

# SHADOW REPORT

**IN RESPONSE TO THE FOURTH  
PERIODIC REPORT ON THE INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS**

**(2013-2020)**



**Independent Medico-Legal Unit**  
A World Free From Torture, Violence and Discrimination



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*Prepared by Independent Medico-Legal Unit (IMLU) for submission to the United Nations Human Rights Committee.*

In collaboration with:

Haki Africa-Mombasa; Kenya Human Rights Commission; Law Society of Kenya; Legal Resources Foundation Trust; Defenders Coalition; National Gay and Lesbian Human Rights Commission; Refugee Consortium of Kenya; Muslims for Human Rights (MUHURI), Faraja Foundation; International Centre for Transitional Justice; Stop the Traffik, Transparency International, Article 19 East Africa, Centre for Minority Rights Development (CEMIRIDE), Center for Rights Education and Awareness (CREAW), Mathare Social Justice Centre, The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Reproductive Health Network.

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SUPPORTED BY THE CENTER FOR CIVIL AND POLITICAL RIGHTS.

## ACRONYMS AND ABBREVIATIONS

**‘Network’ or ‘we’:** Human rights organizations working on civil and political rights in Kenya which prepared this report

<b>BBI</b>	Building Bridges Initiative
<b>CUC:</b>	Court Users Committee
<b>DPP:</b>	Director of Public Prosecutions
<b>EACC:</b>	Ethics and Anti-Corruption Commission
<b>FGM:</b>	Female Genital Mutilation
<b>ICC:</b>	International Criminal Court
<b>ICCPR:</b>	International Covenant on Civil and Political Rights
<b>IEBC:</b>	Independent Electoral and Boundaries Commission
<b>Ill-treatment:</b>	Cruel, inhuman or degrading treatment or punishment
<b>IMLU:</b>	Independent Medico-Legal Unit
<b>IPOA:</b>	Independent Policing Oversight Authority
<b>KMA:</b>	Kenya Medical Association
<b>KNCHR:</b>	Kenya National Commission on Human Rights
<b>LGBTIQ:</b>	Lesbian, Gay, Bisexual, Trans, Intersex and Queer
<b>NCAJ</b>	National Council on Administration of Justice
<b>NGEC:</b>	National Gender and Equality Commission
<b>NGOs:</b>	Non-Governmental Organisations

<b>NPM:</b>	National Preventive Mechanism
<b>NPS:</b>	National Police Service
<b>ODPP:</b>	Office of Director of Public Prosecutions
<b>PBO:</b>	Public Order Act
<b>PEV:</b>	Post-Election Violence
<b>PTA:</b>	Prevention of Terrorism Act, 2017
<b>Report:</b>	Alternative Report
<b>State:</b>	Kenya
<b>UNHCR:</b>	United Nations High Commission for Refugees

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# CONCERNS AND RECOMMENDATIONS

## Article 1

- 1) Although it has taken a decade to effect the Constitutional recognition, indigenous people are now recognized by the State. The Community Land Act (2016)<sup>1</sup> and the Regulations (2018)<sup>2</sup> Regulations came into force in 2016 being 6 years after the Constitution 2010 came into force, and the Regulations (2018)<sup>3</sup> two years later. Other facilitating systems such as the community land registry are, however, not yet in place. Secondly, there has been no budgetary allocation for community land registration. By the end of 2020, only two community lands<sup>4</sup>, which in essence were formally group ranches had been registered. The indigenous people have not been properly compensated for their loss since compensation of land compulsorily acquired is based on actual residence and where loss is claimed. Thus, Indigenous peoples have lost access and use of the acquired land without due compensation.

## Recommendations

- i. Allocate funds to undertake the smooth registration of all community lands across the country
- ii. Amend the Land Value (Amendment) Act, 2019 to ensure that the criteria to value community land properly recognises the value of ecosystem goods and services to the community including women, children and persons living with disabilities

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1 *Community Land Act*

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3

4

- iii. Ratify the ILO Convention 169 on Indigenous and Tribal Peoples Convention and adopt the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), to ensure effective mainstreaming of indigenous peoples rights in government planning, especially now that the government acknowledges the existence of indigenous peoples in Kenya

## Article 2

- 2) The National Council on Administration of Justice (NCAJ) established the Court Users Committee (CUC) to enhance access to justice for Kenyans and devolve the forum for discussion of various challenges that are affected by court users. In this regard, a Handbook on Guidelines for Court Users Committees on a human rights-based approach to the criminal justice process was developed. It addresses the different actors in the system and their roles and mandate. NCAJ established the CUC-Kenya which is the point of contact for the CUCs and serves as an entry point for having the Covenant applied by criminal justice actors
- 3) Establishment of a National Committee on The Criminal Justice System that is supposed to review the Criminal Justice System and make recommendations.
- 4) The Judiciary developed a framework, ***“Sustaining Judiciary Transformation – An Agenda for Service Delivery (for the period 2017 – 2021),”*** with the aim of promoting effectiveness and efficiency in the administration of justice, access to justice and judicial performance. As of December 2017, 39 High Courts had been established in 39 counties. The judiciary also developed and launched

the Bail and Bond guidelines which enhances the release of inmates on reasonable bail terms, special consideration for the vulnerable including children and provides mechanisms of dealing with minor traffic cases. The Judiciary launched a virtual case management system and online case filing system in 2020.

- 5) To enhance alternatives to prosecution, the Office of Director of Public Prosecutions (ODPP) has developed a Diversion Policy to enhance access to justice for vulnerable groups including children and to enable out of court settlement on criminal matters. Further, the Plea-Bargaining Guidelines and Rules have been gazetted to enhance plea bargaining. The ODPP has also Developed Decision to Charge Guidelines and implemented the centralized case management and centralized case intake at the headquarters which is linked to the Judiciary for ease of tracking of cases.
- 6) The Access to Information Act 2016 was enacted to give effect to article 35 of the Constitution. In this regard, Kenya has made progress in simplifying access to information by creating internet portals such as the e-government, e-citizen, e-procurement, i-tax. The EACC, Judiciary, ODPP, the Auditors and other institutions publish their periodic performance reports on their respective websites. The Data Protection Act 2019 was also enacted which protects the right to privacy
- 7) KNCHR has entered into a Memorandum of Understanding with the Kenya School of Governance to train judges on various aspects of human rights protection and how to deal with special needs offenders. 30 judges trained on how to handle cases of human rights defenders, and between 2018/2019, 123 judges were trained on how to deal with persons with disabilities in the criminal justice

system. All government officials are undergoing training in the Kenya School of Governance on various aspects of human rights protection. The National policy and Action Plan on Human Rights was adopted to conform to the provisions of the constitution. However, the government has not fully implemented the policy due to lack of financial capacity.

- 8) Courts have declared some sections of various pieces of legislation unconstitutional including: the mandatory nature of the death penalty under section 204 of the Penal code on the basis that it violates the rights to a fair trial; Section 194 of the Penal code which criminalizes defamation violates the right to freedom of expression; and Section 25 (2) and (3) of the Penal Code; Sections 162-167 of the Criminal Procedure Code on the basis that the indefinite detention of persons at the pleasure of the President violates separation of powers since it vests in the executive powers reserved for the Judiciary.
- 9) The Public Benefits Order Act of 2013, National Coroners Act, 2017 and the Prevention of Torture Act, 2017 have not been implemented since their enactment.
- 10) In 2018, the Equalization Fund was operationalized although to date no monies have been disbursed to the counties<sup>5</sup>. The marginalization Policy has re-defined marginalization<sup>6</sup>, thus including more communities than those identified under Article 260 of the Constitution.

<sup>5</sup> Implementation further delayed when the High Court declared the **Guidelines on the Administration of the Equalisation Fund unconstitutional**. Council of County Governors v Attorney General & 2 others; Commission on Revenue Allocation & 15 others (Interested Parties) [2019] eKLR

<sup>6</sup> Media Release: CRA Policy to Tackle Marginalization to Ensure That No Kenyan Is Left Behind

<https://www.crakenya.org/news/media-release-cra-policy-to-tackle-marginalization-to-ensure-that-no-kenyan-is-left-behind/>

- 11) The enactment of the National and Employment Authority Act, 2016 gives institutional framework to realize the provisions of Article 56 (c) of the Constitution of Kenya that provides for affirmative action through provision of special opportunities for access to employment for minorities and marginalized communities. However, the Act does not define marginalized groups/ community or even provide their representation on the in its Board.
- 12) Kenya finalized and launched the National Ethics and Anti-Corruption Policy in 2020 that is aimed at mainstreaming ethics and integrity in the management of public affairs as well as synergize all efforts made towards fighting corruption. Other measures include: the Political Pillar of Kenya Vision 2030 provides the broad anti-corruption policy framework; the multisectoral Kenya Integrity Plan (KIP) (2015-2019); and enactment of the Bribery Act 2016 which requires public or private entities to put in place appropriate procedures for the prevention of bribery and corruption
- 13) Establishment and operationalization of the Multi Agency Team (MAT) to enhance cooperation, coordination and collaboration among law enforces in economic crimes (The Multi Agency Team (MAT) framework). MAT collaborates in prosecution and freezing and seizing of assets held both nationally and internationally. The government has also developed the Proceeds of Crime and Anti-Money Laundering (Criminal Assets Recovery Fund) (Administration) Regulations to seize proceeds of crime
- 14) Kenya has taken multiple initiatives to promote integrity and ethics in the public service including training all public officers through the National Integrity Academy which was launched on 17th October 2018. Its curricula

focus on leadership, ethics, anti-corruption and integrity. Kenya has also established the “Public Service Excellence Award” with integrity as one of the selection criteria.

- 15) In 2017, the Companies Act was amended to introduce a beneficial ownership framework so as to enhance transparency in management of companies.
- 16) Enactment of the Public Procurement and Asset Disposal Act 2015 which sets out a comprehensive public procurement regime and advocates for transparency and accountability in public procurement. It establishes the Public Procurement Regulatory Authority as the monitoring and enforcement agency. However, the PPRA is lacking necessary resources to undertake its functions.
- 17) On 13 June 2018, a presidential executive order was issued requiring all government entities and public owned institutions to publish full details of tenders and awards. Further, starting 2019, all public procurements are undertaken through the electronic platform of the Integrated Financial Management Information System (IFMIS) managed by the National Treasury and Planning. The system is operational both at the national and county governments and facilitates the traceability of expenses.
- 18) There has been an increase in arrests of individuals including high ranking government officials adversely mentioned in corruption related scandals – including a Cabinet Secretary. Investigations have also been launched against governors and prominent state officers for alleged involvement in corruption. Progressive pronouncements from courts on recovery of unexplained wealth and subsequent asset recovery from notable individuals. Former PS - Lillian Omollo case, Stanley Amuti v Kenya Anti-Corruption Commission – the Supreme

Court upheld the Court of Appeal decision that the appellant's property constituted unexplained assets and should be forfeited to the state. EACC recovered public assets amounting to Kshs. 3,187,821,838.80 during the period FY 2018-2019. Various notable convictions have been secured in the fight against corruption including the conviction of ex-Kasarani MP John Chege for soliciting a bribe and the former Permanent Secretary for the Cemetery Case

- 19) Kenya is yet to implement the constitutional two thirds gender rule following the advisory of the Supreme Court for the dissolution of Parliament in accordance with the Constitution.

### **Recommendations**

- i. The State to prepare an appropriate policy and/or statutory instruments on the administration of the Equalization Fund as set out in the Constitution.
- ii. Repeal the sections of the Penal Code that have been declared unconstitutional.
- iii. Implement the PBO Act, National Coroners Act and the Prevention of Torture Act, 2017.
- iv. The National Policy and Action Plan on Human Rights to be reviewed to ensure that it addresses emerging issues and be adequately resourced to ensure its full implementation, access to legal aid and enhance access to justice.
- v. Amend the National and Employment Authority Act, 2016 to provide for a definition and representation mechanisms for minorities and indigenous communities in its institutional framework.

- vi. Adopt various legislations to enhance the fight against corruption including the Whistle Blower Protection Act and the Conflict of Interest Management Bill
- vii. Establish sanctions or consequences for non-compliance by public bodies, with recommendations issued by EACC
- viii. Enhance the effectiveness of the procurement system including by committing the necessary resources to PPRA
- ix. Implement the law on bribery (Bribery Act) particularly on the area of development of guidelines to assist public and private entities to establish procedures for prevention of bribery
- x. Adopt legislative measures to ensure quick disposal of corruption matters.

#### **Article 4**

- 20) The definition of act of terrorism in the Prevention of Terrorism Act 2012 is very broad/falls under general crime and does not qualify what should be referred to as terrorism.
- 21) The State Curfew Order, 2020 gave a provision of state control during curfew hours which led to extreme use of power and violation of human rights and a lack of accountability by law enforcers creating physical and emotional harm. The police acted in contravention of the National Police Standing Orders Act which prescribes for the use of a proportional and reasonable force.

- 22) The right to fair trial and habeas corpus applications especially against Terrorism suspects are not adhered to. In 2020, Liban Abdullahi Omar a freed Westgate terror suspect was abducted minutes after being acquitted by a court of law on charges of terrorism.<sup>7</sup>
- 23) The Cabinet Secretary for Interior has continued to abuse his powers by refusing applications for registration and revocation of registration of associations with the justification that they are linked to terrorist groups.
- 24) PTA Act (Amendment) introduced section 9A that is ambiguous or unduly broad and in breach of the international standards on freedom of expression. Unclear what 'advice' regarding terrorism acts might entail.
- 25) In 2016 some of the provisions of the Security Laws Act were declared unconstitutional by the High Court – section 30A and 30F for violating the freedom of expression and the media guaranteed under Art 33 & 34 of the Constitution. No review on the unconstitutional provisions has been undertaken yet.

### **Recommendations:**

- (i) Revise the definition of terrorism in the POTA to align with the Covenant and safeguard against abuse by police with innocent persons being charged with terrorism.
- (ii) Fully Implement the recommendations to Kenya by the UN Special Rapporteur on Protection of Human Rights

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<sup>7</sup> <https://www.the-star.co.ke/news/big-read/2020-10-15-mystery-of-terror-suspects-being-abducted-after-court-frees-them/>

- (iii) The National Police to adhere to the standing order which generally declares emphasis of proportional and reasonable force in maintaining public order and enforcement of curfew in the spirit of curtailing and containing COVID 19 in Kenya.
- (iv) Revise or repeal sections 40C and 9A to safeguard against possible abuse by the NCTC and national security agents.
- (v) Review the provisions of the Security Amendment Law that were declared unconstitutional in line with the High Court ruling

## Article 6

- 26) The Supreme Court of Kenya gave courts the discretion of sentencing similar cases on an individual basis<sup>8</sup>. The death penalty still forms part of Kenya's punitive sentences and we have seen judges issuing the death sentence.<sup>9</sup> Even though Kenya commuted the death sentence of about 2747 prisoners who were on the death row in 2016, a moratorium is yet to be issued by the Kenyan president to convert all the death sentences into life imprisonment.
- 27) Kenya is also yet to accede to the second optional protocol to the covenant.
- 28) A Taskforce on the Review of the Mandatory Nature of the Death Penalty was set up and their report<sup>10</sup> was submitted in 2018. However, no guidelines have been developed to operationalize their recommendations.

8 <https://www.statelaw.go.ke/wp-content/uploads/2018/03/Supreme-Court-Ruling-on-the-Death-Penalty-Murwatetu-case-14-Dec-2017.pdf>

9 criminal case no 93 of 2015

10 [https://www.deathpenaltyproject.org/wpcontent/uploads/2019/07/DPP\\_Pathways\\_to\\_Justice\\_Kenya\\_2019.pdf](https://www.deathpenaltyproject.org/wpcontent/uploads/2019/07/DPP_Pathways_to_Justice_Kenya_2019.pdf)

## Recommendations

- i. A moratorium to be issued by the Kenyan President to convert all the death sentences into life imprisonment.
- ii. Ratify the Second Optional Protocol to the ICCPR.
- iii. Development of guidelines to operationalize the recommendations from the task force.

## Article 7

- 29) In 2017, Kenya made a tremendous step in the enactment of the Prevention of Torture Act and the National Coroners Service Act which were to ensure that perpetrators of torture and extra judicial killings are held accountable. However the two Acts have not been fully implemented since their enactment
- 30) The Persons Deprived of Liberty Act is still not being implemented fully, and lack of comprehensive data to the question on the extent of compliance with legal safeguards by security officials.
- 31) Despite the comprehensive legislative framework, the rate of investigation of extrajudicial killings has been minimal hence entrenching a culture of impunity within the security agencies. Between 2015-2019 IPOA received 13618 complaints from the public, they investigated 5,613 completed 1518, forwarded 160 to the Office of the Director of Public Prosecution and have secured 6 convictions.<sup>11</sup>
- 32) The government is slow in complying with court orders requiring compensation of survivors of torture, EJE and

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<sup>11</sup> <http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Annual-Report-2018-2019-Web.pdf>

Enforced Disappearance defeating the principle of access to justice. IMLU has 9 cases where compensation amounting to approximately Kenya Shillings 19 million (USD 19,000) was awarded to the victims as far back as 2011 but the government is yet to honor them.

### **Recommendations.**

- i) Fully implement the National Coroners Service Act 2017 and the Prevention of Torture Act 2017, and develop a monitoring and evaluation tool to access the progress of implementation.
- ii) The Persons Deprived of Liberty Act should be implemented fully, including through the establishment and capacitation of the Consultative Committee on Persons Deprived of Liberty and the operationalization of the complaints and disciplinary procedure.
- iii) Appropriate budget allocation to ensure that the government provides redress to victims of torture, extra judicial killings and enforced disappearance.
- iv) Prompt and effective disbursement of the compensation funds to the survivors of torture, extra judicial killings and enforced disappearance.

### **Article 8**

33) The Government has made significant efforts in eliminating human trafficking, however, despite these strides Kenya is yet to meet the minimum standards for ending human trafficking remained on Tier 2.<sup>12</sup>

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<sup>12</sup> <https://www.state.gov/reports/2020-trafficking-in-persons-report/kenya/#:~:text=In%202019%2C%20the%20government%20report-ed,trafficking%2Drelated%20cases%20in%202018>

- 34) The National Police Service has trained two units within the Directorate of Criminal Investigations (DCI) on human trafficking. These units are the Transnational Organized Crime Unit (TOCU) and the Anti Human Trafficking Child Protection Unit. The Government has, however, not established safe shelters for victims of trafficking which would provide services such as psychological counselling.
- 35) Despite the prevalence of human trafficking in the country there is no consolidated data or repository for information relating to human trafficking in Kenya. The Counter Trafficking in Persons Act (2010) makes provision for a repository in section 20 (2) (g) of the Counter Trafficking in Persons Act, 'Compilation and documentation of data and information on cases of trafficking in persons for purposes of policy formulation and program direction'. The absence of this repository makes it difficult to inform policy on prevention, protection, prosecution and partnership in matters relating to counter human trafficking.

### **Recommendation**

- i. Ensure protective services are available to adult trafficking victims.
- ii. Establish safe shelters for victims of trafficking which would provide services such as psychological counselling.
- iii. The Government should have consolidated data or repository for information relating to human trafficking and publish the data for public scrutiny.
- iv. Fully implement a screening mechanism to prevent the penalization of potential trafficking victims.

## Article 9

- 36) There are several legislations that have been put in place to deal with issues revolving around the right to life, extrajudicial executions and enforced disappearance including the Prevention of Terrorism Act, Security Laws Amendment Act, National Coroners Service Act, and the Prevention of Torture Act. Most of these statutes have been abused and used to target CSOs dealing with issues on PCVE, extrajudicial Executions and enforced disappearance.
- 37) The Kenyan Government has established the National Strategy to counter violent extremism. There are several County Action Plans that have been developed to this effect including Mombasa County Action Plan and Kwale County Action Plan. Although the Kenya National Action Plan 2020-2024 mentions the threat of violence by terrorist organizations, the proliferation of small arms, and their gendered impact on women, they make no specific commitments to disarmament other than incorporating a gender perspective and analysis into disarmament, demobilization, and rehabilitation initiatives.
- 38) Kenya has signed the International Convention for the Protection of All Persons from Enforced Disappearance, but is yet to ratify it. Consequently, the existing legal framework falls short of international human right standards, and is thus unable to comprehensively deal with enforced disappearance.
- 39) Between the years 2012-2016, Haki Africa came up with a report on Extra Judicial Executions (EJE) within the coastal region, "*What Do We Tell the Families?*" which details the deaths or disappearances of 81 people during that time. 22 of the deaths allegedly were caused by excessive

force by police; four occurred in police custody; 31 involved cases of alleged extrajudicial execution; and 24 were thought to be enforced disappearances. Mathare Social Justice Center recorded 156 killings by police over a three-year period from January 2013 to December 2016 in Mathare – Nairobi County. Of these, only thirty cases were raised as an official complaint to the IPOA and only one of these complaints has resulted in legal proceedings before a court<sup>13</sup>.

- 40) In 2017, IMLU recorded 74 cases of summary executions by police officers. These put into question the commitment of the National Police Service to respect the right to life prescribed under Article 26 of the Constitution and the assumption of innocence until proven guilty by an impartial judicial process.
- 41) Mathare Social Justice Centre documented 55 incidents of police violence in Mathare settlement in Nairobi between 2013 and 2016. In 39 of these cases, there were witnesses, but they were afraid of reprisals to come forward to provide evidence. Victims and witnesses of police brutality are reluctant to come forward to register complaints against the police, due in part to the fear of intimidation and threats to life that they will suffer and their lack of trust in – or inability to effectively access – the witness protection mechanisms provided by the Witness Protection Agency which are more relevant to victims of crime.<sup>14</sup>

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13 Mathare Social Justice Centre, 'Who is next? A Participatory Action Research Report against the Normalization of Extrajudicial Executions in Mathare', pages 25 and 35. The case of Nura Malicha who was killed by the police in 2015 was the only one to reach the court (see Case No. 11). The full report is available at: [https://drive.google.com/file/d/0B2NZry\\_SioNhZHRVQmd6RW1CVWs/view](https://drive.google.com/file/d/0B2NZry_SioNhZHRVQmd6RW1CVWs/view)

14 Ibit

- 42) Human rights defenders have endured threats, intimidation and physical attacks as they conducted their work. Between August 2017 and March 2018, police and other officials targeted at least 15 activists and victims in Nairobi and in the western county of Kisumu for intimidation, Human Rights Watch found. The Kenyan authorities have not investigated or in many cases even acknowledged the alleged killings and other abuses during the August 2017 despite the extensive evidence published by Kenyan and international rights groups. Human Rights Watch documented more than 100 killings, most by police during government clampdowns on protesters in opposition strongholds.
- 43) There are rules and provisions regarding the use of force by law enforcement officials which are permissible within the international law. Firearms may not be used purely to defend property or to prevent escape, other than in the case of a proximate grave threat to life. The Cabinet Secretary for Internal Security and the Inspector General of Police should formulate further regulations on the use of firearms.
- 44) In March 2020 to help fight the spread of Covid-19, President Uhuru Kenyatta passed a dusk to dawn curfew. In trying to enforce the order by the president, police officers armed with batons and guns assaulted most Kenyans and causing some deaths. According to Human Rights Watch, at least 10 people lost their lives in the first 10 days of the curfew.

## Recommendations

- i. Establish a framework for co-operation between the Parties in relation to investigating, documenting and following up on Extra Judicial Executions and conducting advocacy campaigns meant to curb Extra Judicial Executions and Enforced Disappearances in Kenya.
- ii. An official statutory database should be established and managed on behalf of relevant agencies, including the National Police Service (NPS), the Independent Police Oversight Authority (IPOA), the ODPP, KNCHR, the National Crime Research Centre, and the Judiciary for synthesizing and administering investigation, prosecution and conviction data of persons including public officials charged with serious crimes.
- iii. Establish a commission of inquiring to investigate incidences of extrajudicial executions and enforced disappearances.
- iv. Ratify the International Convention for the protection of all persons from enforced disappearance.
- v. Enact legislation criminalizing Enforced disappearances and Extra judicial Executions

## Article 14

- 45) The Alternative Justice System's policy was finalized and launched. The NCAJ is currently working on implementation guidelines. Court Annexed Mediation is being implemented to resolve cases (and among others address backlog) with the assistance of court accredited mediators. The agreement reached is considered legally binding by the courts. There are special courts addressing children matters.

- 46) The TJRC Report has not been officially adopted by Parliament. Although the TJRC report was gazetted, chapters 2A & 2C that document human rights violations and land issues were omitted in the gazettment. Little progress has been made in implementing the recommendations of the TJRC report other than the apology issued by the President in 2015 and establishment of the Kshs 10 billion Restorative Justice Fund for reparations. Draft framework (Regulations and Policy on Reparations developed in 2017 for implementing the Restorative Justice Fund are yet to be adopted by the relevant government agencies.
- 47) Trustees to oversee the implementation of the Victims Protection Trust Fund have been gazetted. The regulations (framework) to implement the Fund are awaiting parliament's approval.
- 48) The police launched the National Police Service Standard Operating Procedures on Addressing Gender Based Violence in 2019. Similarly, the NPS digitized the police Occurrence Book (OB) – which was launched in November 2019 and established online anonymous reporting mechanisms under the Internal Affairs Unit and IPOA which enhances transparency and accountability in policing.

### **Recommendations:**

- i. Government to adequately resource alternative mechanisms and set up the constitutional Judiciary Fund that will enable the CJ to channel funds appropriately
- ii. Parliament to officially fully adopt and implement the TJRC Report.

- iii. The AG and Treasury Cabinet Secretary to spearhead the adoption and operationalization of the Restorative Justice Fund by adopting the draft reparations regulations and policy to guide rolling out the implementation of remedies/redress for past violations as envisaged by the TJRC in its reparations framework
- iv. IPOA to investigate violations by police especially during elections for purposes of reparations.

### Article 17

49) Since 2 July 2020, the Kenya Forest Service (KFS) has engaged in a large-scale and deliberate campaign to remove Ogiek communities from their lands in the Mau Forest, prejudicing the implementation of the 2017 judgement. As of 9 July 2020, over 100 Ogiek families, including 9 families in Maasai Mau had been evicted and rendered homeless.

50) The government instituted a taskforce on the implementation of the African Court on Human and Peoples' Rights judgement on the indigenous Ogiek people however, it has failed to release a report produced by the gazetted Task Force, even though the final report was submitted to the Ministry of Environment in March 2020.<sup>15</sup>

### Recommendations

- i. Government to immediately cease all Ogiek and other Indigenous Peoples evictions, which are have been made worse by the Covid-19 pandemic.

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<sup>15</sup> Op Cite note 7

- ii. Government to immediately release the Task Force report and to participate in the African Court process in good faith by fully complying with the 2017 judgement.<sup>16</sup>

## Article 19 and 20

51) Article 33 of the Constitution of Kenya 2010 gives strong protection to the right to freedom of expression, subject to the exclusions of Article 33(2), with Article 34 further protecting freedom of the media, and Article 35 protecting the right of access to information. Article 2 of the Constitution incorporates international law, including the human rights treaties which Kenya has ratified, directly into national law.<sup>17</sup>

52) In April 2017, the High Court of Kenya declared Section 132 of the Penal Code relating to criminal defamation unconstitutional.<sup>18</sup> On 7 August 2020, a three judge bench dismissed a notice of motion filed by the Law Society of Kenya seeking to suspend the enforcement of 26 provisions in the Computer Misuse and Cybercrimes Act (CMCA), 2018. These provisions were upheld as constitutional by the High Court in Petition No. 206 of 2018 on 20 February 2020<sup>19</sup>. There has been an increase in the number of incidences of harassment and intimidation of human rights defenders, journalists and bloggers

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16 <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/african-court-delivers-landmark-judgment-ogiek-land-rights>

17 The Constitution of Kenya 2010. Available at: <http://www.kenyalaw.org/lex//actview.xql?actid=Const 2010>

18 Petition 174 of 2016 Robert Alai v The Hon Attorney General & another [2017] eKLR Available at:

<http://kenyalaw.org/caselaw/cases/view/135467/>

19 <https://www.article19.org/resources/kenya-court-of-appeals-ruling/>

in Kenya. These incidences have spiked during the COVID-19 pandemic period, following the government's introduction of various measures further restricting human rights.

- 53) While Article 19(3) of the ICCPR allows for the restriction of expression on the grounds of protecting public morals, section 181 of the Penal Code prohibits the same, giving significant and excessive leeway to the authorities to target LGBT-related content. The UN Human Rights Committee has clarified that any such restrictions cannot be based on principles that derive solely from a single tradition, and that such restrictions must also take into consideration the principle of non-discrimination.<sup>20</sup>
- 54) The Kenya Films and Classification Board (KFCB) has increased its interference in artistic expression particularly limiting the distribution of content it deems to conflict with traditional values, through the overzealous application of restrictive guidelines and legislation. The KFCB has particularly targeted depictions of sexual and gender minorities, based on discriminatory arguments of "protecting public morals". These decisions violate Kenya's constitutional guarantees for these rights in Articles 33, 10(2) (b), and 27. On 15 June 2017, the KFCB requested a network to immediately discontinue the broadcast of children's television programmes that allegedly contained "glorified" homosexuality, following the receipt of public complaints. The programmes included cartoons such as Hey Arnold, and Loud House, shown on Nickelodeon.<sup>21</sup>

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20 UN Human Rights Committee, General Comment 34 on Article 19 (2011), at para 32.

21 KFCB, CEO's Statement, 15 June 2017. Available at: <https://kfcf.co.ke/wp-content/uploads/2017/06/Statement-onchildren-television-programmes-promoting-homosexuality-in-kenya-is-sued-on-15th-June-2017.pdf>

55) In April 2018, KFCB banned the distribution and screening of the film *Rafiki* for containing depictions of homosexual acts that are illegal under Kenyan law, and, according to the KFCB chairperson, sought to promote lesbianism", against the culture and moral values of Kenyan society.<sup>22</sup> In 2016, the KFCB proposed a new "Film, Stage Plays and Publications" Bill that would have significantly undermined artistic freedom, as well as media freedom and freedom of expression more broadly.<sup>23</sup> The proposed Bill was heavily criticised by civil society groups and stakeholders in the creative industries, and withdrawn in October 2016.<sup>24</sup>

### **Recommendations:**

- i. Repeal the Film and Stage Plays Act of 1962, and fully protect the right to artistic expression without discrimination, including on the basis of sexual orientation and gender identity and ensure effective participation of Civil Society and other key stakeholders in the drafting and enactment of a new legislation
- ii. Fully protect the right to freedom of expression, in particular the rights of LGBT people, by repealing Section 181 of the Penal Code on "distribution and exhibition of indecent content with the potential to corrupt morals".

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22 KFCB, CEO's Statement. Available at: <https://bit.ly/2uQBUGY>,

23 <http://jadili.ictpolicy.org/docs/kfcb2016>

24 See, <https://www.blog.bake.co.ke/2016/10/10/most-dangerous-attacks-on-our-freedom-of-expression/>

- 56) Kenya has failed to put in place measures to ensure the safety of journalists and media, as well as others facing serious risks for exercising their right to freedom of expression and informing the public. Public commentary on issues around corruption, elections, matters of national security, terrorism, political parties, and land ownership, is particularly dangerous.
- 57) Between 1 January 2015 and 31 April 2019, ARTICLE 19 documented 285 incidents of attacks against journalists and media workers, including harassment, arbitrary arrests and physical attacks. State actors were believed to be responsible for or connected to a significant proportion of these attacks, including police, politicians, and other government officials. Acts of violence targeting journalists was particularly pronounced in the run-up to the 2017 elections.<sup>25</sup> An egregious example of state interference occurred in the aftermath of the contested Presidential elections. On January 26, 2018, the Interior Cabinet Secretary summoned the Kenya Editors Guild to the State House, and threatened to revoke the licenses of any media companies that broadcast a planned 30 January rally and symbolic “swearing-in” of opposition leader Raila Odinga in Uhuru Park.<sup>26</sup>
- 58) On 9 October 2017, five journalists were harassed, beaten and injured by the police while covering anti-IEBC protests in Kisumu County. More than 20 officers from the GSU assaulted Rashid Ronald of KTN and Faith Matete of the Star, injuring Ronald on the leg. The officers then lobbed tear gas canisters at NTV's Ouko Okusa, his cameraperson

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25 <https://www.article19.org/resources/not-worth-the-risk-threats-to-free-expression-ahead-of-kenyas-2017-elections/>

26 Editor's guild accuses President Kenyatta of gagging media over coverage. Available at: <https://www.nation.co.ke/news/Editors-Guild-condemns-threats-media/1056-4283676-ax4enuz/>

Doreen Magak and Daily Nation reporter Rushdie Oudia. The officers claimed the journalists had exposed their operation alleging brutality against protesters.<sup>27</sup>

- 59) Since the start of the Coronavirus pandemic there has been an increase in attacks against journalists and media workers. Between March and August, 2019, ARTICLE 19 documented 48 incidents in which 34 male and 14 female journalists and media workers faced various forms of violations, including physical assault, arrest, telephone or verbal threats, online harassment and lack of access to public information, officials and buildings.<sup>28</sup> According to ARTICLE 19's findings, violence against journalists has doubled, compared to the previous six months, between October 2019 and March 2020, when we recorded less than 20 violations. About 60% of these cases were related to lack of access to public information or restricted from accessing various open places to interrogate and provide objective and critical reporting on the Counties COVID-19 preparedness.
- 60) There is a recurring pattern of law enforcement authorities failing to investigate or take protective action in response to criminal complaints from journalists, human rights defenders, and other communicators. In the past five years, no state actor has been held accountable for threatening, intimidating, or physically attacking a journalist or blogger in Kenya.
- 61) In the aftermath of the contested Presidential elections and ahead of the planned 30 January 2018 rally and

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27 Kenya: Violations of Media Freedom May 2017 – April 2018, report by Article 19. Available at: <https://www.article19.org/wp-content/uploads/2018/05/Kenya-Report-1.pdf>

28 ARTICLE 19 Kenya: Journalists attacked and silenced during COVID-19 pandemic: <https://www.article19.org/resources/kenya-journalists-attacked/>

symbolic “swearing-in” of opposition leader Raila Odinga in Uhuru Park, on the orders of the Interior Cabinet Secretary the Communications Authority suspended four channels (three broadcasters) (Citizen TV’s national and local channels, KTN and NTV) in advance of the 30 January event, in an unconstitutional act of prior censorship that clearly violated Kenya’s international human rights law obligations.

62) The United Nations working with the Kenya government through the NPS and the ODPP in 2018 joined the media stakeholders working group to push forward in the formation of a national mechanism for the safety and protection of journalists.<sup>29</sup>

### **Recommendations:**

- i. Ensure accountability for all threats and violence against journalists through impartial, prompt, thorough and independent and effective investigations, in particular to identify the masterminds behind attacks and bring them to justice, while ensuring access to effective remedies for victims and survivors;
- ii. Establish a national mechanism for the safety and protection of journalists in line with the 2018 Addis Ababa Resolution on the creation of coordination mechanisms for the safety of journalists at the national, sub-regional, and regional level.
- iii. Develop a protocol for the investigation of attacks against the right to freedom of expression to address impunity on attacks against journalists and HRDs and other communicators

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<sup>29</sup> National mechanism for safety of journalists in Kenya coming soon. <http://www.reporter.co.ke/2018/01/10/national-mechanism-for-safety-of-journalists-in-kenya-coming-soon/>

- iv. Conduct investigations into cases of threats, assaults, and killings of journalists, and broadcasting signals disruptions.
- v. Contribute to the monitoring of SDGs by preparing national voluntary reviews that include information on the number of cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel and human rights advocates, as per the SDG 16.10.1. Indicator.
- vi. Revise the Media Council Act 2013, Computer Misuse and Cybercrimes Act 2018, and KICA Amendment Act 2013 to bring them in line with Kenya's obligations under international human rights law, and international best practices

Kenya has not made any significant efforts to ensure promotion and protection of the rights to freedom of assembly. The findings of numerous reports by civil society organizations in Kenya disclose that Kenya's approach towards promotion and protection of the right to freedom of assembly has been repressive.<sup>30</sup>

63) In March 2019, the government tabled a draft amendment to the Public Order Act (2014) that would impose criminal and civil liability on anyone who, while participating in an assembly, causes grievous harm or damage to property or loss of earnings. Civil society groups criticized the draft bill for imposing undue restrictions on the right to peaceful assembly.

<sup>30</sup> <https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf>

- 64) Human Rights Defenders have been subjected to unlawful arrest and detention by Kenyan Security Agencies, while exercising their right to protest. In June 19 2020, two human rights activists were arrested while taking part in a peaceful demonstration to express solidarity with the people of Sudan. Police using tear gas also dispersed hundreds of peaceful demonstrators. The arrests occurred despite the fact the activists had notified the central police station of their intention to protest and requested security
- 65) In 2017, following the controversial Presidential Election, police and pro-government militia were responsible for the deaths of more than 100 opposition supporters in Nairobi and western Kenya during elections protests. Although these killings and other abuses have been well documented by human rights groups, Kenyan authorities have rarely investigated them.<sup>31</sup>

### **Recommendations:**

- i. The Kenyan Government should ensure that domestic law and practices related to the right to protest comply with its obligations under the Constitution and international human rights law and standards. In particular, it should ensure the Public Order Act, the Penal Code and related procedures are brought in line with international human rights law and standards.
- ii. The Kenyan Government should ensure that law enforcement fully complies at all times with international human rights law and standards on policing, in particular the African Commission Guidelines on Policing of Assemblies, the UN Code of

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31 <https://www.hrw.org/world-report/2019/country-chapters/kenya#>

Conduct for Law Enforcement Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

- iii. The Kenyan Police should ensure that the public order management procedures, manuals, training and practice are reviewed and brought to compliance with the Constitution and international human rights law and standards.
- iv. The Kenyan Government should ensure that police oversight bodies develop expertise and procure equipment to facilitate professional investigations into unlawful use of firearms, including for securing and examining potential crime scenes, ballistics and other forensic tests, and autopsies and medical examinations.
- v. The Kenyan government should implement its commitments to fulfil freedom of association and assembly (as articulated in the 2016 UPR implementation plan) and work closely with the UN Special Rapporteurs, including accepting and supporting their outstanding visit requests<sup>32</sup>

### **Articles 23, 24 and 26**

66) Penal Code in Kenya still categorically stipulates the minimum criminal liability age to be eight years although most of the international Conventions provide that such age is not to be below the age of 12 years. The Children Act, 2001 is under review to align it to the 2010 Constitution. A Childcare and Protection Manual is undergoing review by NCAJ even though its launch in 2020 was delayed by the COVID-19 pandemic.

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1) 32 [.https://filedn.com/lvHhGFp0ikwyu0EXq8rTE7R/Article%2019%20executive%20summary%20English2019.pdf](https://filedn.com/lvHhGFp0ikwyu0EXq8rTE7R/Article%2019%20executive%20summary%20English2019.pdf)

- 67) The National Plan of Action for Children in Kenya (2015-2022) is in place and provides an operational policy framework to guide stakeholders and funding partners in coordinating, planning, implementing and monitoring programmes for children. A Care Procedures Committee was formed to look into children's matters as part of the 'Improving the Kenya Juvenile Justice System' project. The Committee launched a Child Guide Handbook in 2019. The guidelines introduce how children can be placed at the core of the justice system, detailing measures and strategies to protect them and the key responsible actors. There is progressive development for the Court Practice Directions on children cases through establishment of 3 children's courts in 3 counties.
- 68) There is a lack of a tracking mechanism in the Juvenile Justice System that carries the mandate to monitor the judicial processes when looking into the best interest of a child and decisions made to determine judgments and rulings.
- 69) The Youth Correctional Training Centre was set up for short-term rehabilitation of youth considered prone to crime, however, the period is too short for proper rehabilitation.

### **Recommendations:**

- i. Develop and adopt through Care Procedures Guidelines to enhance reintegration of children back to the society.
- ii. Development of guidelines for Child Protection Units and propose mechanisms for the establishment of a Child Police Unit in the National Police Service.

- iii. Reduce the number of minor and less serious offences clogging up the formal justice system and detention and allow resources to be focused on repeat or high-risk offenders.
- iv. Develop policies on separated cells for children as well as the establishment policy under review but components of this has been established through child friendly courts.
- v. Establish a standardized check-list list mechanism that will ensure the rights of a child are fully taken into consideration during the through care procedures. This will also look into the delays of cases that are not fully complying with the required conclusion period of 6 months for cases appearing before Magistrate or 12 months for the rest.
- vi. Develop a guide to differentiate Children in-contact and in-conflict of the law and separation in terms of how children are hosted in the rehabilitation centers in terms of their various needs children in need of care and protection and those in conflict with the law.
- vii. Establishment of gazetted Safe homes in all counties that will handle the number of children at risk and the reintegration of children in contact with the law in the country

### **Article 25 and 26**

70) The Enactment of the Election Offences Act 2016 with stringent penalties reduced election offences and corrupt and illegal practices during elections. Enactment of the Election Laws (Amendment) Act 2017 which amended election-related laws including the Elections Act, 2011 and the IEBC Act, and was undertaken to give effect to

Article 99 (1) (b) of the Constitution. The finalization of the Election Campaign Finance Regulations, which put into operation the Election Campaign Finance Act of 2013.

- 71) Currently there are proposed Constitutional Reforms under the just concluded BBI process to amend Chapter Seven on Representation of the People to resolve issues of divisive elections arising from electoral processes and realized of the two-third gender rule
- 72) During the 2017 pre-election period, there was use of force in dispersing protesters who were calling for IEBC reform. Instances of death and injuries were reported. Excessive use of force by police was also noted during the post-election period while quelling protesters demonstrating against the election results. The KNCHR reported instances of Civilian-to civilian attacks reportedly instigated along ethnic and political lines especially in Nairobi City County. Reports of sexual violence perpetrated by protestors and security agents. KNCHR documented a total of 201 cases of sexual violence that emanated from the 2017 electoral violence<sup>33</sup>. Majority of the cases were reported from informal settlements where fierce protests were witnessed.
- 73) Shrinking democratic space for civil society organizations working on promoting democracy and good governance has been witnessed in various instances. Immediately after the August 2017 General Elections, the NGO Coordination board communicated via social media that it had deregistered KHRC and issued notice that AfriCOG was operating illegally. In November 2017 the National NGOs Coordination Board wrote and summoned three organizations, Katiba Institute, Muslim for Human Rights (MUHURI) and Inuka Kenya to explain on financial issues

<sup>33</sup> [http://www.knchr.org/Portals/0/KNCHR\\_Silhouettes\\_of\\_Brutality.pdf](http://www.knchr.org/Portals/0/KNCHR_Silhouettes_of_Brutality.pdf)

regarding their projects. The harassment was, to a large extent, directed to CSOs perceived to be partners of organizations which support good governance and democracy.

## **Recommendations**

- i. Judiciary to expedite resolution of electoral violence and related cases
- ii. The principle of command responsibility to be enforced in SGBV cases involving the police.
- iii. The State to ensure there is adequate public participation in development of all these proposed legislation to safeguard against politicization/drafting and passing of laws that will only fulfill selfish political interest of laws as opposed to public interest
- iv. Operationalize the Elections Campaign Financing Act to cap campaign financing as also a measure for curbing corruption

## **Article 27**

74) The state has developed the Kenya AIDS Strategic Framework 2014/2015 to 2018/2019 which recommends removal of legal barriers to access of HIV, SRHR information and services and promotes improving the legal and policy environment for protection and promotion of rights for people living with HIV (PLHIV); and reducing and monitoring stigma and discrimination.

- 75) In 2015, the President issued a directive to all County Commissioners to collect up-to-date data on all school-going children living with HIV. It was to be collected in a prescribed data matrix that would reflect personal information of children living with HIV, including their home area and school. In Petition 250 of 2015<sup>34</sup>, the High Court declared that the directive was a breach of privacy and could lead to stigma and discrimination. Similarly, in Civil Appeal 56 of 2016<sup>35</sup>, the Court of Appeal declared the practice of law enforcement conducting forced anal examinations to obtain evidence of homosexual conduct unconstitutional, as it amounted to cruel, inhuman and degrading treatment.
- 76) Vulnerable and marginalized communities continue to face stigma and discrimination. The National HIV and AIDS Stigma and Discrimination Index 2014 notes that HIV stigma is still high, and key populations including men who have sex with men, trans persons, people who inject drugs, and sex workers face double the stigma and discrimination.<sup>36</sup> Additionally, a number of punitive laws still exist that effectively lead to discrimination of communities living with HIV especially key populations.
- 77) Sections 162 and 165 of the Penal Code effectively criminalize same-sex sexual conduct leading to discrimination of sexual minorities by law enforcement; and even by health workers when they seek HIV care and treatment. Sections 153, 154, 155 and 156 of the Penal

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34 <http://kenyalaw.org/caselaw/cases/view/132167/>

35 <http://kenyalaw.org/caselaw/cases/view/171200/>

36 Ministry of Health and National AIDS Control Council, the National HIV and AIDS Stigma and Discrimination Index: Summary Report. See at: [https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=88&ved=2a-hUKewi3m8yb0qfuAhVXVBUIHffFeBEQQFjABegQIBBAC&url=https%3A%2F%2Fwww.undp.org%2Fcontent%2Fdam%2Fkenya%2Fdocs%2FDemocratic%2520Governance%2FHIV%2520stigma%2520index.pdf&usq=AOvVaw15NxdHM4slh\\_unN2saRjL\\_z](https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=88&ved=2a-hUKewi3m8yb0qfuAhVXVBUIHffFeBEQQFjABegQIBBAC&url=https%3A%2F%2Fwww.undp.org%2Fcontent%2Fdam%2Fkenya%2Fdocs%2FDemocratic%2520Governance%2FHIV%2520stigma%2520index.pdf&usq=AOvVaw15NxdHM4slh_unN2saRjL_z)

Code contain provisions criminalizing running brothels; and living off the proceeds of prostitution.

- 78) Section 5 of the Narcotic Drugs and Psychotropic Substances Control Act criminalizes possession of drug related paraphernalia and is used to arrest drug users with HIV who benefit from needle and syringe programs.
- 79) Section 26 of the Sexual Offences Act criminalizes non-disclosure, exposure and transmission of HIV. The content and application of this section does not consider scientific evidence on HIV exposure and transmission risks; limitations in proving transmission and the effectiveness of antiretroviral therapy. These laws have the potential to increase HIV-related stigma as they characterize PLHIV as criminal. Additionally, they disproportionately affect women as they are often the first in a household to learn their HIV status leaving them vulnerable to blame and violence.

### **Recommendations**

- i. Undertake sensitization of law enforcement and health workers on an enabling environment for PLHIV with the aim of combatting stigma and prejudices against PLHIV especially key populations.
- ii. Remove legal and structural barriers that impede access to HIV services especially for key populations.
- iii. Raise awareness of the HIV and AIDS Tribunal among communities living with and affected by HIV to support access to justice for human rights violations against PLHIV.
- iv. Develop and put in place mechanisms for implementation of a Workplace Policy on HIV/AIDS that applies to the private sector.

- 80) The State has not taken any steps to protect LGBTI individuals against harassment. The Key Populations Mapping and Size Estimation Phase 1 report estimates that there are 32,580 Men having Sex with Men in Kenya.<sup>37</sup> There is no evidence that the State has put in place any measures to protect from non-discrimination or to aid LGBTI persons in accessing justice if they are subjected to violence or discrimination.<sup>38</sup>
- 81) The State has not undertaken any awareness raising efforts on universality of rights including for the LGBTI community in Kenya. Educational campaigns on rights of the LGBTI community have been championed by civil society organizations for example the campaign to #Repeal162becauseloveishuman campaign by the National Gay and Lesbian Human Rights Commission.
- 82) The State had developed the Alternative Justice Systems Policy which makes use of traditional cultural structures for example the Council of Elders to resolve disputes around widow disinheritance with the view to ensuring that women's land and property rights are promoted and protected.

## Recommendations

- i. Decriminalise same-sex sexual conduct between \_\_\_\_\_ consenting adults.

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<sup>37</sup> Ministry of Health, National AIDS and STI Control Programme (NAS COP), Key Population Mapping and Size Estimation in Selected Counties in Kenya: Phase I Key Findings, 2019. See at: <https://hivpreventioncoalition.unaids.org/country-action/key-population-mapping-and-size-estimation-in-selected-counties-in-kenya-phase-one-key-findings-april-2019/>

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<sup>38</sup> See University of Minnesota Law School Human Rights Litigation and International Advocacy Clinic and Human Rights Center submission for the List of Issues on Rights of LGBTIQ+ citizens and non-citizens in Kenya for a comprehensive analysis of the rights issues facing the LGBTIQ+ community in Kenya.

- ii. Proactively conduct education and awareness campaigns aimed at ending social stigma of LGBTI communities and send a clear message that the State does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity.
  - iii. Develop and implement a comprehensive strategy to eliminate harmful practices and stereotypes that discriminate against women, including through more awareness-raising campaigns for community and religious leaders and the general public and by prosecuting and adequately punishing perpetrators
  - iv. Provide systematic training for judges, prosecutors, legal professionals, law enforcement officials and medical personnel on the strict application of criminal law provisions to punish child and forced marriage, female genital mutilation, child rape ("beading") and widow inheritance, and raise awareness about the criminal nature of such practices and their adverse effect on women's right
  - v. Ensure that women who are victims of harmful practices can file complaints without fear of retribution or stigma and have access to effective remedies and victim support, such as legal, social, medical and psychological assistance and shelter
  - vi. Ensure AJS is adopted and implemented.
- 83) Following the judgement in Petition 266 of 2015, the Standards and Guidelines for reducing morbidity and mortality from unsafe abortions have been reinstated. However, the ministry of health is yet to send a national memo of its reinstatement. The Ministry of Health developed a post abortion care hand book pocket guide

for health care providers on post abortion care in 2019 and launched in 2020. Some counties have developed reproductive health laws. The Makueni County Maternal, Newborn and Child Health Act is quite progressive, permitting access to safe abortions in the cases of sexual violence, foetal abnormality and incest. The Kilifi County Maternal, Newborn and Child Health Act only permits abortion in cases of emergency treatment.

- 84) The Health Act, 2017 includes the right to reproductive health in section 6; and mandates that any procedure for conditions occurring during pregnancy including safe and legal abortions be performed in a legally recognized health facility with an enabling environment consisting of minimum human resources, infrastructure, commodities and supplies for the facility. Additionally, section 7 criminalises refusal to offer emergency medical treatment.
- 85) Sections 158, 159 and 160 of the Penal Code still criminalise procuring abortions, performing abortions, and supplying instruments meant for abortion. Most women and girls are charged with concealing birth under section 227 and killing an unborn child under section 28 of the Penal Code. Research into abortion cases post 2010 has revealed that none of the courts adjudicating refer to or apply Article 26(4) to its full extent.<sup>39</sup>

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39 Center for Reproductive Rights, A Decade of Existence: Revealing Progress, reversals, and Betrayal of a National Compromise, 2020. See at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewjUuLHUw6fuAhWGRxUI-HWvPAdUQFjAAegQIAhAC&url=https%3A%2F%2Freproductiverights.org%2Fdocument%2Fdecade-existence-revealing-progress-reversals-and-betrayal-national-compromise&usg=AOvVaw074GQgIWH-PbBq9EEie-c6f>. Kenya Legal and Ethical Issues Network, Prosecution of Women, Girls and Medical Providers Post Enactment of Article 26(4) on Access to Abortions since 2010 (unpublished).

Age of consent in Kenya is enshrined in 2010 constitution and adolescent and youth face discrimination and denied access to safe abortion due to bridged confidentiality increasing cases of unsafe abortion increasing health risk of maternal mortality and morbidity

86) There is a Reproductive Healthcare Bill, 2019 currently tabled at the Senate. In addition to the instances in the Constitution, it permits abortion in the case of severe foetal abnormalities, SGBV, during and emergency and when the health of the mother is in danger . It also ascribes a duty to refer the pregnant women to a trained medical professional in the case of conscientious objection increasing access to safe abortion under article 26(4).

87) In 2018, the Kenya Film Classification Board canceled advertisements that were part of a Marie Stopes educational campaign on safe and legal abortions, claiming that they were promoting abortion. Subsequently, the Kenya Medical Practitioners and Dentists Board banned Marie Stopes from providing any kind of abortion services following a petition by an anti-abortion organization. These decisions are being challenged in Petition 428 of 2018 at the High Court of Kenya as it violates women and girls' right to access reproductive health information.'

## Recommendations

- i. Ensure full implementation of the standards and guidelines, including providing systematic training of medical providers on methods of safe and legal abortion, when they can be conducted, and emphasizing the duty to provide post abortion care as it is emergency treatment.
- ii. Strengthen access to reproductive health information for women and girls including when, why and where they can obtain a safe and legal abortion.
- iii. Enhance financing for safe abortion service and commodities
- iv. Increasing access to abortion information by disseminating related guidelines, laws and policies to policy implementers, law enforcers and grassroots women and girls in the simplest language possible.
- v. Increased fund allocation to abortion related research to show the gaps face in implementing health policies and inform future planning and interventions in reducing maternal mortalities related to unsafe abortion.
- vi. Fully implementation of article 43,1 on provision of fundamental human rights including access to safe and legal abortion according to article 26,4 and sexual offence act without discrimination of gender and age.
- vii. Trainings for judges, prosecutors, legal professionals, law enforcement officials the right to reproductive health including safe and legal abortion and an enabling environment for women and girls.

- viii. Withdraw Kenya's reservation to Article 4(2)(c) of the Maputo Protocol
- ix. Repeal section 6(1) (c) of the Health Act that makes a notifiable procedure. Repeal sections 158, 159, 160, 227 and 228 of the Penal Code or alternatively, amend them to reflect the provisions of Article 26(4).

88) The Refugees Bill, 2019 seeks to walk away from the encampment policy as it does not contain an offence for refugees who reside outside designated areas as it was contained in the 2006 Act. The Bill also seeks to increase the geographical scope where refugees can reside as it provides for designation of specific counties to host refugees as opposed to refugee camps. We note that refugees are required to reside in designated counties as opposed to reside in designated camps increasing the scope of movement for refugees, however, the Refugee Bill recommends free movement of refugees in Kenya subject to reasonable restrictions in the law or directions issued by the Commissioner (Clause 28).

89) The Bill contains provisions that could lead to violations of the principle of non-refoulement. Clause 19 (2) of the Bill provides that a refugee or an asylum seeker engaging in conduct that is in breach or likely to result in the breach of public order or public morality maybe expelled from Kenya. This provision is a violation of the international principle of non- refoulement as contained in Article 32 of the 1951 Refugee Convention Relating to the Status of Refugees.

- 90) Clause 23 (5) provides that a person who has submitted an application for refugee status has an obligation to abide by all the laws in Kenya and failure to which their name will be struck off the asylum process and be removed from Kenya subject to the immigration laws. Clause 18, 19 (1), 19 (3) and 29 sufficiently provide for the expulsion of a refugee that is found to be guilty of offences that breach or are likely to breach national security and public order. If a refugee commits an offence that does not amount to a breach of national security or public order, then the offender should be charged under the Kenyan criminal law and not removed from the territory.
- 91) The UNHCR notes that there have been cases reported in Kakuma refugee camp where members of the LGBTI community have reported insecurity incidents. To reduce tension, NGOs in Kakuma and the Government have encouraged the community to discuss the challenges and identify constructive ways to address them.
- 92) The Government of Kenya to continue to offer protection to all refugees and asylum seekers including LGBTI individuals in Kenya.
- 93) In the year 2020, a total of 80 foreign nationals and undocumented migrants were arrested in Kenya and charged with the offence of illegal presence in Kenya along the Kenya Somalia and Kenya South Sudan border points while their intention was to seek asylum.<sup>40</sup> Persons charged with the offence of illegal presence in Kenya and if found guilty, are sentenced according to the law and deported. Persons fleeing persecution and seeking asylum are charged and risk deportation.

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<sup>40</sup> Refugee Consortium of Kenya, access to territory reports of 2020

94) In 2018, The Kenyan Government launched a crackdown on undocumented migrants and foreigners with no work permits and valid documents leading to the arrest and detention of irregular migrants.<sup>41</sup> The targeting of foreigners deescalated in 2019 and 2020 and there is no information on xenophobia and repressive policies against undocumented migrants.

95) Section 16(4) of the Refugees Act of 2006 provides the right to wage-earning employment for refugees in Kenya upon attainment of a Class M work permit which is issued gratis. Refugees are required to have skills not available in the labour market limiting access to work permits as refugees have similar skills as those of Kenyans.<sup>42</sup> Section 40 (3) (a) of the Kenya Citizenship and Immigration Act was amended to include provisions that foreigners need to apply for work permits before entry into Kenya.<sup>43</sup> This requirement is not attainable because refugees reside in Kenya. In addition to that, refugees are given work permit rejection decisions lacking reasons for the decision.

### **Recommendations:**

- i. The Government to uphold freedom of movement of refugees and asylum seekers in Kenya in the Refugee law.
- ii. Clause 19 (2) and Clause 23 (5) of the Bill be removed from the Bill as it is contrary to human rights principles and will result to refoulement of refugees.

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41 Amnesty International, Kenya: Crackdown on irregular migrants risks sparking xenophobia, 1<sup>st</sup> September, 2018 <https://www.amnesty.org/en/latest/news/2018/09/kenya-crackdown-on-irregular-migrants-risks-sparking-xenophobia/>

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42 The Kenya Citizenship and Immigration Regulations 2012, First Schedule , Form 25 <http://kenyalaw.org:8181/exist/kenyalex/subleg-actview.xql?subleg=No.%2012%20of%202011>

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43 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202011>

- iii. Amend the requirement that refugees need to have skills not available in the labour market as provided for in the Kenya Citizenship and Immigration Act and Regulations so as to accommodate the unique humanitarian situation of refugees and enable them to obtain work permits and review the Refugees Act giving safeguard to refugees right to employment.
- iv. Refugees to be exempt from the requirement of applying for work permits before entry to Kenya taking cognizant of their unique humanitarian situation.
- v. The Department of Immigration to issue written reasons to refugees when their application for work permits are rejected.
- vi. Non- detention or arrest of refugees and asylum seekers solely on the basis on unauthorized access to the States territory in compliance to Section 11 of the Refugees Act, 2006.

96) The Internal Displacement Monitoring Centre notes that there are 162,000 internally displaced persons as of 31<sup>st</sup> December 2019.<sup>44</sup> Displaced persons receive assistance in the immediate aftermath of violence or disaster but are still far in achieving durable solutions with challenges in accessing decent housing, livelihood, security, healthcare, and education.<sup>45</sup> The Government of Kenya has made strides to attempt to compensate IDPs with money but the process has been surrounded with claims of corruption due to lack of proper records of IDPs.<sup>46</sup>

44 Internal Displacement Monitoring Centre, Kenya Country Information, <https://www.internal-displacement.org/countries/kenya>

45 Internal Displacement Monitoring Centre, The ripple effect: economic impacts of internal displacement, January 2020, Page 23, <https://www.internal-displacement.org/sites/default/files/publications/documents/202001-cost-of-displacement-africa-case-studies.pdf>

46 The Star, IDP compensation long closed, official tells claimants,

- 97) There is lack of government data on persons displaced by environmental disasters or development as most persons considered IDPs are those displaced due to conflict.
- 98) The term of the current members of the National Consultative Coordination Committee (NCCC) has since lapsed and no one is legally in office.<sup>47</sup> This has affected the registration of the Internally Displaced Persons.

### **Recommendations:**

- i. The Government to Gazette members of the National Consultative Coordination Committee who are tasked with registration of all internally displaced persons and to prioritize durable solutions of IDPs in Kenya.
- ii. Review the National Disaster Management Authority Bill and harmonize it with provisions of the IPD Act with the aim of strengthening protection of IPDs.

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Ndichu Waninaina, 7<sup>th</sup> October 2019, <https://www.the-star.co.ke/counties/central/2019-10-07-idp-compensation-long-closed-official-tells-claimants/>

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47 Refugee Consortium of Kenya, Evaluation of the Implementation of the IDP Act in Kenya, <https://www.rckkenya.org/>

## **ANNEX 1: ORGANISATIONS THAT PARTICIPATED IN PREPARING THE ALTERNATIVE REPORT**

1. INDEPENDENT MEDICO-LEGAL UNIT
2. CENTRE FOR RIGHTS EDUCATION AND AWARENESS;
3. HAKI AFRICA-MOMBASA;
4. INTERNATIONAL COMMISSION OF JURISTS-KENYA CHAPTER;
5. KENYA HUMAN RIGHTS COMMISSION;
6. LAW SOCIETY OF KENYA;
7. LEGAL RESOURCES FOUNDATION TRUST;
8. DEFENDERS COALITION ;
9. NATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION;
10. REFUGEE CONSORTIUM OF KENYA;
11. MUSLIMS FOR HUMAN RIGHTS (MUHURI),
12. FARAJA FOUNDATION;
13. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE;
14. STOP THE TRAFFIK;
15. NATIONAL GAY & LESBIAN HUMAN RIGHTS COMMISSION
16. KELIN Kenya
17. TRANSPARENCY INTERNATIONAL
18. ARTICLE 19- EAST AFRICA
19. CENTRE FOR MINORITY RIGHTS DEVELOPMENT (CEMIRIDE)
20. : MATHARE SOCIAL JUSTICE CENTRE,





Independent Medico-Legal Unit  
A World Free From Torture, Violence and Discrimination



Mathare Social Justice Centre  
In Defense of Social Justice  
[www.matharesocialjustice.org](http://www.matharesocialjustice.org)



Reproductive Health Network Kenya  
Reproductive health and rights for all



KENYA HUMAN RIGHTS COMMISSION



faraja



Reclaiming Rights, Rebuilding Lives



Humanity | Activism | Knowledge | Integrity



DEFENDERS COALITION



Centre for  
Minority Rights  
Development



faraja



LEGAL RESOURCES FOUNDATION  
Haki Itwale



STOP THE TRAFFIK  
PEOPLE SHOULDN'T BE BOUGHT & SOLD



MUHURI  
Utegezi Wa Haki



MUHURI  
MUSLIMS FOR HUMAN RIGHTS



National Gay and Lesbian  
Human Rights Commission  
Equality, Dignity, Freedom



TRANSPARENCY  
INTERNATIONAL  
KENYA



ICTJ  
Justice  
Truth  
Dignity



ARTICLE 19