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Committee on the Elimination of Racial Discrimination**Concluding observations on the fifth to seventh periodic reports of Kenya***

1. The Committee considered the fifth to seventh periodic reports of Kenya (CERD/C/KEN/5-7), submitted in a single document, at its 2530th and 2531st meetings (see CERD/C/SR 2530 and 2531), held on 2 and 3 May 2017. At its 2541st, 2542nd and 2543rd meetings, held on 10 and 11 May 2017, it adopted the present concluding observations.

A. Introduction

2. The Committee welcomes the submission, albeit delayed, of the fifth to seventh periodic reports of the State party. The Committee expresses appreciation for the constructive dialogue held during the consideration of the report, and also wishes to thank the delegation for the detailed information provided during the consideration of the report, and the additional information submitted following the conclusion of the dialogue.

B. Positive aspects

3. The Committee commends the State party for its engagement in the development of the 2030 Agenda for Sustainable Development, and for including in its development blueprint, Vision 2030, strategies aimed at achieving substantive equality through support for historically disadvantaged regions and groups.

4. The Committee welcomes the efforts of the National Cohesion and Integration Commission. It further welcomes the introduction of the Equalization Fund which benefits marginalised areas.

5. The Committee commends the State party's efforts as one of the largest refugee-hosting countries in the world.

6. The Committee welcomes the adoption of the following legislative measures:

- (a) National Employment Authority Act (2016);
- (b) Legal Aid Act (2016);

* Adopted by the Committee at its ninety-second session (24 April to 12 May 2017).

- (c) Establishment of the Restorative Justice Fund (2016);
- (d) Basic Education Act (2013);
- (e) Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (2012).

C. Concerns and recommendations

Statistics

7. The Committee welcomes the information provided by the State party concerning the representation of different ethnic groups in civil service employment. Yet the Committee is concerned by the fact that the data provided do not provide a comprehensive appraisal of the enjoyment of rights guaranteed under the Convention, such as housing, education, employment and health care, disaggregated by ethnic groups including indigenous peoples. The Committee has requested this data in its previous concluding observations (art. 1).

8. The Committee recommends that the State party request the Kenyan National Bureau of Statistics to provide statistical data, disaggregated by sex, on the socioeconomic situation and representation in education, employment, health, housing and public and political life of ethnic groups, including indigenous peoples, in order to provide it with an empirical basis to evaluate the equal enjoyment of rights under the Convention.

Definition of racial discrimination

9. The Committee notes with great interest that both Kenya's Constitution and the National Cohesion and Integration Act 2008 prohibit ethnic discrimination, but observes that the definition of ethnic discrimination contained in the Act is not in line with article 1 of the Convention.

10. The Committee recommends that the State party amend the definition of ethnic discrimination contained in the National Cohesion and Integration Act to align it with article 1, paragraph 1, of the Convention.

National human rights institution

11. The Committee welcomes the information that the national human rights institution, the Kenya National Commission on Human Rights, has again been granted "A" status by the Global Alliance of National Human Rights Institutions. However, the Committee hopes that the Commission will have adequate resources to efficiently execute its mandate (arts. 2 and 6.)

12. Referring to its general recommendation No. 17 on the establishment of national institutions to facilitate the implementation of the Convention, the Committee recommends that the State party ensure the allocation of adequate financial resources to the Kenya National Commission on Human Rights, in full accordance with the Kenyan Constitution (article 249.3) and with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

Acts of racial discrimination, racist hate speech and incitement to racial hatred

13. The Committee welcomes the recent strategies adopted to monitor hate speech and incitement to violence in social media platforms and political rallies. The Committee takes

note of the reporting and prosecution of cases of racial discrimination and hate speech, and notes with interest that the State party is reviewing the National Cohesion and Integration Act to strengthen penalties for acts of racial discrimination. However, the Committee is concerned by the lack of comprehensive data collection on reasons for declining to prosecute, convictions, effective remedies to victims and information on administrative procedures and sanctions for acts of racial discrimination, including data by areas: employment, education, housing, media, etc. The Committee is also concerned by information received concerning the need for increased resources for the Director of Public Prosecution and the National Cohesion and Integration Commission, and the need for the Commission's further independence. The Committee is also concerned that the prohibition in the Act does not fully conform to article 4 of the Convention. It notes with interest the State party's ongoing legislative efforts to address this (arts. 2, 4 and 6).

14. Recalling its general recommendations No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system and No. 35 (2013) on combating racist hate speech, the Committee:

(a) Recommends that the State party amend its legislation to align it with article 4 of the Convention;

(b) Encourages the State party to continue prosecuting acts of racial discrimination and racist hate speech, increasing the powers of the Director of Public Prosecution in the initiation of proceedings and the National Cohesion and Integration Commission, as well as enhancing its independence;

(c) Reiterates its request for information on complaints, prosecutions, convictions, administrative procedures initiated by areas (employment, education, media, housing, hate speech, etc.) and sanctions imposed for acts of racial discrimination (see CERD/C/KEN/CO/1-4, paras. 9-10), and requests information on compensatory measures to victims decided by the authorities as a result of such convictions or sanctions;

(d) Requests an explanation of the different administrative bodies with the authority to address acts of racial discrimination (by areas including hate speech, housing, education, media, and employment).

Access to justice

15. The Committee welcomes the adoption of the Legal Aid Act (2016) and the National Legal Aid Policy, intended to ensure access to affordable legal aid and awareness services for all Kenyans. However, the Committee is concerned that the combined budget of the Legal Aid Fund and the National Legal Aid Awareness Fund may be insufficient. It is further concerned by reports that the Act has not been fully implemented, and that court proceedings continue to be excessively complex and expensive for many victims of racial discrimination, including indigenous peoples and women (arts. 5 and 6).

16. The Committee encourages the State party to continue implementing its legal aid policies to ensure equal access to justice for victims of racial discrimination, minorities and indigenous peoples, in particular by:

(a) Providing adequate funding and staffing for legal aid services;

(b) Reducing the distances between national courts and the areas where some minority groups and indigenous peoples live;

(c) Building the human rights-related capacity of alternative justice systems and continuing to establish and operationalize small claims courts to deal with minor disputes.

Special measures to address inequalities

17. The Committee welcomes the various provisions in domestic law and programmes establishing special measures to remedy inequality between different groups and counties. A key component of these efforts has been the steps taken to devolve certain powers to county governments and through the operation of the Equalization Fund to target marginalised regions for special funds to generate development and reduce inequalities. However, the Committee notes that while county boundaries may in some cases tend to replicate ethnic divisions, over a dozen counties are not in compliance with the provision of the County Governments Act requiring that at least 30 per cent of vacant entry-level posts must be filled by candidates belonging to the county's ethnic minorities (art. 5).

18. In accordance with articles 1, paragraph 4, and 2, paragraph 2, of the Convention and with its general recommendation No. 32 (2009) on the meaning and scope of special measures in all areas of the Convention, the Committee recommends that the State party strengthen its efforts to ensure that counties implement the minority recruitment requirements in the County Governments Act, including by considering the possibility of imposing sanctions on non-compliant counties. The Committee also requests that the State party encourage private corporations and businesses in the country to generate greater equality in employment across ethnic groups.

Situation of indigenous peoples

19. The Committee is alarmed by reports that the Sengwer people are being forcibly evicted from their traditional forest lands in the Embobut Forest, in violation of a High Court injunction. While noting the State party's position that no forced evictions have recently been carried out, the Committee notes allegations that agents of the Kenya Forestry Service have burned dozens of Sengwer homes. Similarly, the Committee is worried by reports that the Endorois indigenous community has been subjected to attacks and forced evictions by armed raiders. The Committee is further concerned by reports that in spite of the 2014 High Court decision in *Joseph Letuya v. Attorney General*, the forced eviction of the Ogiek people from the Mau forest continues today. The Committee is also concerned by reports that activities affecting the ancestral land occupied by indigenous peoples have been undertaken without their free, prior and informed consent (arts. 2, 5 and 6).

20. In line with its general recommendation No. 23 on the rights of indigenous peoples (1997), the Committee urgently calls upon the State party to:

(a) **Prevent, investigate, prosecute and sanction acts threatening the physical security and property of the Sengwer, the Endorois, the Ogiek and other indigenous peoples;**

(b) **Ensure legal acknowledgement of the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources;**

(c) **Carry out effective consultations between relevant actors and communities likely to be affected by projects to develop, conserve or exploit indigenous ancestral land or its natural resources; and obtain the free, prior and informed consent of indigenous communities before implementing such projects.**

21. While welcoming the State party's recent measures to enhance access to education, the Committee is concerned by reports that indigenous peoples have difficulty accessing education due to the lack of nearby schools (arts. 5 (e) and 7).

22. The Committee recommends that the State party strengthen its efforts to ensure that all Kenyans enjoy access to education without discrimination, including through the adoption of appropriate special measures.

Historical land injustices

23. The Committee commends the provision in Article 40 of the 2010 Constitution that affirms the right of individuals and groups to own property either individually or collectively. The Committee also notes the adoption of the Community Land Act 2016 and the Land Laws Amendment Act 2016, which addresses historical land injustices. The Committee welcomes the establishment in 2016 of the Restorative Justice Fund, which aims to give relief to victims of historical injustices. However, the Committee is concerned that inter-ethnic conflicts continue to be fuelled by inequities arising from the present land ownership pattern. (art. 5 (d) and (e)).

24. Given the fact that the discriminatory pattern of land distribution is a core grievance fuelling ethnic disputes, the Committee urges the State party to take requisite measures toward redistribution of land. The Committee reiterates its recommendation that the State party take measures without delay to operationalize the mechanisms for addressing land problems fairly, taking into account the historical contexts of land ownership and acquisition (see CERD/C/KEN/CO/1-4, para. 18.) The Committee invites the State party to provide data about patterns of land ownership. The Committee also wishes to have more information about the Constitutional requirements to set a maximum limit on the amount of land that can be owned or leased by an individual or group. The Committee urges the State party to take every opportunity, through urban planning programs, to create communities in which residents live, work, go to school and exercise political participation in multi-ethnic settings.

Informal Settlements

25. The Committee remains concerned about the informal settlements and what appears to be slow movement by the government, despite the Kenya Slum Upgrading Program, to provide residents adequate housing, clean water and sanitation, healthcare services and accessible education for young people. The Committee has emphasized in its previous concluding observations that this was a matter of urgency and that steps must be taken to invest in efforts commensurate with the scale of the problems in order to avoid further ethnic conflicts in the slums (art. 5).

26. Given that the informal settlements are still a source of continuing resentment and potential ethnic tension, the Committee would like to be informed about the measures the State party has devised to address the magnitude of the problem, calls upon the State party to expedite the Kenya Slum Upgrading Program, and encourages it to promote a mix of ethnic groups.

Stateless persons

27. The Committee notes with interest the efforts made by the State party to register stateless individuals. However, the Committee is concerned by reports that some ethnic groups, including the Nubians, individuals of Somali descent, and groups living near Kenya's borders, face challenges and lengthy vetting procedures in obtaining identity documents (arts. 1, 2 and 5).

28. In accordance with its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee urges the State party to stop discriminatory practices and accelerate its efforts to address statelessness, including through

standardized registration procedures and issuance of official identification documents. The Committee also urges the State party to consider awarding Kenyan citizenship to all Nubians who resided in Kenya on the date of Kenyan independence, and their descendants.

Counter-terrorism measures

29. While noting the recent terrorist attacks that have resulted in increased security measures in Kenya, the Committee is concerned by reports that counter-terrorism initiatives combatting Al-Shabab, including ethnic profiling of certain ethnic groups, have resulted in human rights violations, including dozens of extrajudicial killings and enforced disappearances (art. 5).

30. The Committee recommends that the State party promptly address the alleged violations and ensure that all suspected persons benefit from fundamental legal safeguards, particularly when the suspects are of foreign descent or nationality, in the light of the statement on racial discrimination and measures to combat terrorism adopted by the Committee on 8 March 2002 (A/57/18, para. 514).

Trafficking in persons and migrant workers overseas

31. The Committee is concerned by the State party's information regarding the recruitment of Kenyans, especially women, to perform domestic work abroad in conditions akin to slavery. The Committee is concerned that in 2013, the State party identified several dozen victims of trafficking, but only convicted seven perpetrators of trafficking offenses (arts. 5 and 6).

32. The Committee recommends that the State party accelerate its efforts to combat trafficking in persons, and provide in its next periodic report data on human trafficking, including information on court cases and remedies provided to victims. It also encourages the State party to pursue its efforts to combat abuse of Kenyan migrant workers abroad, and to ratify ILO Convention No. 189 on Domestic Workers.

Persons with albinism

33. While noting the information provided by the State party during the dialogue concerning efforts to address violence against persons with albinism in Kenya, the Committee is alarmed by reports that there have been 13 such attacks, including five killings (arts. 6 and 7).

34. The Committee recommends that the State party take effective measures to protect persons with albinism from violence, discrimination and stigmatisation.

Truth, Justice and Reconciliation Commission

35. Notwithstanding the information provided by the State party, the Committee is concerned by reports that some victims of the violence that followed the 2007 elections have not received sufficient relief, and have not been able to safely return to their land owing to security concerns (arts. 6 and 7).

36. The Committee asks the State party to provide further details and assurances concerning the recommendations made by the Truth, Justice and Reconciliation Commission and remedies provided to those affected by the 2007 post-election violence (see CERD/C/KEN/CO/1-4, paras. 14-16).

Refugees and asylum-seekers

37. The Committee commends the State party for receiving and hosting hundreds of thousands of refugees and asylum-seekers for over 25 years, in coordination with international humanitarian agencies. However, the Committee is seriously concerned by the government's decision to appeal the 2017 High Court decision ruling that the order to close the Dadaab camp, which hosts over 250,000 refugees, was null and void. The Committee is concerned by the absence of information concerning burden-sharing by the international community, as the Committee recommended in its previous concluding observations (see CERD/C/KEN/CO/1-4, para. 25). The Committee is further concerned by restrictions on the freedom of movement of refugees, by the absence of alternative resettlement options, and by substandard conditions for those living in the camps. (arts. 2, 5 and 6).

38. **The Committee recommends that the State party ensure the protection of asylum-seekers and refugees in its territory, in accordance with its legal obligations, in particular by:**

(a) **Continuing to partner with international humanitarian agencies to establish and maintain sufficient capacity for refugees and asylum seekers in reception facilities providing adequate food, shelter and health services;**

(b) **Inviting once again the international community to discharge its responsibility towards refugees under the principle of burden sharing;**

(c) **Developing, in consultation with the groups concerned and in partnership with UNHCR and other relevant organisations, a long-term strategy for a durable solution for integration of refugees, especially relating to education and access to decent livelihoods, since camps do not represent a durable solution for their inhabitants.**

(d) **Respect the High Court decision in *Kituo Cha Seria & 8 others v Attorney General* (2013), and follow the law when declaring curfews, ensuring that they are not maintained for a disproportionate length of time and are only resorted to in exceptional circumstances.**

D. Other recommendations

Ratification of other instruments

39. Bearing in mind the indivisibility of all human rights, the Committee encourages the State party to consider ratifying those international human rights instruments that it has not yet ratified, in particular treaties with provisions that have direct relevance to communities that may be subjected to racial discrimination, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee also recommends that the State party ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

Follow-up to the Durban Declaration and Programme of Action

40. In the light of its general recommendation No. 33 (2009) on the follow-up to the Durban Review Conference, the Committee recommends that, when implementing the Convention in its domestic legal order, the State party give effect to the Durban Declaration and Programme of Action, adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, taking into account the outcome document of the Durban Review Conference, held in Geneva in April 2009. The Committee requests that the State

party include in its next periodic report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action at the national level.

International Decade for People of African Descent

41. In the light of General Assembly resolution 68/237, in which the Assembly proclaimed 2015-2024 the International Decade for People of African Descent, and resolution 69/16 on the programme of activities for the implementation of the Decade, the Committee recommends that the State party prepare and implement a suitable programme of measures and policies. The Committee requests that the State party include in its next periodic report specific information on the concrete measures adopted in that framework, taking into account its general recommendation No. 34 (2011) on racial discrimination against people of African descent.

Consultations with civil society

42. The Committee recommends that the State party continue consulting and increasing its dialogue with civil society organisations working in the area of human rights protection, in particular those working to combat racial discrimination, in connection with the preparation of the next periodic report and in follow-up to the present concluding observations.

Amendment to article 8 of the Convention

43. The Committee recommends that the State party ratify the amendment to article 8 (6) of the Convention adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by the General Assembly in its resolution 47/111.

Declaration under article 14 of the Convention

44. The Committee encourages the State party to make the optional declaration provided for in article 14 of the Convention recognizing the Committee's competence to receive and consider individual communications.

Common core document

45. The Committee encourages the State party to submit to it a common core document to replace its core document, issued in 2011 (HRI/CORE/KEN/2011), in accordance with the harmonized guidelines on reporting under the international human rights treaties, in particular those on the common core document, as adopted at the fifth inter-committee meeting of the human rights treaty bodies, held in June 2006 (HRI/GEN/2/Rev.6, chap. I). In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 42,400 words for such documents.

Follow-up to the present concluding observations

46. In accordance with article 9 (1) of the Convention and rule 65 of its rules of procedure, the Committee requests the State party to provide, within one year of the adoption of the present concluding observations, information on its implementation of the recommendations contained in paragraphs 8, 14 (c), 14 (d) above.

Paragraphs of particular importance

47. The Committee wishes to draw the attention of the State party to the particular importance of the recommendations contained in paragraphs 20, 24, 26 and 38 above

and requests the State party to provide detailed information in its next periodic report on the concrete measures taken to implement those recommendations.

Dissemination of information

48. The Committee recommends that the State party's reports be made readily available to and accessible by the public at the time of their submission and that the concluding observations of the Committee with respect to those reports be similarly publicized in the official and other commonly used languages, as appropriate.

Preparation of the next periodic report

49. The Committee recommends that the State party submit its combined eighth to ninth periodic reports, as a single document, by 13 October 2020, taking into account the reporting guidelines adopted by the Committee during its seventy-first session (CERD/C/2007/1) and addressing all the points raised in the present concluding observations. In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 21,200 words for periodic reports.
