
Advance unedited versionDistr.: General
2 September 2011

Original: English

Committee on the Elimination of Racial Discrimination**Seventy-ninth session**

8 August – 2 September 2011

Consideration of reports submitted by States parties under article 9 of the convention**Concluding observations of the Committee on the Elimination of Racial Discrimination****Kenya**

1. The Committee considered the initial to fourth periodic reports of Kenya (CERD/C/KEN/1-4), submitted in one document, at its 2100th and 2101st meetings (CERD/C/SR.2100 and CERD/C/SR.2101), held on 15 and 16 August 2011. At its 2119st meeting (CERD/C/SR.2119), held on 29 August 2011, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission, although with a delay, of the initial to fourth periodic reports which comply with the reporting guidelines and provide a critical assessment of the situation in the State party.

3. The Committee also welcomes the presence of a large and high-level delegation, led by the Minister of Justice, National Cohesion and Constitutional Affairs, notwithstanding the demands occasioned by the current parliamentary work on the adoption of laws implementing the new Constitution.

4. The Committee further appreciates the frank and constructive dialogue with the State party as well as the detailed information provided on the themes identified by the Rapporteur and in response to the questions posed by the members of the Committee.

B. Positive aspects

5. The Committee welcomes the adoption of the new Constitution in 2010 containing a broad catalogue of human rights which lays the foundation for the promotion of an inclusive multi-ethnic Kenyan society, addressing inequalities and eliminating discrimination. The Committee also notes with interest the constitutional provisions aimed

at instituting good governance in the State party. Furthermore, the Committee notes with interest the legislative process undertaken by the State party to implement the 2010 Constitution and to bring its legislation into conformity with international standards.

6. The Committee welcomes the institutional and other measures taken by the State party to promote national reconciliation and unity subsequent to the violence following the 2007 elections, to establish historical record of what happened, to prosecute perpetrators, and to provide redress to victims. The Committee notes in particular the establishment of the Commission of Inquiry on Post-Election Violence and of the Truth, Justice and Reconciliation Commission.

7. The Committee welcomes the efforts undertaken by the State party to overhaul and reform its judicial system.

8. The Committee notes with appreciation the active engagement of, and contribution from, the Kenya National Commission on Human Rights as well as the contributions from non-governmental organizations to the dialogue.

C. Concerns and recommendations

9. While noting that racial discrimination is outlawed in the State party and that the Convention forms part of its law, the Committee regrets the absence of information on sanctions for acts of racial discrimination. Moreover, the Committee notes that while the legislation explicitly prohibits discrimination in areas such as employment, it does not do so for other fields of public life where discrimination occurs frequently, such as in housing. (art. 2 and 5)

The Committee wishes to receive information on sanctions applied for acts of racial discrimination. Moreover, the Committee recommends that, in addition to legislation outlawing racial discrimination in general, the State party also address racial discrimination in policies on employment and housing, as well as other relevant areas.

10. The Committee welcomes the opportunity to improve access to justice provided by the new Constitution, whereby competence for hearing racism cases is no longer limited to the High Court and victims of racism can now access lower courts. The Committee is nonetheless concerned that the limited awareness of rights by the population, and particularly the right not to be discriminated against, as well as the limited accessibility of judicial remedies, will continue to prevent victims from seeking justice and reparation through courts. (art. 6)

Recalling its General Recommendation No. 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005), the Committee recommends that the State party:

(a) **sensitize the population, through mass education, about the legal prohibition of racial discrimination and about their right to equality and non-discrimination, as provided by the Constitution and other pieces of legislation;**

(b) **ensure the provision of free legal aid throughout the country, including by rolling out the National Legal Aid Scheme which should involve the use of Paralegals in the rural and Arid and Semi-arid Areas of the country; and**

(c) **review judicial procedures as necessary to speed up the processing of cases of racial discrimination in the courts, including through the reinforcement of the role of public prosecutors and members of the prosecution service in the initiation of judicial proceedings for racist acts.**

The Committee requests the State party to include in its next periodic report data on complaints or legal proceedings relating to racial discrimination.

11. The Committee notes that the State party is in the process of reviewing the institutional arrangements for its national human rights institution, in pursuance of the constitutional provision which provides for the establishment of the Kenya National Human Rights and Equality Commission.

The Committee encourages the State party to build on the positive experience of the Kenya National Commission on Human Rights in deciding the most suitable institutional arrangement for its national human rights institution. The Committee further encourages the State party to ensure that the fight against racial discrimination continues to be at the core of the mandate of its national human rights institution, and that it remains fully compliant with the Paris Principles and is adequately resourced.

12. While noting that the National Cohesion and Integration Act of 2008 and the Penal Code prohibit hate speech and incitement to hatred, the Committee is concerned that the State party's legislation is narrow and does not cover all punishable offences prescribed by article 4 of the Convention and that relevant provisions condemn hate speech on only a limited number of grounds. (art. 4)

The Committee recommends that the State party undertake the necessary legislative amendments in order to widen the scope of the existing legislation so as to give full effect to article 4 of the Convention. In this regard, it refers the State party to its General Recommendations No. 1 on States Parties Obligations (1972); No. 7 on Legislation to Eradicate Racial Discrimination (1985); and No. 15 on article 4 of the Convention (1993).

13. The Committee notes with concern that politicians in the State party continue to use incitement to ethnic hatred in statements and speeches. The Committee also notes that recent court proceedings against politicians on incitement to hatred have been halted in controversial and unexplained circumstances. (art. 4)

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

14. The Committee notes the work achieved so far by the Truth, Justice and Reconciliation Commission, including the holding of hearings and the collection of statements from witnesses. The Committee further notes that an extension of the duration of its mandate is under consideration by the government. (arts. 6, 7)

The Committee encourages the State party to continue to fully support the work of the Truth, Justice and Reconciliation Commission until the completion of its work and calls on the State party to uphold its findings and implement its recommendations.

15. The Committee regrets that no victim of the violence which occurred following the 2007 elections has received reparation hitherto and the perpetrators are yet to be prosecuted. The Committee also notes that proceedings before the International Criminal Court are in progress. (art. 6)

The Committee calls on the State party to ensure that all victims of the post 2007 elections violence are effectively compensated and that the perpetrators of the violence are properly prosecuted. The Committee notes the continued cooperation between the State party and the International Criminal Court. In this regard, the Committee refers the State party to its General Recommendation No. 31 (2005) on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System.

16. The Committee notes with great concern reports that some persons displaced by the violence following the 2007 elections have not been able to return to their homes nor received compensation. (art. 5)

Recalling its General Recommendation No. 22 on Article 5 and Refugees and Displaced Persons, the Committee recommends that the State party give its fullest attention to the plight of the internally displaced persons and to ensure that they return to their land or are otherwise properly re-settled and provided with adequate reparation.

17. The Committee notes with concern that the State party has not acted upon the decisions of the African Commission on Human and Peoples' Rights as regards forced evictions of the *Endorois* and the *Ogiek* from their lands and that people affected are still without any redress to date. (art. 5)

The Committee urges the State Party to respond to the decisions made by the African Commission on Human and Peoples' Rights and to ensure that all marginalised communities and peoples involved are redressed as ordered.

18. The Committee notes with concern that little progress has been made in resolving land issues over the years and that inter-ethnic violence over land disputes continues to occur. The Committee notes that the State party has adopted a National Land Policy and that a National Land Commission is instituted by the new Constitution. (art. 5 (d) and (e))

The Committee recommends that the State party take measures without delay to operationalize the machinery and mechanisms for addressing land problems fairly taking into account historical contexts of land ownership and acquisition. The Committee wishes to be informed of the outcomes of actions taken in this regard.

19. The Committee notes with interest the introduction of the concept of community lands in the 2010 Constitution which recognises the rights of marginalised and vulnerable ethnic minorities. (art. 5)

The Committee calls on the State party to take the necessary legislative measures and to adopt policies to implement the constitutional provisions on community lands and minority rights.

20. The Committee notes with concern that the State party has been historically governed by representatives of the large ethnic groups. Moreover, while understanding the need to promote ethnic representation within political parties, the Committee expresses concern that the legislative provisions in this regard may diminish the opportunity for smaller ethnic groups to be represented in elected bodies. (art. 5 (c))

The Committee encourages the State party to put into place without delay the mechanisms necessary for implementing the Constitutional provisions on the ethnic representation in government bodies and offices, and invites the State party to extend the requirement for equitable ethnic representation to bodies and commissions established by the new Constitution. The Committee further calls on the State to ensure that the new pieces of legislation concerning political parties and elections to be

adopted by the State party will enable the representation of ethnic minorities in elected organs, such as the Parliament.

21. The Committee expresses concern at the discriminatory and arbitrary extra requirements for Nubians, Coastal Arabs, Somalis and Kenyans of Asian descent, in the recognition of nationality and in accessing identity documentation such as Kenyan Identity Cards, birth certificates and passports. The Committee is also concerned that by introducing the possibility of revocation of nationality, the new Constitution imposes a differential treatment of citizens according to the way the Kenyan nationality has been acquired. (art. 5 (d))

The Committee urges the State party to make the necessary amendments to its legislation and administrative procedures to implement the new constitutional provisions on citizenship by ensuring that all citizens are treated equally and without any discrimination and receive identity documents, and to ensure compliance with article 5 (d) (iii) of the Convention. The Committee also calls upon the State party to implement the decision of the African Committee of Experts on the Rights and Welfare of the Child in respect of the Nubian children's right to acquire national identity papers.

22. The Committee notes that projects of upgrading of the slums of Nairobi are being implemented by the State party, and that bodies such as the District Peace Committees and the Uwiano Platform for Peace have been set up. At the same time, the Committee is concerned at the prevailing ethnic tension in these overcrowded slums and at the risk of escalation into violent ethnic clashes due to agitation by politicians. (art. 5 (b))

The Committee urges the State party to take measures to check the overcrowding of the slums of Nairobi and minimise the possibility of the situation in the slums being exploited in the political platforms of politicians, and to invest in efforts commensurate with the scale of the problems in order to address ethnic tensions in the slums.

23. The Committee notes that the new Constitution of the State party calls for an equitable allocation of public resources among national and county governments and creates the Equalisation Fund. Nevertheless, the Committee notes with concern that measures previously taken by the State party have not addressed the ethnic and regional disparities in the enjoyment of economic and social rights, which is one of the causes of resentment among ethnic groups. The Committee also regrets the lack of information on affirmative measures in place in favour of disadvantaged ethnic groups. (art. 5 (e))

The Committee commends the State party to address the question of ethnic and regional disparities and encourages the State party to allocate the necessary resources, in addition to those coming from the Equalisation Fund, to address the lack of provision of, and access to, public services in marginalised areas. Recalling its General Recommendation No. 32 (2009) on the Meaning and Scope of Special Measures in ICERD, the Committee also urges the State party to adopt special measures so as to reduce in a tangible manner the inequalities among ethnic groups in fields such as employment and education. Moreover, the Committee calls on the State party to anchor the fight against inequality and the development of marginalized areas in its poverty reduction policy and strategies.

24. While noting the inclusion of human rights education in the school curricula and the various initiatives undertaken by the Ministry of Justice, National Cohesion and Constitutional Affairs, such as the cohesion cafés and the televised programmes, the Committee is concerned these measures are not sufficient to promote inter-ethnic understanding and tolerance. The Committee is further concerned that the targets of these

initiatives as well as the types of the media being used do not reach all segments of the population. (art. 7)

The Committee calls on the State party to step up educational efforts to promote national cohesion and reconciliation, including by ensuring that they effectively address ethnic prejudices and stereotypes as well as the history of inter-ethnic violence in the State party, utilising media that reach all segments of the population.

25. The Committee notes with concern the grave conditions at the Dabaab refugee camp caused by overcrowding and lack of basic needs of life for refugees. (art. 5 (b) and (e))

The Committee commends the State party for the efforts it is making to alleviate this humanitarian catastrophe at the Dabaab camp and encourages it to invite the international community to discharge its responsibility towards refugees under the principle of burden sharing.

26. The Committee notes that the report submitted by the State party does not contain statistical data on the enjoyment of economic and social rights. The Committee further notes that the 2009 census gathered data on ethnicity as well as on some economic and social rights indicators, but they were not provided in the report.

The Committee invites the State party to include in its next periodic report statistical data on the enjoyment of economic and social rights as collected in the course of the 2009 national census.

27. The Committee recommends that the State party ratify the amendments to article 8, paragraph 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 of 16 December 1992. In this connection, the Committee cites General Assembly resolution 61/148, 63/243 and 65/200, in which the Assembly General strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment to the Convention concerning the financing of the Committee and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.

28. The Committee encourages the State party to consider making the optional declaration provided for in article 14 of the Convention recognizing the competence of the Committee to receive and consider individual complaints.

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

30. In light of its General Recommendation No. 33 (2009) on follow-up to the Durban Review Conference, the Committee recommends that 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, when implementing the Convention in its domestic legal order. 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.

31. The Committee recommends that the State party undertake and publicize an adequate programme of activities to commemorate 2011 as the International Year for

People of African Descent, as proclaimed by the General Assembly in its resolution 64/169 of 18 December 2009).

32. The Committee recommends that the State party continue consulting and expanding its dialogue with organizations of civil society working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report.

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

34. In accordance with article 9, paragraph 1, of the Convention and rule 65 of its amended rules of procedure, the Committee requests the State party to provide information, within one year of the adoption of the present conclusions, on its follow-up to the recommendations contained in paragraphs 13, 17 and 19 above.

35. The Committee also wishes to draw the attention of the State party to the particular importance of recommendations 18, 21, 22 and 24 and request the State party to provide detailed information in its next periodic report on concrete measures taken to implement these recommendations.

36. The Committee encourages the State Party to submit a common core document in accordance with the harmonized guidelines on reporting under the international human rights treaties as adopted by the fifth inter-Committee meeting of the human rights treaty bodies held in June 2006 (HRI/MC/2006/3).

37. The Committee recommends that the State party submit its fifth to seventh periodic reports in a single document, due on 13 October 2014, taking into account the guidelines for the CERD-specific document adopted by the Committee during its seventy-first session (CERD/C/2007/1), and that it address all points raised in the present concluding observations. The Committee also urges the State party to observe the page limit of 40 pages for treaty-specific reports and 60-80 pages for the common core document (see harmonized guidelines for reporting contained in document HRI/GEN.2/Rev.6, para. 19).
