion that ethnically disaggregated data could catalyse national dissension and even fragmentation. In fact, Kenya's realities as well as its legal context do anticipate the need for disaggregation of data on the basis of region (usually amounting to ethnicity). Article 27 of the Constitution outlaws discrimination on the basis of ethnicity. Article 56 requires the State to put in place affirmative action programmes for minority and marginalised groups. Article 260 defines 'marginalised community' as: "(a) a community that because of its relatively small population ... has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole ..." Finally, multiple provisions in the Constitution require appointments to public office to take account of the country's ethnic diversities. Effectively, then, ethnically disaggregated data is one accountability mechanism to ensure that the State abides by these constitutional provisions. Then, again, national cohesion will be better achieved by acknowledging and respecting the country's ethnic and other diversities.

Individual remedies

The Committee encouraged Kenya to consider making the optional declaration provided for in Article 14 of the Convention recognising the competence of the Committee to receive and consider individual complaints.

In 2010, the KNCHR along with MOJNCCA held a technical workshop to review the need for Kenya to ratify or accede to international human rights instruments which offer remedies to individuals. A key conclusion of that meeting was that Kenyans should be provided the possibility of utilising the individual remedy mechanism to ensure against violation of their human rights. Following that meeting, the Government pledged at the Human Rights Council

in September 2010 that it would accede to international human rights instruments offering individual remedies once a ratifications law had been legislated.

Ratification of other human rights instruments

Bearing in mind the indivisibility of all human rights, the Committee encouraged Kenya to consider ratifying those international human rights treaties which it has not yet ratified, in particular treaties the provisions of which have a direct bearing on the subject of racial discrimination, such as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Kenya's priority in this regard should be passage of a law to enable Article 2 (5) and (6) of the Constitution which have turned Kenya into a monist state. Once enabling legislation is in place, the Government pledged to the Human Rights Council that it would review accession to international human rights instruments which it as yet was not party to. A further priority then will be to identify and assess the value of acceding to international human rights instruments which Kenya has not signed.