KENYA

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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INTRODUCTION

Amnesty International submits this briefing to the Human Rights Committee ahead of its examination, in July 2012, of Kenya's third periodic report on the implementation of the International Covenant on Civil and Political Rights (the Covenant or ICCPR).[1]

The document highlights main aspects of Amnesty International's ongoing human rights concerns in Kenya in relation to a number of questions on the Committee's list of issues to be taken up in connection with its review of the state report.[2] It also summarizes concerns on a number of additional areas not contained in the list of issues the organization considers would be useful to raise with the government delegation during the review of the state report.

In particular, Amnesty International is concerned about the failure of the Kenyan government to fully comply with its obligations (under Articles 2, 3, 6, 7, 13, 17 and 26 of the Covenant) with respect to persisting impunity for unlawful killings – including extrajudicial executions – by police forces, unequal access to services for people living in slums and informal settlements, discrimination and violence against women, ongoing discrimination on the basis of sexual orientation and gender identity, lack of protection of the rights of refugees and asylum seekers as well as forced evictions carried out in contravention of international human rights standards.

The document is based on Amnesty International's research and information the organization has received since the Committee's consideration of the last periodic report in 2005.

IMPUNITY FOR HUMAN RIGHTS VIOLATIONS INCLUDING UNLAWFUL KILLINGS AND EXTRAJUDICIAL EXECUTIONS (ARTICLES 2 AND 6 ICCPR)

Amnesty International is particularly concerned at the failure of the state party to hold to account those responsible for human rights abuses, and to provide justice and reparation to the victims as required under Article 2 of the Covenant. It is particularly concerned about impunity for violations committed in connection with the post-election violence in 2007-2008, with widespread unlawful killings, including extrajudicial executions, rape and other forms of sexual violence and mass displacement which may have amounted to crimes against humanity.

The organization is also concerned that unlawful killings and excessive force by police officers continue to be an ongoing problem – as the state party has acknowledged itself – and that police reforms have so far proven insufficient to provide redress to victims and prevent such violations in future.

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[1] Kenya's third periodic report (state report) under the ICCPR is available at: http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.KEN.3_en.doc.

[2] List of issues to be taken up in connection with the consideration of the third periodic report of Kenya, UN Doc. CCPR/C/KEN/Q/3, 22 November 2011, http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.KEN.Q.3_en.pdf.

Post-election violence, 2007-8

– Question 7 in the List of Issues –

Over four years after the outbreak of post-election violence following the disputed December 2007 General Elections, the Government of Kenya has done very little to address widespread impunity for human rights violations, and possible crimes against humanity, committed during the violence. After more than four years the victims of those violations are still waiting for the authorities to provide them with justice and reparations.

While the authorities have repeatedly stated their intention to investigate and hold perpetrators to account, these commitments have not translated into meaningful action at the national level. Amnesty International is also concerned at the increasing lack of cooperation by the government with the International Criminal Court (ICC) which is undermining efforts to address impunity in Kenya and further entrenching a culture of impunity in the country.

In May 2008, the Government of Kenya established the Commission of Inquiry into the Post Election Violence in Kenya after the General Elections (CIPEV). In its final report finding, presented in October 2008, the Commission found that at least 1,133 people had been killed during the post-election violence.[3] It emphasized the sexual violence committed against women and men during the violence, including "rape, gang rape, sexual mutilation [and] loss of body parts."[4] CIPEV also found that approximately 350,000 people were displaced from their homes during the violence.

CIPEV made a number of recommendations, including the creation of a Special Tribunal, to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya."[5] CIPEV recommended that the Tribunal be composed of Kenyan and international judges and staff. CIPEV stated that should the Special Tribunal not be established, or if its work was subverted – a list containing the names and other relevant information of those suspected to bear the greatest responsibility for crimes in the post-election violence would be sent to the Prosecutor of the ICC, with a request to analyse the information with a view to opening a preliminary examination.[6] Upon publication of the report, CIPEV delivered the list of alleged perpetrators and evidence to the Panel of Eminent African Personalities, led by Kofi Annan.

An agreement was signed by President Kibaki and Prime Minister Raila Odinga in December 2008, which stated that a Cabinet Committee would be responsible for drafting a bill establishing the Special Tribunal. But the Committee failed to do so. A bill to amend the Constitution to provide for a Special Tribunal was proposed by the Minister of Justice in January 2009. However, the bill was rejected by Parliament in February 2009. In July 2009, following no further credible efforts to establish the Special Tribunal, Kofi Annan handed

[3] Commission of Enquiry into Post Election Violence (CIPEV), 2008, page 385.

[4] *CIPEV,* page 237.

[5] *CIPEV,* page 472.

[6] *CIPEV,* page 473.

over the list to the ICC Prosecutor. Two further attempts to establish a Special Tribunal in Kenya following the provision of the names to the ICC were also unsuccessful.

In November 2009, the ICC Prosecutor requested the judges of the ICC to authorize the opening of an investigation which was granted in March 2010. In December 2010 the Prosecutor requested the judges to issue summonses to appear in the court against six Kenyan citizens suspected of bearing the greatest responsibility for crimes against humanity alleged to have been committed during the post-election violence; Francis Kirimi Muthaura, Uhuru Kenyatta, Mohammed Hussein Ali, William Somoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. The request was granted in March 2011 and all suspects were summoned to appear before a pre-trial chamber in April 2011.

Confirmation of Charges hearings were heard against the six in September and October 2011.

In January 2012, the ICC Pre-Trial Chamber I confirmed charges against four of the six suspects; Francis Kirimi Muthaura, Uhuru Kenyatta, William Somoei Ruto and Joshua Arap Sang.

Immediately following the naming of the six suspects, President Kibaki announced that "the government is fully committed to the establishment of a local tribunal to deal with those behind the post-election violence, in accordance with stipulations of the new constitution."[7] These words stood in stark contrast to the government's failure to do just this, prior to the unveiling of the ICC's suspects. Also in December 2009, the Parliament of Kenya passed a resolution for Kenya to withdraw from the Rome Statute.

The Government of Kenya has also since sought to actively undermine the ICC's jurisdiction over the four cases in which charges were confirmed. Amnesty International has serious concerns that the Kenyan authorities lack the political will to see the four cases in particular tried at all, regardless of jurisdiction, and that this is contributing to the continued existence of a widespread culture of impunity in the country.

In March and April 2011, the Government of Kenya unsuccessfully sought consideration by the UN Security Council for a deferral of the ICC cases under Article 16 of the Rome Statute which permits the Security Council to suspend the proceedings of the Court if prosecutions would constitute a threat to international peace and security. Following closed-door consultations between Kenyan officials and Security Council members states, the Colombian Ambassador, the Council President for the month of March, told the media that "after full consideration, the members of the Security Council did not agree on the matter."[8]

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[7] *Statement by President Kibaki*, The Standard, http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000024826&cid=4&, accessed 12 May 2012.

[8] *UN Council shelves Kenya request to defer ICC case*, Reuters, 9 April 2011, http://af.reuters.com/article/topNews/idAFJOE73801I20110409, accessed 11 May 2012.

In March 2011, the government applied to the ICC for the six cases to be declared inadmissible because amendments to Kenyan law, including the adoption of a new Constitution and the enactment of the International Crimes Act mean, that "national courts were now capable of trying crimes from the post-election violence, including the ICC cases." In May 2011, the ICC Pre-Trial Chamber I rejected the application, maintaining that it had no evidence of ongoing investigations and prosecutions against the six suspects, and that a promise to do so could not be used to pre-empt the Court's jurisdiction over the cases.[9] Under the Rome Statute, the Court can only find a case inadmissible where the case is *being* or *has been* investigated or prosecuted. This decision was confirmed on appeal in August 2011.[10]

Following the confirmation of charges against four of the suspects in January 2012, the Kenyan President instructed the Attorney-General to "constitute a legal team to study the ruling and advise on the way forward."[11] He noted the reform processes which had been ongoing in Kenya while the ICC process was "underway", including the enactment of the Constitution and judicial and police reform processes. He stated that "[i]t is now the collective responsibility of all these institutions to ensure justice for all at all times."[12]

In April 2012, the East African Legislative Assembly (EALA) passed a resolution urging the East African Community (EAC) Council of Ministers to request the transfer of the ICC cases to the East African Court of Justice, and submitted a resolution to the 10th Extraordinary Summit of the EAC Heads of State for the expansion of the East African Court of Justice's jurisdiction to include crimes under international law retrospectively. During the summit, chaired by President Kibaki, the Heads of State directed the Council of Ministers to consider the matter and report to an extraordinary summit to be convened after the end of May 2012. These efforts create serious concerns that the Government of Kenya was seeking to undermine the ICC, rather than taking credible, genuine steps towards national prosecutions of the four charged individuals and all other perpetrators of human rights violations during the post-election violence.

The Rome Statute does not provide for the transfer of cases to regional courts, and the East African Court of Justice lacks jurisdiction over crimes under international law including the charges of crimes against humanity facing the four. The East African Court of Justice also lacks the expertise and institutional infrastructure to investigate and prosecute the crimes. Building such expertise and infrastructure would need to take a number of years and would require significant amendments to the statute of the East African Court of Justice. Futile efforts and rhetoric regarding transfer of the cases to this or any other regional mechanism

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[9] See ICC-01/09-02/11.

[10] See ICC-01/09-02/11 O A.

[11] *Attorney General to study ruling indicting four Kenyans*, Capitam FM, 23 January 2012, http://www.capitalfm.co.ke/eblog/2012/01/23/ag-to-study-ruling-indicting-four-kenyans-kibaki/ accessed 6 June 2012.

[12] *Anxiety as Tobiko, AG plan local trials,* The Standard, 30 January 2012, http://www.standardmedia.co.ke/InsidePage.php?id=2000051149&cid=4v accessed 12 May 2012.

simply serves to further delay and distance justice for victims, and undermines the authority of the ICC in favour of an untested and unprepared mechanism.

Despite Kenya's attempts to remove the four cases from the jurisdiction of the ICC, on the basis of repeated promises that domestic institutions would be able to ensure individual criminal accountability, no steps had been taken by the authorities to establish a credible local judicial process with jurisdiction over post-election violence cases, including the four before the ICC.

In February 2012, the Director of Public Prosecutions (DPP) established a taskforce to deal with the prosecution of 5,000 post-election violence cases. The taskforce is expected to make recommendations ahead of the forthcoming General Elections, and the DPP has stated that he expects the taskforce to work with the ICC. This is the third time that a team has been formed to look into the post-election violence case-load. It remains unclear as to whether this taskforce will result in concrete steps forward towards justice for victims of the post-election violence and for perpetrators at all levels to be held to account.

In March 2012, the legal team established by the Attorney-General in January following the confirmation of charges against the four Kenyans before the ICC, was reported to have submitted its report. Media reports indicated that the report questioned the political will in government to try those with the highest responsibility for the post-election violence and pointed to a lack of a comprehensive policy for dealing with the crimes committed in the post-election violence.

It remains unclear whether these efforts will result in justice for victims of the post-election violence, or will simply serve to screen further inaction.

In his State of the Nation address in April 2012, the President renewed his call for a "local mechanism to deal with any international crimes". Any such mechanism must be a complementary measure to the efforts of the ICC cases, it must be meaningful, independent, impartial and professional, and must be genuinely able and willing to provide justice and full reparations to the victims of the post-electoral violence.

In addition to their right to equal and effective access to justice, victims of gross human rights violations, including victims of the post-election violence, have the right to adequate, effective and prompt reparation for the harm they suffered, and should form part of the transitional justice mechanisms following the work of the Truth, Justice and Reconciliation Commission (TJRC), currently finalizing its report into past human rights violations.[13] The TJRC was mandated to receive applications for reparations, determine victim status and make recommendations for the implementation of reparations.

In order to end impunity, efforts to address the post election violence must also involve the strengthening of national institutions and in particular the Witness Protection Agency. This is necessary for domestic investigations and prosecutions in Kenya.

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[13] Under its mandate, the TJRC is investigating human rights violations which took place between 12th December, 1963 and 28th February, 2008.

In June 2010, the Witness Protection (Amendment) Act 2010 became law. The Act substantially modified and improved the Witness Protection Act 2006, expanding the definition of a witness in need of protection and establishing an independent Witness Protection Agency.

However, Amnesty International is concerned that the Agency is still not fully operational and has not received adequate funding. In the 2011-2012 budget, the Agency has been allocated 200 million shillings, which the Attorney General reportedly described at the Agency's launch as "a drop in the ocean".[14]

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Fully cooperate with the International Criminal Court.**
- **Conduct investigations and if there is sufficient admissible evidence, prosecute in fair proceedings high, mid and low level perpetrators of human rights violations and crimes under international law committed during post-election violence.**
- **Fully fund and make fully operational the Witness Protection Agency.**
- **Immediately establish an independent and transparent national reparations programme to provide full reparations, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition for victims of human rights violations, including victims of post-election violence. Such reparation programme should be prioritized including by annual line-item allocations through the national budgetary process.**

Police reform

– Questions 8 and 9 in the List of Issues –

According to CIPEV, gunshots accounted for 962 casualties during the post-election violence, of whom 405 died. The report stated that the "Commission has received no evidence to suggest that where gunshot was recorded as the cause of death or injury, it was from a source other than the police."[15] The Commission's analysis of post mortem examinations revealed "too many" instances of people being shot from behind, children shot (also from behind in some instances) and other cases of individuals being shot as they sheltered in and near to their homes.[16]

The Government of Kenya notes in its state report, unlawful killings by the police continue to be a "major challenge". However, the government claims that it "has been unequivocal in condemning this [unlawful killings by the police] whenever it happens as one of the most

[14] The Standard, *Witness Protection Unveiled Ahead of Hague Hearing*, http://www.standardmedia.co.ke/?articleID=2000040678&pageNo=1, accessed 11 June 2012.

[15] CIPEV, page 346.

[16] CIPEV, page 418.

serious human rights violations. Any allegation of unlawful killing is investigated by the authorities and perpetrators are tried and convicted by a competent court if found to have used unreasonable force."[17]

However, actions by the Kenyan authorities in relation to excessive force and unlawful killings by the police do not live up to this statement. They have taken no steps to bring to justice police officers and other security personnel who reportedly carried out unlawful killings, including extrajudicial executions.

In January 2011, for example, plain-clothed police officers shot dead three men in Nairobi after ordering them out of their car. According to eyewitnesses, the men surrendered before being shot. After the incident, the police claimed the men were armed criminals. Although the Minister of Internal Security announced that the officers involved had been suspended, the government did not specify any steps it had taken to bring the officers to justice.

In 2011, the police also halted their investigations into the killings of **Oscar Kingara** and **Paul Oulu**, two human rights activists working for the Oscar Foundation Free Legal Aid Clinic (the Oscar Foundation), who were killed by unknown gunmen in 2009. The two were shot dead in their car while stopped in traffic in the centre of Nairobi. It appeared to be a coordinated ambush. The Oscar Foundation had been campaigning against illegal killings by the police and had met with the UN Special Rapporteur on extrajudicial, summary or arbitrary executions two weeks prior to their killing.[18] The UN Special Rapporteur reported that human rights activists were "systematically intimidated" before, during and after his visit,[19] and that a number were forced to flee or to go into hiding.

Amnesty International has also documented excessive use of force by the police and security forces during forced evictions and against refugees (see below).

In its state report, Kenya noted the establishment of a National Taskforce on Police Reforms and the adoption of its report by Parliament. In 2011, key laws establishing the framework for police reform were passed by Parliament. These remain to be (fully) implemented, however. The bills contain an ambitious reform agenda, including the establishment of an independent oversight authority over the police for the first time and an overhaul of the structure of the police force, with the intention of removing the structural shortcomings which encourage and maintain impunity for abuses committed by the police.

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[17] State report, para 136.

[18] *Amnesty International calls for immediate investigation into the execution-style killings of human rights activists,* Amnesty International, 6 March 2009 http://www.amnesty.org/en/for-media/press-releases/kenya-amnesty-international-calls-immediate-investigation-execution-styl, accessed 14 June 2012; Report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions Addendum: Mission to Kenya,AA/HRC/11/2/Add.6, 26 May 2009.

[19] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Addendum: Mission to Kenya, A/HRC/11/2/Add.6, 26 May 2009, Appendix III: Intimidation of human rights activists, para 1.

However, there are concerns that there is a lack of political will to drive forward the reform agenda in favour of maintaining the status quo. In particular, there are fears that reform will not begin before Kenya's next General Elections and lack of progress will increase the risk of violence during the electoral period. In a March 2012 report, the Kenya National Dialogue and Reconciliation Monitoring Project stated "The lack of fundamental reforms in the police is worrisome in light of the role played by the police in the post-election violence."[20]

The National Police Service Act, which was passed in August 2011, has at the time of writing, remained unpublished. The Act will merge the Kenya Police and the Administration Police into one hierarchy and will establish the role of Inspector General of Police, which will have authority over both policing branches. Art.41 of the National Police Service Act also places limits on the force which police are able to exercise, stipulating that an officer may use "force and firearms, if and to such extent only as is necessary." The continued failure to publish the Act, which has been assented to by the President, raises serious concerns regarding political commitment towards police reform, particularly as General Elections approach. There are concerns that the Act will not be implemented in time for necessary reforms to have been undertaken before the electoral period begins. This has also raised concern that the same policing structures blamed by CIPEV and others for serious human rights violations during the 2007-8 post-election violence will remain intact during the next electoral period, increasing the risk of a repeat of the 2007-8 violence.

The National Police Service Commission Act establishes a civilian board to oversee recruitment and appointments of police officers, review standards and qualifications, and will be able to receive complaints from the public and refer complaints to the Independent Policing Oversight Authority (IPOA) and other government entities for remedy. At the time of writing, appointment of Commissioners had been severely delayed, raising concerns regarding a lack of political will to implement the reform package, and efforts to thwart the reforms through delay tactics.

The Independent Policing Oversight Authority Act, which establishes an oversight authority mandated to deal with complaints against the police, will investigate complaints and make recommendations, including for prosecution and compensation or other relief and will publicize the responses received to its investigations. The members of the Authority were approved by Parliament in May 2012 and sworn into office.

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Ensure that the Independent Policing Oversight Authority is fully funded and operational.**
- **Act without delay to publish and implement the National Police Service Act.**
- **Ensure the Police Service Commission is fully-funded, staffed and operational.**

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[20] The Kenya National Dialogue and Reconciliation Monitoring Project, *Agenda Item 4 Reforms Long-standing issues and solutions: Progress Review Report March 2012,* para 45.

NON-DISCRIMINATION AND EQUAL RIGHTS (ARTICLES 2, 3, 7 AND 26 ICCPR)

As a party to the ICCPR, Kenya is required to ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The right to equality before the law requires that administrative officials must not act arbitrarily in relation to the protections available under existing law. Though the administrative authorities can take into account individual characteristics, they must ensure that the distinction in treatment does not amount to discrimination, which would breach Kenya's obligations under the Covenant. The Committee on Economic, Social and Cultural Rights has emphasized that "The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g., whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle."[21] The Committee has also noted that "Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g., land ownership or tenure) and personal property (e.g., intellectual property, goods and chattels, and income), or the lack of it".[22]

In addition, as the Human Rights Committee pointed out in its General Comment No. 18, "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions." [23]

Article 27 of Kenya's Constitution provides that "(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms"[24]

However, Amnesty International is seriously concerned at the differential treatment of people living in informal settlements in Kenya, particularly by the failure of the authorities to enforce protections that are available under national law in these areas and to provide them with services that are available to other urban residents. Furthermore, discrimination and violence against women remains a serious problem and discrimination on the basis of sexual orientation and gender identity persists both in law and fact in Kenya.

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[21] UN Committee on Economic, Social and Cultural Rights, General Comment no. 20, *Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, E/C.12/GC/20, 10 June 2009, para 34.

[22] Committee on Economic, Social and Cultural Rights, General Comment No. 20, para 25.

[23] Human Rights Committee General Comment No. 18: Non-discrimination, para 10.

[24] The Constitution of Kenya, 2010.

Failure to enforce protections under the law and unequal access to services for people living in informal settlements

– Additional issue not contained in the List of Issues –

Amnesty International's research in 2009 and 2010 highlighted the lack of adequate sanitation within informal settlements and slums in Nairobi, reflecting decades of neglect because of the government's failure to recognize these areas for city planning purposes and the non-enforcement of applicable domestic law and regulations. During the research many women emphasized how the lack of toilets/latrines and bathroom facilities combined with the lack of effective policing, left them at high risk of sexual and other forms of gender-based violence.

Water and sanitation

The majority of Nairobi's residents live in informal settlements and slums and most do not have access to public water supplies which are available to other residents of the city. The longstanding government view that informal settlements are illegal mean that local authorities have not been held responsible for providing access to water and other essential services. In 2007, by the government's own admission, "sustainable access to water dropped to as low as 20 per cent in the settlements of the urban poor where half of the urban population lives."[25]

According to a 2006 study commissioned by the World Bank[26], up to 68 per cent of informal settlement and slum residents rely on shared toilet/latrine facilities, and up to 6 per cent of all slum and informal settlement residents do not have access to toilet facilities at all. The official water and sanitation regulator and provider estimate that only 24 per cent of residents in Nairobi's informal settlements have access to toilet facilities at a household level.

There is very little, if any, sewerage coverage, or alternative disposal mechanism for waste in the slums and informal settlements. Nairobi's generally dysfunctional sewerage system further alienates slum and informal settlement residents, who have almost no access to public sewer lines and waste disposal systems. The majority of slum residents use shared pit latrines[27], if these are available, and mostly only during the day. Women interviewed by Amnesty International said that one pit latrine would be shared by up to 50 people living in different households. Most women interviewed by Amnesty International had to walk more than 300 metres from their homes to use the available latrines. Most latrines are full and rarely emptied, and pose serious health problems to residents. Access to the latrines is

[25] *Summary of the National Water Services Strategy 2007-2015*, Government of Kenya, Ministry of Water and Irrigation, 2007, p.1.

[26] *Inside Informality: Poverty, Jobs, Housing and Services in Nairobi's Informal Settlements* 2006, S. Gulyani, Debrata Tulukdar, Cuz Potter, The World Bank, page 48.

[27] Pit latrines are holes in the ground which collect excreta. As these are not connected to sewer systems, latrines need to be emptied on a regular basis in order to remain functional. The waste should be disposed of away from human settlements and water resources.

especially unsafe for women and particularly at night (as explained below). The common use of "flying toilets"[28] in settlements is a result of the inaccessibility of toilet facilities.

Because many of the settlement areas do not fall within the boundaries covered by formal urban plans, public government or local authority facilities for pit emptying services are in general, rarely used in the settlements. The poor state of the roads into settlements and other factors, such as the long distances to the official dumping site have also contributed to the high cost of latrine emptying services, acting as a further disincentive to maintaining services.

Under Kenyan law the primary responsibility to ensure adequate access to sanitation at a household level rests with the private individuals and companies that own the houses and structures inhabited by most people living in the settlements. The Public Health Act and relevant provisions of the applicable Building Code[29] make provisions regarding minimum standards which include sanitary requirements. The local authorities and public health officials supervise the compliance of these standards by individual private developers.

The Building Code provides in section 3(1) that the by-laws apply with respect to "any person who erects a building or develops land or changes the use of a building". The applicable standards include provisions on "drainage", "sanitary conveniences" and "sewers", which are considered mandatory in the construction of "any building" and under which standards on issues such as latrine, bath and lavatory accommodation and sewage and waste water disposal are provided for. Sections 118 and 119 of the Public Health Act make provision on what constitutes "nuisance" under this law, including poor sanitary conditions in a building/premise and empowers public health officials to take action to ensure such nuisance is redressed. Section 126A of the Act provides for the power of "every municipal council and every urban and area council" to make and enforce by-laws in relation to buildings and sanitation.

However, Amnesty International found that these laws and regulations were not enforced in four settlements it visited in 2009.[30] This was partly because the settlements fall outside areas covered by urban plans and as a result, proper sanitation infrastructures, including settlement connection to public sewer lines were not ensured. There is little cooperation between the Ministry of Public Health, Ministry of Water and the Nairobi City Council in order to require structure owners to ensure access to sanitation, and to provide assistance to those households that are unable to construct latrines themselves. Non-enforcement of existing laws has directly resulted in the lack of adequate toilet and shower facilities in settlements.

The absence in practice of any official supervision of existing laws and standards means that private developers, including landlords and structure owners, often construct houses without

[28] Human waste disposed of in plastic bags and thrown into the open.

[29] The Local Government (Adoptive by-laws) (Building) Order 1968, revised 2009.

[30] Amnesty International delegates visited four of Nairobi's over 200 slums and informal settlements – Kibera, Mathare, Mukuru Kwa Njenga and Korogocho.

complying with sanitation requirements. Structure or house owners focus primarily on maximizing incomes by renting out a high number of structures or houses and paying little attention to the availability and adequacy of sanitation facilities. Residents told Amnesty International that a single structure owner would usually own tens of houses but not pay attention to the needs of families for toilets and shower spaces. Most residents, usually tenants, can do nothing about the poor sanitation or the fact that structure owners are not complying with existing laws and standards because City Council and public health authorities will not act, as they still consider slums and informal settlements irregular.

Despite an official government policy now recognizing the existence of settlements and the formal adoption of a government slum upgrading programme there has been little change in the practice of government officials and the local authority, the Nairobi City Council. The Nairobi City Council's city planning department told Amnesty International that slums and informal settlements are yet to be included in the city's urban plans. The official water service provider and regulator have admitted that "informal" settlements fall outside the formal planning framework of the State authorities, and therefore lack legal standing. The City Council and all other utilities rarely plan the provision of services to these areas. Services still not being planned for or provided include those relating to sanitation.

City Council officials told Amnesty International in 2010 that "the Council was developing a new master urban plan which will incorporate the government's slum upgrading initiative and eventually ensure that planning regulations and building codes can be relevant to the situation in the slums". It is not clear when this proposed plan will be finalized and how it will be implemented considering other challenges including the widespread lack of security of tenure in the settlements. It is also not clear how these plans will be implemented in line with the ongoing government slum upgrading programme. The slum upgrading programme has long-term goals to improve infrastructure and access to essential public services in informal settlements.

The official regulator of water and sanitation services within Nairobi, the Athi Water Services Board (AWSB), and the water service company, Nairobi City Water Services Company (NCWSC), operate as independent entities. The service provider, NCWSC, operates as a company, but the government retains statutory oversight authority over the operations of both bodies.

Both AWSB and NCWSC have acknowledged since 2008, the dire situation with regard to access to water and sanitation, including the dearth of toilets or latrines and related sanitation facilities in Nairobi's slums and informal settlements. On this basis, the two bodies formulated a plan, which was made public in 2009, aimed at improving access. The plan summarizes the situation with regards to lack of access to water and sanitation and was a step in the right direction. However, challenges remain, including that community or public facilities remain few and far between, and invariably involve walking for long distances through insecure neighbourhoods with poor public lighting.

In May 2012, AWSB announced the Nairobi Sewerage Improvement Project to rehabilitate and expand the sewerage infrastructure in the city, including the provision of community

sanitation in informal settlements, where trunk lines will be laid. The project covers the Ngong, Mathare and Kiu river basins.[31] This is a welcome development but the government must ensure that it also takes steps in the interim period to ensure that people have access to at least basic levels of sanitation, while this project is being implemented. This requires enforcement of laws and regulations requiring structure owners to provide toilets, latrines and bathrooms in the immediate vicinity of each household and greater availability of pit emptying services and dumping sites.

Public security

The lack of public security services is yet another consequence of the failure to recognize Kenyan slums and settlements for city planning and budgeting purposes over the last decades. There is little police presence and no permanent police station or post in Kibera, Kenya's largest informal settlement. A police official heading one of three regular police stations located in areas adjacent to Kibera and with a mandate to extend police services into Kibera told Amnesty International that "the police effectively remedy the lack of a permanent police post by conducting regular police patrols. We also rely on a contingent of administrative police attached to the office of provincial administration situated in the outskirts of Kibera. They have power to conduct arrests even if they cannot detain suspects who they eventually bring to one of three police stations/posts outside Kibera…"

The scarcity of essential services has a particular impact on women and girls as set out below. This is particularly the case in relation to the absence of adequate sanitation in most informal settlements. Women interviewed by Amnesty International described the ever-present risk of sexual and other forms of gender-based violence because of the long distances they have to travel to reach toilets and other sanitation facilities. For the significant majority of those interviewed, the lack of adequate access to toilets and bath facilities meant that they would not dare use the limited available facilities because they were far away.

Discrimination and violence against women in slums and informal settlements

– Questions 11, 12 and 4 in the List of Issues –

Levels of violence and crime in Nairobi's slums and informal settlements are high, and are an issue for residents. A 2006 survey revealed that "as many as 63% of slum households report that they do not feel safe inside their settlement".[32] Violence against women is endemic in the settlements.

Various studies have documented the general high prevalence of domestic violence in Kenya. A recent country-wide study by the Federation of Women Lawyers in Kenya (FIDA-K) reveals that gender-based domestic violence and intimate partner violence is a common feature

[31] *New sewer system set to ease city residents' agony*, The Star, 7 May 2012, http://www.the-star.co.ke/national/national/74613-new-sewer-system-to-ease-city-residents-agony-.

[32] *Inside Informality,* page 40.

across Kenya and is overwhelmingly driven by factors "ranging from the low status society accords to women, to poor policy and legal frameworks that condone or ignore the prevalence and perpetuation of domestic violence."[33] Just like their counterparts in other parts of the country, women in slums and informal settlements are victims of domestic violence – including rape, marital rape, physical assault and psychological violence within their homes and in the hands of spouses, partners and other family members. Domestic violence is the most prevalent form of violence that women face in the slums and informal settlements.

Many women do not seek legal redress because they do not trust the justice system. Speaking on behalf of a focus group with Amnesty International in Mukuru Kwa Njenga, one respondent said "the police do not want to be involved in cases of alleged violence perpetrated in the home. They would always advise you to go back and sort it out with the alleged perpetrator." A number of women also identified police misconduct as an obstacle to accessing justice.

Women told Amnesty International also of the high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. A number of women said that their daughters or children in their custody had suffered rape and other forms of sexual violence while attempting to use toilets, mostly at night but sometimes even during the day. Women also reported being harassed and intimidated by members of the community in which they live, when using shared facilities.

They spoke of a number of ways they try to mitigate the threat of violence, including where possible, showering or using latrines in groups, or asking male members of the family to accompany them to the latrines at night. However, most of them were of the view that these options would only be possible if the facilities were available and accessible in the first place. In addition, for some, being single and heads of households means that the option of male relatives providing them and/or their children with security, or accompanying them to use the toilets at night does not exist. The majority of women interviewed by Amnesty International indicated that they would be better off with more facilities available closer to their homes or within plots.

Muggings, physical attacks, theft and other violence are rampant. Though perpetrators of such crimes often target victims at night, women survivors of violence said that they are at risk of being targets of violence and crime throughout the day. In the past, criminal groups have also taken advantage of public disorder, for instance during the post-election violence of 2007/8 when they and other individuals and groups subjected many women to physical, sexual and other gender-based violence. Many women survivors of violence were specifically targeted because of their gender, and some because of their ethnic identity combined with their gender. For most of these women living in the slums and informal settlements, there have been virtually no medical, legal or other remedies for the violence they suffered.

In its Concluding Observations of February 2011, the CEDAW Committee expressed concern at the "persistence of adverse cultural norms, practices and traditions as well as patriarchal

[33] *Gender-Based Domestic Violence in Kenya*, Federation of Women Lawyers in Kenya, 2008, p 6.

attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life."[34] The Committee noted that such stereotypes perpetuate discrimination against women and contribute to the persistence of violence against women as well as harmful practices, including female genital mutilation, polygamy, bride price and wife inheritance. It expressed concern that despite such negative impacts on women, the government "had not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and harmful practices."

Because of wider societal gender-based discrimination (including in relation to education and access to credit), women are disadvantaged when it comes to work opportunities. In interviews with Amnesty International, women living in slums expressed the view that they struggle to access gainful employment and most of them have no choice but to take low paying casual jobs. Many women told Amnesty International that they earned low wages either through small scale vending within the settlements, through casual work as domestic house helps or as casual workers in higher income areas near the settlements in which they live. While their work presented an opportunity to earn much needed income, they faced threats of violence and actual violence as a result of it.

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Ensure that all cases of gender-based violence are promptly investigated in a manner which is sensitive and respects the rights of the victim, and ensures that perpetrators are brought to justice in fair trials that do not lead to the imposition of the death penalty.**
- **Ensure that survivors of gender-based violence receive prompt and appropriate healthcare and other forms of support they need.**
- **Take immediate steps to ensure that police and judicial officials understand women's right to live free from violence and deal appropriately and sensitively with victims reporting violence.**
- **Take immediate steps to improve confidence in the justice system and policing, including by improving channels of communication with police so that it is easier for women to report crimes against them and ensuring there is an effective complaints procedure women can use if they receive an inappropriate response from the police.**
- **Take immediate measures to improve legal awareness by supporting programmes for civic education on legal rights, and legal aid programmes to provide support to women seeking justice.**
- **Address the factors contributing to violence against women, including taking action to eliminate negative stereotypes and harmful practices affecting women, improving access to education, job creation schemes, and financing for women's businesses so that women can improve their working conditions.**
- **Ensure equal protection under the law to all the people living in informal settlements,**

[34] Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kenya, CEDAW/C/KEN/CO/7, 2 February 2011, para 17.

including by applying and enforcing legislation requiring landlords to construct toilets/latrines and bathrooms in the immediate vicinity of each household.

- **Provide assistance to structure owners who are unable to meet the costs of construction of toilets/latrines and bathrooms.**

- **Ensure effective forms of policing in consultation with residents of the slums and settlements.**

- **Instigate other measures to improve security, including by increasing the level of street lighting in the informal settlements.**

Discrimination on the basis of sexual orientation and gender identity

– Question 26 in the List of Issues –

Consensual sexual activity between people of the same sex continues to be prohibited under Kenya's Penal Code.[35] Article 45 of the Constitution also limits the right to marry to only a person of the "opposite sex."

Article 27 of the Constitution prohibits direct and indirect discrimination against any person on a number of grounds, including race, sex, ethnic or social origin, it does not directly prohibit discrimination on the grounds of sexual orientation or gender identity. However, the wording of Article 27 suggests that the list is not exhaustive. In addition, the Human Rights Committee has previously ruled that the word "sex" in Article 2, paragraph 1 and Article 26 of the Covenant are to be taken as including sexual orientation[36], although this issue has not so far been considered by the Kenyan courts in relation to Article 27 of the Constitution.

Homophobia also remains very high in Kenyan society, often encouraged by religious and political leaders condemning homosexuality in public. For example, in November 2010, Prime Minister Raila Odinga told a crowd in Nairobi that lesbian, gay, bisexual and transgender (LGBT) people should be arrested.[37] During a workshop in June 2011, Muslim religious leaders called on the government to introduce the death penalty for LGBT people, and called on individuals to openly discriminate against and boycott the businesses of people who were LGBT.[38] Religious leaders also denounced a report by the Kenya National Commission on Human Rights released in May 2012, which recommended that the

[35] Ss162-165 Penal Code, Chapter 63 of the Laws of Kenya.

[36] Toonen v Australia, communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para 8.7.

[37] http://www.voanews.com/english/news/africa/Odinga-Remarks-Spark-Persecution-Fears-for-Kenyas-Gay-Community-111057574.html.

[38] http://www.nation.co.ke/News/regional/Clerics+seek+harsher+laws+for+gays+/-/1070/1180544/-/r4rm13/-/index.html.

government decriminalize consensual same-sex behaviour.[39]

On 23 February 2012, a number of human rights defenders were reportedly seized by youths who stormed the venue of a peer-learning and HIV seminar for LGBT people in Likoni. They were released after the police and District Officer closed the seminar.[40]

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Remove provisions of the Penal Code which criminalize consensual same-sex behaviour, in line with international human rights law.**
- **Ensure that all allegations of human rights violations perpetrated against individuals on the basis of their actual or perceived sexual orientation or gender identity or assumed consensual same-sex behaviour are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted in a manner that conforms to international human rights standards.**
- **Ensure that government representatives do not incite hatred, violence or discrimination against people on the basis of sexual orientation or gender identity.**
- **Introduce ongoing training for all levels of police, prosecutors, magistrates, judges and court officials on homophobia, transphobia, human rights obligations in relation to sexual orientation and gender identity, and on efficient and impartial investigation and prosecution of violent attacks against LGBT individuals.**
- **Work with LGBT and human rights organizations to encourage people to report hate crimes and ensure that the victims have access to redress, including access to justice, rehabilitation and compensation.**
- **Create and implement a public awareness campaign about the unacceptability of violence towards LGBT people.**

THE RIGHTS OF REFUGEES AND ASYLUM-SEEKERS (ARTICLES 2, 6, 7, 9, 12 AND 13 ICCPR)

– Questions 15 and 18 in the List of Issues –

Over half a million Somali refugees and asylum-seekers are currently hosted by Kenya.[41] The

[39] *Clergy and rights groups oppose KNCHR report on homosexuality*, The Star, 4 May 2012, http://www.the-star.co.ke/national/national/74286-clergy-and-rights-groups-oppose-knchr-report-on-homosexuality, accessed 14 May 2012.

[40] *Kenya: Gays Flee as Irate Residents Storm Likoni Seminar*, Daily Nation, 23 February 2012, http://allafrica.com/stories/201202240097.html , accessed 14 May 2012.

[41] 523,728 were registered as refugees as of May 2012, according to the UN High Commissioner for Refugees (UNHCR); the real number of Somali nationals living in Kenya may be much higher, since many are not registered.

Dadaab refugee complex in North Eastern Kenya is the largest refugee camp in the world. Amnesty International is mindful of the monumental challenge this poses for the Kenyan authorities, acknowledged by Kenya in its state report[42], and considers that it disproportionately shoulders the responsibility for large refugee flows from Somalia. The Refugee Act 2006, as noted in Kenya's state report, "has clear provisions for the promotion and protection of refugees in Kenya."[43] However, the Kenyan authorities' restricting of the rights of Somali refugees and asylum-seekers, in contravention of the Covenant and its own Refugee Act, on Kenyan territory is a matter of profound concern.[44]

Border closure, registration and security concerns

In January 2007, the Kenyan authorities closed the country's border with Somalia and the main transit centre in Liboi, operated by the United Nations High Commissioner for Refugees (UNHCR), following the resurgence of armed conflict in southern and central Somalia. In its state report, Kenya claims that the closure of the border "[W]as necessary in order to allow the Security forces to distinguish between genuine refugees and insurgents."[45]

The closure of the border and the transit centre has negatively impacted on the protection and medical and humanitarian assistance for Somali asylum-seekers and refugees, while it has had little effect to stem the flow of asylum-seekers to Kenya. The border closure has in effect denied Somalis access to refuge and international protection and led to violations of the principle of *non-refoulement*.

At the transit centre in Liboi, UNHCR used to register asylum-seekers, provide a health screening and transport refugees to the Dadaab camps. The Kenyan authorities also used to run a security screening centre in Liboi. Since the closure of the centre, Somali asylum-seekers have had to make their way to the Dadaab camps, to be registered by UNHCR and Kenya's Department for Refugee Affairs, after a refugee status determination process. Somali nationals are usually recognized as prima facie refugees.

For registration and screening, and an assessment of their protection needs, asylum-seekers have had to first reach the camps, some 80 kilometres from the border, in an often dangerous journey, during which there has been a rise in extortions and human rights violations by Kenyan law enforcement officials against them.

Human rights violations have included the Kenyan police at the closed border threatening asylum-seekers with forced removal to Somalia in order to extort bribes or arresting and detaining asylum-seekers until they pay a bribe. In addition, Somali asylum-seekers have often been arbitrarily arrested, detained and charged with "illegal entry" under Kenya's 1967

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[42] Para 158.

[43] Para 159.

[44] Amnesty International, *From life without peace to peace without life – the treatment of Somali refugees and asylum-seekers in Kenya,* AI Index: AFR 32/015/2010, December 2010, http://www.amnesty.org/en/library/info/AFR32/015/2010/en.

[45] State report page 33.

Immigration Act, which punishes entry into the country without a permit with a fine or one year's imprisonment, in contravention of Kenya's 2006 Refugee Act.

The closure of the Liboi transit centre has not only delayed the registration of refugees, it has also disrupted the medical screening of those arriving from Somalia, potentially posing serious risks for the health of asylum-seekers, but also the refugee population in the camps and the population around the camps. In addition, asylum-seekers are no longer transported by UNHCR from Liboi to the camps, and are therefore made more vulnerable to abuse on the road, by bandits or Kenyan security officers. Further, this allows abuses to go unchecked, contributing to continuing impunity.

In October 2011, after the kidnapping of two international aid workers from Dadaab, the Kenyan authorities suspended the registration of all newly arrived people to the Dadaab camps. The lack of registration hampers the access of recently arrived asylum-seekers to humanitarian assistance, protection and essential services in the camps. Somali nationals continue to arrive in Dadaab, often seeking shelter on the outskirts of the camps in make-shift shelters. This makes women and girls in particular vulnerable to sexual and gender based violence.

Refoulement

In recent months, and following Kenya's military intervention in Somalia, Kenyan government officials have repeatedly and publicly stated their intention to close the Dadaab refugee camps and return Somali refugees across the border into Somali territory. In January 2012, the Permanent Secretary for Internal Security said that Somali refugees would be moved to "safe" areas of Somalia, commenting "In fact, there are safe places inside Somalia following the operation by Kenyan troops; these refugees will be moved anytime".[46] In February, the Minister for Foreign Affairs reportedly told Reuters, "We definitely want the refugees to go home. We want them out yesterday."[47] In March, the Minister for Internal Security reportedly announced that Somali refugees would be relocated to areas of Somalia which were "safe".[48] Yet the situation in southern and central Somalia remains extremely volatile, with continuing armed conflict, gross human rights violations and indiscriminate and generalized violence the norm. Fighting in areas under the control of Kenyan forces in Lower Juba has been particularly severe, with front lines moving quickly and without notice.

When the Kenyan authorities closed the border with Somalia, they effectively trapped around 4,000 Somali people in the Somali border town of Dobley and forcibly returned around 360 refugees who were waiting at Liboi, for transfer to Dadaab. Kenyan NGOs estimate that thousands of Somali asylum-seekers have been refouled back to Somalia by the Kenyan security forces in the border area since it was closed.[49] Some have been returned to Somalia

[46] http://www.standardmedia.co.ke/InsidePage.php?id=2000050572&cid=4.

[47] http://uk.reuters.com/article/2012/02/23/us-kenya-somalia-refugees-idUKTRE81M1QR20120223.

[48] http://allafrica.com/stories/201203200026.html.

[49] See Amnesty International, Kenya: Denied refuge, the effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees, AI Index: AFR 32/002/2007, 2 May 2007,

soon after crossing the border, while others were denied entry all together. In 2009, UNHCR denounced the forcible return of at least 93 Somali asylum-seekers in the border areas in violation of the *non-refoulement* principle. The areas between the Somali border and Dadaab are not consistently monitored due to the very poor security situation, and it is possible that the real number of Somalis deported by the security forces may be much higher.

Following the border closure, reports of forcible returns to Somalia increased, as did reports of Kenyan security forces harassing and extorting bribes from Somali asylum-seekers. The Government of Kenya has continued to turn a blind eye to the flow of Somali asylum-seekers who continue to cross the border, despite its official closure, failing to respond to their protection needs.

After violent clashes in October 2010 in the Somali border town of Belet Hawo between the armed Islamist group al-Shabab and Ahlu Sunna Wal Jamaa, a group loosely affiliated with the Somali Transitional Federal Government (TFG), tens of thousands of people fled their homes. Around 8,000 people made their way to a makeshift site known as Border Point 1, located near the Kenya town of Mandera, where they were registered by UNHCR. On 31 October, the District Commissioner in Mandera ordered the refugees to leave Border Point 1 by 2 November. Some 8,000 left the site, as a result of which, they no longer had access to humanitarian aid. Approximately 3,000 crossed about 1km into Somalia, putting them in range of Belet Hawo and at risk of further fighting. Kenyan Administrative Police were reported to have moved them even further inside Somalia on 4 November.

On 17 January 2010, following violent protests in support of a Muslim cleric, Abdulla al-Faisal, Kenyan police raided the Eastleigh neighbourhood in Nairobi, an area predominantly populated by Somalis, and arbitrarily arrested hundreds of Somali nationals. One Kenyan NGO estimated that close to 1,500 people were arrested. Somali Members of Parliament living in Kenya and Kenyans of Somali ethnicity were also arrested. The arrests were carried out by the General Service Unit and the anti-terrorism police after Kenyan officials claimed that al-Shabab were involved in the protests. Somalis were also arrested in other cities in Kenya, including Mombasa. Asylum-seekers and refugees with valid documents were arrested. Local organizations reported that the police tore up the permits of some of those arrested.

According to NGOs working with refugees in Nairobi, police transported by truck an unknown number of Somali refugees and asylum-seekers back to the border with Somalia where they were then *refouled* after they were detained, with or without court orders. Lawyers who provided legal aid to hundreds of those arrested reported that some of those detained, unaware of their rights, pleaded guilty to offences of "unlawful presence".

Other Somali asylum-seekers have been arrested, detained and charged with "illegal entry" under Kenya's Immigration Act (1967), which punishes entry into the country without a permit with a fine or one year's imprisonment. The provisions under the Immigration Act contradict Kenya's Refugee Act of 2006, thereby undermining the latter, which states that "no person claiming to be a refugee within the meaning of section 3(1) shall merely, by

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http://www.amnesty.org/en/library/info/AFR32/002/2007/en.

reason of illegal entry be declared a prohibited immigrant, detained or penalized in any way".

Security and policing

Refugees have long complained about insecurity in the Dadaab camps and several have expressed concern at the presence of members or sympathizers of al-Shabab, the Islamist armed group in Somalia. Overcrowding in the camps has also exacerbated incidences of crimes among the refugees in the camps, including incidents of sexual abuse and theft.

While the camps undoubtedly pose a security challenge to the Kenyan authorities, Kenya has an obligation to ensure the adequate protection of refugees in the camps, including through effective policing. Policing in the Dadaab camps has been made more difficult by the lack of sufficient police officers to address insecurity, but also by the distrust that exists between the police and the refugees, many of whom have been victims of abuses at the hands of the Kenyan security forces.

In June 2010, Kenya's Minister for Internal Security established a committee to investigate allegations of police abuse of Somali refugees and asylum-seekers near the border. The committee, comprised of Kenyan government officials and the Supreme Council of Kenya Muslims among others, travelled to Dadaab to investigate these allegations in August 2010. One refugee, who had reported to Amnesty International that he was beaten up by a policeman during a food distribution in April 2010, and whose injuries necessitated his transfer for medical treatment in the capital Nairobi, was interviewed by the committee.

However, to Amnesty International's knowledge, the results of the investigation have still not been made public.

Following the kidnapping of two international aid workers from Dadaab and the Kenyan military intervention in Somalia in October 2011, the security situation in Dadaab has deteriorated significantly. A number of attacks, including grenade attacks on police posts and officers, attacks and kidnappings from towns close to the Somali border and explosions along the roads to the Dadaab camps have affected Kenyans and Somalis alike, killing and injuring a number of people.

As a result of the increasing insecurity, a number of humanitarian agencies, including UNHCR, suspended non essential activities within the camps. Of particular concern was the suspension of protection monitoring activities, leaving refugees and asylum-seekers even more vulnerable to attacks and other abuses from the security forces and others.

At least three refugee representatives have been killed in the camps since December 2011.

In response to some of these incidents, Kenyan security forces have arrested scores of people. On 6 December 2011, over one hundred refugees were arrested following an attack on 5 December which killed one police officer and wounded three more.[50] This led to four

[50] 100 suspects arrested after Dadaab attack, Capital FM, 6 December 2011 http://www.capitalfm.co.ke/news/2011/12/100-suspects-arrested-after-dadaab-attack/.

days of beatings, looting of property and sexual violence against refugees by security officers, according to witnesses.[51]

Conditions in the Dadaab camps

Due to congestion in the camps, the rights of the asylum-seekers and refugees to housing, water, sanitation, health and education have been severely compromised.

The three refugee camps in Dadaab, Ifo, Dagahaley and Hagadera were originally established in the early 1990s to accommodate 90,000 refugees divided equally between the camps. As of mid-2012, the refugee population in the camps was over 460,000. The camps' resources and infrastructure have been stretched beyond capacity and the quality and quantity of essential services delivered heavily compromised.

Despite the recent building of two new camps to ease congestion, the rising insecurity in Dadaab is now negatively impacting the provision of essential services to the refugee population, including protection activities.

Although there are primary and secondary education facilities in the camps, they cannot cater for the needs of a growing population, including of unaccompanied minors, many of whom have arrived in the last three years and who do not have access to education. Those newly arrived from Somalia, where access to and quality of education is severely compromised by the armed conflict, face a huge challenge in adapting to a new education system. Many children, particularly girls, have never been to school when they were living in Somalia, other than *duksi* (Koranic school).

Medical facilities are also stretched, and psychosocial services and counselling are minimal, considering the high level of trauma that the vast majority of the population coming from Somalia have endured. There are no specific programs to address the psychosocial needs of children who escaped recruitment into armed groups in Somalia, who are more likely to experience trauma.

Freedom of movement and right to work for refugees

Somali refugees in the Dadaab camps cannot venture out without special permission. Though no official policy to confine people to the camps[52] has ever been enacted in Kenya, nevertheless, a de facto camp confinement policy is enforced by the Kenyan government. Refugees receive free humanitarian assistance in the camps, but if they reach urban areas, they have to be economically self-sufficient.

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[51] Human Rights Watch, *Criminal Reprisals*: *Kenyan Police and Military Abuses Against Ethnic Somalis* (May 2012), page 40.

[52] Under the Aliens Restriction Act, the Minister for Internal Security can enact a policy for "requiring aliens to reside and remain within certain places or districts" only "when a state of war exists... or when it appears that an occasion of imminent danger or great emergency has arisen." *See* Aliens Restriction Act, Article 3, May 1973.

The camps offer almost no economic opportunities to refugees. Those who work for UNHCR and humanitarian agencies are not allowed to receive a wage; instead, they receive "incentives". With adequate shelter, water, sanitation and education and other essential services detrimentally affected by the severe overcrowding in the camps, many refugees, the majority of whom are young people, prefer to go to urban areas, where they believe they would have more work opportunities and a chance to improve their life.

Whilst refugees do get free assistance in the camps, Amnesty International believes that the dearth of livelihood opportunities causes them hardship and increases their desperation, hindering self-reliance and creating push factors towards urban centres where they can become vulnerable to exploitation, as described below.

Refugees have had to apply for a movement pass to be able to travel outside the camps. Permission is granted to refugees needing medical treatment unavailable in the camps, pupils and students who have obtained a scholarship or a place to study in education establishments outside the camps, for family reasons (such as funerals), or for attending resettlement interviews set up by embassies of third countries. Those who need to be moved away from the Dadaab camps for their own protection are also considered.

Refugees travelling without permission risk detention or forced returns by the Kenyan security forces. Even those in possession of a movement pass for medical reasons have at times been arrested.

The authorities have discretion to restrict the issuance of travel documents on security grounds. In 2010, a vetting committee, comprising of the Provincial Commissioner of North-Eastern Kenya, representatives of Kenya's security forces, including the national intelligence services and the military, and the Department of Refugee Affairs, was screening requests for movement passes on security grounds. The committee was reportedly set up because the Kenyan authorities considered that too many refugees were not returning to the camps after obtaining passes, and that some of the movement passes used were fake. This has further curtailed the issuing of movement passes, as national security concerns are prioritized over the rights of refugees, and because the committee does not meet often enough.

Despite the fact that under national and international law refugees should enjoy equality with other foreign nationals in Kenya, those who have obtained refugee status have had their right to work restricted. Article 16(4) of the 2006 Refugee Act states:

"Subject to this Act, every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya."

Refugee Bill 2012

As noted by Kenya in its state report, the Refugee Act 2006 has clear provisions providing protection from discrimination to asylum seekers, refugees and their families, and further provides that no person should be refused entry into Kenya, expelled, extradited or returned

to any other country where he would be persecuted.[53]

A new Refugee Bill is currently before the Commission for the Implementation of the Constitution. The Refugee Bill 2012, in its current draft, would significantly curtail the rights of refugees and asylum-seekers in Kenya. The Bill states that the benefits of s15 covering *non-refoulement* "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of Kenya, or who… constitutes a danger to the community in Kenya."[54] However, the Bill does not have a provision covering further non-refoulement obligations under international human rights law, in particular the prohibition of return to the "danger of torture or cruel, inhuman or degrading treatment or punishment" in another country. S5(8) also prevents a person who has transited through a third country which is party to the UN Refugee Convention or a member of the African Union, from claiming asylum in Kenya. The Bill legalizes Kenya's de facto camp confinement policy and restricts the freedom of movement of refugees in the country by restricting refugees to residence inside "the designated area indicated in his or her refugee identity card or other registration document." Any refugee who wishes to change their place of residence must apply to the Refugee Commissioner. Finally, the Bill reduces the time frame for appeals under the Act from 30 to 14 days.[55]

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Allow for the immediate resumption of registration of newly-arrived asylum-seekers in Dadaab.**
- **Cease all threats to arbitrarily close Dadaab and forcibly return all residents to Somalia.**
- **Continue to allow entry to individuals fleeing from conflict in Somali and seeking refuge in Kenya, in line with its obligations under international and national law.**
- **Urgently reopen the UNHCR-administered refugee transit centre in Liboi to screen refugees and provide them with immediate humanitarian assistance, and allow UNHCR to transport refugees from Liboi to Dadaab.**
- **Ensure that persons found not to be eligible for prima facie recognition as refugees, are subject to an individualized refugee status determination procedure with respect for all procedural safeguards.**
- **Investigate all reports of abuses by the security forces against asylum-seekers and refugees, including harassment, extortion, ill-treatment, arbitrary arrests and detentions; bring to justice those responsible for such abuses; and provide redress and compensation to the victims.**
- **Ensure refugees' safety in the Dadaab camps, investigate all reports of rape and other forms of sexual violence and bring to justice those responsible.**

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[53] State report page 33.

[54] S15(2), The Refugees Bill 2012.

[55] S21 of The Refugees Bill 2012, S10 of the Refugee Act 2006.

- **Respect the right of recognized refugees to freedom of movement throughout Kenya, and facilitate refugees' right to work.**

- **Ensure that all provisions of the Refugees Bill 2012 are compliant with international human rights and refugee law.**

FORCED EVICTIONS (ARTICLE 17 ICCPR)

– Additional issue not contained in the List of Issues –

In its concluding observations of April 2005, the Human Rights Committee stated its concern regarding forced evictions from slums and informal settlements from Nairobi and other parts of Kenya, and recommended to Kenya that it "develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made."[56] This was followed by a similar recommendation from the UN Committee on Economic, Social and Cultural Rights in December 2008.[57]

Since 2005, the government has taken some positive steps towards meeting this recommendation. The Kenyan Constitution now guarantees the right to accessible and adequate housing. In three separate cases, the High Court of Kenya has affirmed that this right includes the right not to be forcibly evicted from one's home.[58] The government committed to developing guidelines on evictions in 2006. The Ministry of Lands has developed a draft Eviction and Resettlement Guidelines Bill, 2011 after consultation with civil society organizations. The draft Bill contains many of the safeguards that are required under international law but as discussed in more details below, the sections on remedies, accountability of officials involved in forced evictions and resettlement should be strengthened to bring it in line with international human rights standards. The draft Bill has also not yet been placed before Parliament.

The Attorney General of Kenya made a commitment to the Human Rights Committee in March 2005 that any future evictions would be done in accordance with "established international and United Nations standards on eviction". The government has failed to comply with this commitment and the Committee's recommendation to "ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made."[59] Amnesty International and other human

[56] UN Human Rights Committee: Concluding Observations: Kenya, CCPR/CO/83/KEN, 29 April 2005, para 22.

[57] UN Committee on Economic, Social and Cultural Rights: Concluding Observations: Kenya, E/C.12/KEN/CO/1, 1 December 2008, para 31.

[58] Petition Case No. 65 of 2010, Petition Case No. 66 of 2010, and Constitutional Petition No. 2 of 2011.

[59] UN Human Rights Committee: Concluding Observations: Kenya, CCPR/CO/83/KEN, 29 April 2005, para 22.

rights organizations have documented a number of forced evictions by Kenyan authorities since 2005. The absence of a law clearly prohibiting forced evictions and setting out safeguards that must be complied with in all cases of evictions makes it very difficult for victims to hold authorities accountable when they carry out forced evictions and to seek effective remedies.

In its state report, Kenya acknowledges that "access to adequate housing in Kenya remains a major challenge", estimating that between 60-80 per cent of residents of Kenya's urban centres live in informal settlements with no security of tenure.[60]

The haphazard and unplanned growth of settlements means that hundreds of families stay in structures or houses constructed on land reserved for roads, electricity lines, railway tracks, or on dumping grounds and river banks. In its slum upgrading strategy of 2005, the Government of Kenya admitted that "a common denominator in the urban slums and informal settlements of Kenya is the lack of security of tenure and or residence." It committed to "regularize land for purposes of integrating the settlements into the formal physical and economic frameworks of urban centres." Seven years later, this promise has yet to be acted upon. The government adopted a National Land Policy in 2009 but has not taken any steps to resolve the tenure issues around informal settlements.

The lack of security of tenure means that informal settlement dwellers are particularly vulnerable to forced evictions, which have often been carried out en masse with catastrophic consequences for individuals and families. Many evictions in Nairobi also involve private developers, who claim ownership of land on which some of the settlements stand, or government projects.

The Government of Kenya acknowledges in its state report that the government has carried out evictions in different informally settled areas. What it fails to mention is that most of these evictions are in fact forced evictions, and meet none of the above international standards in terms of notice, consultation, legal remedy, compensation. Thousands of people have been left homeless vulnerable to other human rights abuses as a result of the forced evictions. Authorities have also contravened court injunctions preventing evictions, and have also carried out evictions at night, in the cold season and in particularly bad weather.

A number of mass forced evictions have been carried out in relation to government infrastructure development in Nairobi, for example, the construction of roads, electricity and railway lines. Residents of informal settlements and slums have been most affected because these settlements developed, often with the acquiescence of government officials, on land initially reserved for such infrastructure projects.

In July 2010, a 74 year old man was reportedly shot dead by police during a protest against the forced eviction of Kabete NITD, an informal settlement in Nairobi. An estimated 1,000 people lost their homes and market stalls when the settlement was demolished in a mass forced eviction on 10 July. The Nairobi City Council, which carried out the forced eviction, gave no official notice to residents. Hundreds of people, mainly women and children, were

[60] State report, para 63.

left without shelter and were forced to sleep outdoors, without blankets or warm clothes in Kenya's winter.

In October and November 2011, the authorities carried out mass forced evictions and house demolitions in at least five informal and formal settlements in Nairobi. Officers from the regular and administrative police and the General Service Unit, acting with officials from the Kenya Airports Authority (KAA) and the city council carried out demolitions of homes and other buildings and evicted residents in Kyang'ombe informal settlement on 22 October, Kenya Ports Authority (KPA) settlement on 29 October, the non-slum settlement of Syokimau on 12 November, and a settlement in Embakasi where Maasai *manyattas* were demolished on 17 November. All are located close to the Jomo Kenyatta International Airport. Evictions also took place in Mitumba informal settlement, located near Wilson Airport on 19 November, and in settlements close to the Moi Airbase in Eastleigh on 22 November. Thousands of people were affected by the evictions.

KAA officials maintained that evictions close to the airports were necessary because the settlements were in restricted flight paths and around restricted airport areas, and needed to be demolished to avert potential air disasters in the future. No reason was given for demolitions in areas close to the Moi Air base.

In most instances, residents said they had not been given adequate notice of the demolitions, an opportunity to challenge them or to seek alternative housing. In Kyang'ombe, thousands were forcibly evicted at night despite an existing temporary injunction from the High Court preventing demolitions and evictions taking place pending a hearing regarding ownership of the land on which the settlement is located. Residents told Amnesty International that a car drove around the community throwing eviction notices out of the windows some three months prior to the evictions. These notices were in specific reference to the need to move from the flight path of the airport. However, residents were not clear about the geographical scope of the flight path and whether the notice applied to some people or everyone in the settlement. Community leaders wrote to the KAA requesting clarification on the boundaries of the flight path, but received no response.

On 28 January 2012, an eviction in Mukuru Kwa N'jenga led to the deaths of three people. One woman was electrocuted by a live power cable which fell during the eviction, another woman was shot. A child was killed when protestors demonstrating against the eviction fled from police. An eviction notice was reportedly issued in March 2010, but no eviction took place. No notice was issued to residents before the January 2012 eviction, and many residents were away at work when the demolitions began. Some of the affected residents had previously been forcibly evicted from Kyang'ombe informal settlement in December 2011.

In response to the Mukuru eviction, Prime Minister Raila Odinga issued a statement calling for evictions in the country to be halted until there was a government policy in place to ensure that forced evictions did not take place. He was quoted as "emphasis[ing] that the order will remain in effect until measures are put in place to ensure residents are not evicted only to be rendered homeless." Despite this statement, the Government of Kenya has taken no steps to implement a formal moratorium on evictions until a law regulating evictions and prohibiting forced evictions is in place.

Yet forced evictions have continued to be threatened and be carried out. People living in the settlements of Tetrapark, Uchumi, Hazina village, parts of Maasai village, and Barclays, located next to Mukuru Kwa Reubens and areas in Mukuru Kayabahave been placed under threat of forced evictions, after a notice of eviction was placed in the area chief's office by the state-owned Kenya Railway Corporation (KRC).

In March 2010, almost 50,000 residents living close to the same railway lines in Kibera and other parts of Mukuru slums in Nairobi were given a 30 day eviction notice by KRC. KRC had no plans to resettle any of the residents. In April 2010, the plans were suspended and KRC agreed to develop and implement a Relocation Action Plan (RAP), which was developed by Pamoja Trust, an NGO, in consultation with affected communities, as a pilot project by KRC. Negotiations between residents, community organizations, NGOs and the KRC are still ongoing in relation to this plan.

In May 2012, residents of those settlements affected by the 2012 railway eviction notice applied to the High Court of Kenya for an order for the KRC to treat them in the same manner as those residents benefiting from the RAP. As of 11 June, the Court's decision was still pending.

In its state report, Kenya noted that a government taskforce has been established to develop eviction guidelines on the recommendation of the national land policy, approved by Parliament in 2009.[61] The government first formed a taskforce to develop guidelines on eviction in 2006. No discernable progress was made on the issue until 2011, when the Ministry of Lands' Land Reform and Transformation Unit (LRTU) working in close cooperation with NGOs finally produced a draft eviction guidelines document and a draft law.

The draft guidelines are reportedly currently awaiting consideration by Cabinet.

The Eviction and Resettlement Guidelines Bill, 2011 (draft law on evictions), developed by the Ministry of Lands is a significant and welcome development. It aims to regulate evictions of 'unlawful occupiers of land' and tries to incorporate many key safeguards required under international law, such as requirements for provision of prior notice, genuine consultation and assessment of impacts of evictions. The draft law on evictions however needs to be revised and strengthened to ensure that it is fully consistent with international human rights law and includes all the safeguards that are required. Some of the key gaps and weaknesses in the draft law on evictions are:

- It does not contain an explicit prohibition on forced evictions;
- It only focuses on evictions of 'unlawful occupiers of land' leading to a gap in terms of protection against forced evictions in other situations;
- It requires a court order prior to any eviction, which is an important safeguard but does not provide that such an order can only be made after all the necessary safeguards (consultation, resettlement) have been complied with;

[61] State report, para 63.

- It does not identify which public authorities or agencies or responsible for implementation of its provisions and this is likely to lead to serious gaps in enforcement, particularly when evictions are carried out by private actors;

- It has a section on remedies which is not adequately developed, particularly in terms of clarifying access to the court or other bodies at different stages of the eviction process, ability to challenge lack of enforcement of the provisions of the draft law (such as on resettlement) and forms of reparation which should be made available;

- The draft law on eviction places responsibility on the Cabinet Secretary to facilitate the resettlement of evictees following an eviction. Though it is useful that this provision identifies the authority who is responsible for implementation of this key requirement, the provision should be revised to clarify that resettlement should be provided prior to eviction and also that any alternative housing and resettlement provided should comply with requirements on 'adequacy' of housing identified by the Committee on Economic, Social and Cultural Rights;

- The draft law makes it an offence to evict an unlawful occupier without a court order but considering that the law does not require the court to pass an eviction order only once it is satisfied that all necessary safeguards are in place, this provision is inadequate in terms of accountability. It is essential that the law have clear provisions for actions against officials who carry out forced evictions and fail to comply with the provisions set out under the law.

In light of Amnesty International's ongoing concerns, the organization has been calling on the authorities of Kenya to:

- **Immediately cease all forced evictions, legislate and enforce a clear prohibition on forced evictions; the law should also set out safeguards that must be complied with prior to any eviction as required under international human rights law.**

- **Until such steps have been taken, impose a moratorium on evictions.**

- **Revise the draft law on evictions to ensure that it incorporates all the safeguards required under international human rights law and to prioritise its consideration and adoption.**

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