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**Submission for the List of Issues: Kenya**

to be considered in connection with the Fourth periodic report of Kenya (CCPR/C/KEN/4) on its compliance with the International Covenant on Civil and Political Rights

**Rights of LGBTQI+ Citizens and Non-Citizens in Kenya**

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## **INTRODUCTION**

This report focuses on the pervasive human-rights violations based on sexual orientation and gender identity in Kenya. To comply with its obligations under the ICCPR, the Kenyan Government must take decisive action to improve the human rights situation of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) persons, including Kenyan citizens, people living inside refugee camps, and non-citizens residing in urban areas. LGBTQI+ Kenyans and non-citizens face laws criminalizing same-sex conduct, heightened levels of sexual and gender-based violence, threats and extortion by authorities, and inadequate or non-existent remedies for violence and discrimination perpetrated by state and non-state actors. LGBTQI+ persons face discrimination when seeking healthcare, housing, and employment. In this generalized context of discrimination, LGBTQI+ refugees have additional vulnerabilities caused by their insecure status, the encampment policy that limits freedom of movement, and delays in accessing adequate documentation and other legal protections.

In the previous review of Kenya in 2012 this Committee offered important recommendations relating to the rights of LGBTQI+ persons as well as people living in refugee camps. Major developments since then argue for increased attention to sexual orientation and gender identity (SOGI) in the 2020 review. These developments include a dramatic influx of LGBTQI+ refugees from neighboring countries as well as legal advances and setbacks. Since the last ICCPR review,

the international human rights system has strengthened attention to and codification of LGBTQI+ rights<sup>1</sup> and the Kenyan Government has continued to host refugees from neighboring countries in the face of diminishing support from the international community. In reviewing Kenya's compliance with its human-rights obligations, it is critical to note, the external pressure caused by decreasing options for refugee resettlement and the need for the international community with UNHCR to support the Kenyan Government under the principle of burden sharing.

This report has been prepared in consultation with a diverse coalition seeking to ensure that the rights of LGBTQI+ Kenyans and non-citizens are duly considered in the current review. Because of fears of retaliation including physical harm, many remain anonymous. We urge the Committee to ensure that the following requests are included in the List of Issues so that they may be fully addressed in the review.

## **I. EQUAL PROTECTION OF THE LAW, NON-DISCRIMINATION, AND RIGHT TO REMEDY (Articles 2, 17, 26)**

Under the Covenant, States Parties are required to adopt legislative, judicial, administrative, educative, and other measures to protect individuals from discrimination.<sup>2</sup> The Committee has interpreted articles 2 and 26 of the Covenant as prohibiting discrimination of persons on the basis of their sexual orientation and gender identity.<sup>3</sup> Other particularly relevant rights have been Articles 17 (privacy) and Articles 23 (family).

We urge the Committee to pay special attention to the discriminatory human-rights impacts in the areas of criminalization of same-sex conduct; discrimination in access to the highest standards of physical and mental health, the right to adequate housing, and work; and access to effective remedy for violations.

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<sup>1</sup> See Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

<sup>2</sup> International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Human Rights Committee General Comment 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [hereinafter General Comment 31] ("Article 2 requires that State Parties adopt legislative, judicial, administrative, educative and other measures in order to fulfil their legal obligations"). Article 26 requires state parties to ensure "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." (ICCPR, *supra* at art. 26). Specifically, article 26 mandates that the "law ... prohibit[s] any discrimination and guarantee[s] to all persons equal and effective protection against discrimination on any ground." (*Id.*)

<sup>3</sup> See, e.g., Toonen v. Australia, Communication No. 488/1992 (CCPR/C/50/D/488/1992); Young v. Australia, Communication No. 941/2000 (CCPR/C/78/D/941/2000), ¶ 10.4; X v. Colombia, communication no. 1361/2005 (CCPR/C/89/D/1361/2005), ¶ 9; concluding observations on Mexico (CCPR/C/MEX/CO/5), ¶ 21; concluding observations on Uzbekistan (CCPR/C/UZB/CO/3), ¶ 22.

## A. Criminalization of same-sex conduct (Articles 2, 17, 26)

The continued criminalization of same-sex conduct is a stark violation of Kenya's human-rights obligations that has been denounced consistently by this Committee as well as other UN treaty bodies and special procedures.<sup>4</sup> Additionally, criminalization fuels the systemic violence, discrimination, and deprivations described below.

The Committee's Concluding Observations from 2012 recalled and renewed previous recommendations calling for the decriminalization of consensual sexual conduct between adults of the same sex.<sup>5</sup> This call focused on criminalization and also on the related "social stigmatization ... harassment, discrimination (and) violence" which had occurred "against people based on their sexual orientation or gender identity."<sup>6</sup>

As the 2019 State Report acknowledges, same-sex conduct remains criminalized in Kenya.<sup>7</sup> In May 2019, the Kenyan High Court declined to strike down Sections 162 and 165 of the Penal Code which criminalizes same-sex conduct.<sup>8</sup> In doing so the Court rejected petitioners' arguments which had been based on the constitutional and human rights to privacy, freedom of expression, human dignity, the right to health, and the right to protection against discrimination.<sup>9</sup>

The Committee has previously noted that criminalization of same-sex sexual conduct has a chilling effect on the enjoyment of other human rights in Kenya, and this remains true. As discussed further in the following section, fear of arrest and prosecution has led people to avoid seeking medical care for injuries or diseases that could expose their sexual orientation.<sup>10</sup> LGBTQI+ people may also avoid the mental-health care necessary to alleviate traumatizing

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<sup>4</sup> See, e.g., Human Rights Committee, *Concluding Observations*, CCPR/C/KEN/CO/3, Aug. 31, 2012; UN Committee on Economic, Social, and Cultural Rights (CESCR), *Consideration of reports submitted by State parties under article 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social, and Cultural Rights: Kenya*, E/C.12/KEN/CO/1 ¶¶ 21-22, Dec. 1, 2008. (Committee called on the State to decriminalize same-sex acts and to "take the steps necessary to put an end to the social stigmatization of homosexuality"); See U.N. Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women- Kenya*, CEDAW/C/KEN/CO/7 ¶ 11, April 5, 2011 (calling upon Kenya to facilitate legislative reform, repealing discriminatory laws.); See also submissions for Kenya's recent Universal Periodic Review. During the 2<sup>nd</sup> cycle of the UPR, civil society echoed the call for decriminalization and also urged the government of Kenya to protect persons in the LGBT+ community and take action against violence and hate speech against the LGBT+ community.

<sup>5</sup> Human Rights Committee, *Concluding Observations*, CCPR/C/KEN/CO/3, Aug. 31, 2012 ¶ 8 [hereinafter 2012 *Concluding Observations*].

<sup>6</sup> *Id.*

<sup>7</sup> Kenya State Report, *Fourth periodic review report submitted by Kenya under Art. 40 of the International Covenant on Civil and Political Rights*, CCPR/C/KEN/4, April 26, 2019 [hereinafter Kenya State Report].

<sup>8</sup> Eric Gitari v Attorney General & another [2016] eKLR.

<sup>9</sup> *Id.*

<sup>10</sup> GAY AND LESBIAN COALITION OF KENYA, RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA 29 (2016), [https://issuu.com/galckkenya/docs/research\\_on\\_the\\_lived\\_experiences\\_o](https://issuu.com/galckkenya/docs/research_on_the_lived_experiences_o) [hereinafter RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA].

experiences of remaining “closeted” in a discriminatory environment.<sup>11</sup> Studies have found higher levels of substance abuse to cope with these mental health struggles.<sup>12</sup>

**We respectfully urge the Committee to ask the Government to:**

Please provide updated information on the State’s efforts to decriminalize same-sex unions to comply with the international standard on LGBTQI+ human rights.

**B. Discrimination in access to the highest standards of physical and mental health, housing, and work (Articles 2, 26)**

LGBTQI+ Kenyans and refugees face continuing discrimination due to the Kenyan Penal Code’s prohibition on same-sex conduct and the failure of the Government to enforce prohibitions against discrimination in healthcare, housing and employment.<sup>13</sup> Stigmatization results in LGBTQI+ people avoiding seeking out critical services.

In Kenya’s 2012 Review, the Committee expressed its concern about unequal access to medical care and treatment and addressed the high rates of HIV among the LGBTQI+ community.<sup>14</sup> As noted by the Committee, criminalization contributes to the stigmatization that underlies many forms of discrimination. In 2012, the Committee expressed concern over the “HIV/AIDS prevalence among homosexuals which is partly attributable to the laws that criminalize consensual same-sex relationships and the societal stigmatization of this group that hampers access to treatment and medical care by this group.”<sup>15</sup> While much of the focus on this area has been on gay men, this is a trend that also disparately impacts transgender women.<sup>16</sup>

The most recent review by the Committee on Economic, Social and Cultural Rights (CESCR) also noted concern that “lesbian, gay, bisexual, transgender and intersex persons are stigmatized and socially excluded, as well as discriminated in gaining access to social services, particularly health-care services.”<sup>17</sup> The CESCR called on the State to decriminalize same-sex acts and to “take the steps necessary to put an end to the social stigmatization of homosexuality and ensure

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<sup>11</sup> *Id.* at 28–31.

<sup>12</sup> *Id.*

<sup>13</sup> Gay and Lesbian Coalition of Kenya, *Know Your Rights* (2016) <https://www.galck.org/know-your-rights/>.

<sup>14</sup> 2012 *Concluding Observations, supra* at ¶ 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; Michael Carter, ‘Alarmingly high’ HIV Incidence Among MSM and Transgender Women in Sub-Saharan Africa, AIDSMap (Nov. 19, 2018) <http://www.aidsmap.com/news/nov-2018/alarmingly-high-hiv-incidence-among-msm-and-transgender-women-sub-saharan-africa>.

<sup>17</sup> UN Committee on Economic, Social, and Cultural Rights (CESCR), Consideration of reports submitted by State parties under article 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social, and Cultural Rights: Kenya, E/C.12/KEN/CO/1, Dec. 1, 2008.

that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity.”<sup>18</sup>

In its 2019 report for this review, the Kenyan Government reiterated that it “does not sanction or condone discrimination against any persons on the basis of their sexual orientation in terms of access to basic fundamental human rights such as health, education and housing.”<sup>19</sup> The Government asserts that “laws and policies are being amended to ensure that they fully conform to the constitutional imperative on non-discrimination”<sup>20</sup> The State Report references an important transgender rights case for Audrey Mbugua Ithibu, in which her school certificate was reissued without a gender mark.<sup>21</sup> The report also describes efforts to sensitize police officers<sup>22</sup> and health care workers for persons with HIV/AIDS.<sup>23</sup> The Government also highlights efforts in Mombasa which include a 2008 survey of gay men and several programs related to the prevention and detection of HIV/AIDS.<sup>24</sup>

Nonetheless, the 2019 State-sponsored Homophobia report by the International Lesbian, Gay, Bisexual, Trans, Intersex Association (ILGA World) highlighted “an alarmingly high incidence of HIV among men who have sex with men and trans women in Kenya.”<sup>25</sup> Because of the context of criminalization and stigmatization, privacy concerns are particularly serious in regards to health concerns of the LGBTQI+ community.

In addition to continuing stigma and issues of LGBTQI+ access to HIV/AIDS programs, the LGBTQI+ communities face many other issues in access to healthcare, adequate housing, and employment. Research by the Gay and Lesbian Coalition of Kenya (GALCK) shows that LBQ women were “discriminated against by health care providers or were refused services in government hospitals. The participants stated that their main concerns were confidentiality and disclosure.”<sup>26</sup> The same study notes that many LBQ women “avoid seeking medical services at all [rather] than risk having their privacy breached by medical professionals.”<sup>27</sup> A recent study

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<sup>18</sup> *Id.*

<sup>19</sup> Kenya State Report, *supra* at ¶ 19.

<sup>20</sup> *Id.* at ¶ 8.

<sup>21</sup> *Id.* at ¶ 19. (citing Republic v Kenya National Examinations council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR.)

<sup>22</sup> *Id.* at ¶ 20. (National Police Service, National Gender and Equality Commission and a number of Nongovernmental organizations such as the Kenya Human Rights Commission, the Legal Resource Foundation).

<sup>23</sup> *Id.* at ¶¶ 21–24.

<sup>24</sup> *Id.* at ¶ 25.

<sup>25</sup> Lucas Ramon Mendos, *State-Sponsored Homophobia*, International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA World), 13th edition, at 395 (2019). [https://ilga.org/downloads/ILGA\\_State\\_Sponsored\\_Homophobia\\_2019.pdf](https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf) (citing “Alarmingly high HIV incidence among MSM and transgender women in sub-Saharan Africa”, NAM-aidsmap, 19 Nov. 2018).

<sup>26</sup> RESEARCH OF THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA, *supra* at 29.

<sup>27</sup> *Id.*

with LBQ women refugees in Nairobi further documents stigmatization by health professionals.<sup>28</sup>

LGBTQI+ refugees and asylum-seekers in Kenya face additional obstacles to access to health care because they often lack the necessary legal documentation to access services. A number of studies have documented delays and bureaucratic inefficiencies in processing these necessary documents so that refugees can access healthcare.<sup>29</sup>

Interviews with leaders of community-based organizations confirmed that a central issue for LGBTQI+ people was that they would avoid treatment or seeking access to medication in order to protect themselves from physical harm and harassment.

These interviews have also revealed that LGBTQI+ persons face discrimination in employment, both by current and prospective employers. One recent academic study of LBQ women refugees reported job losses when their employers learned of their nationality and the refugees reported that because of this type of discrimination, “retaining employment is nearly impossible.”<sup>30</sup>

Throughout Kenya, LGBTQI+ refugees have extreme difficulty locating legal housing outside refugee camps. Given the pervasive homophobia in Kenya, LGBTQI+ Kenyans also report arbitrary evictions if the landlord discovers their status.<sup>31</sup> One recent academic study of LBQ women refugees reported prevalent rates of forced eviction by Kenyan landlords. The study found that these evictions came about after the landlord or neighbors learned of LBQ refugees’ nationality and private lives.<sup>32</sup> A Reuters’ report provides examples of the hardships LGBTQI+ Kenyans face when trying to find and keep housing, stating, “Scores of LGBT+ refugees are in desperate need of emergency shelter after facing homophobic threats, violence and eviction warnings from community members in a Nairobi slum...” In the same article, people interviewed talked about personal interactions: “[t]he people here threaten and insult us. They say we are spreading disease and teaching their children to be homosexuals...” and “They said either we go, or they will kill us. We are so scared to leave our rooms. At night, we take turns to stand guard.”<sup>33</sup>

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<sup>28</sup> Hester K.V. Moore, “*The Atmosphere is Oppressive*”: Investigating the Intersection of Violence with the Cisgender Lesbian, Bisexual, and Queer Women Refugee Community in Nairobi, Kenya, in *LGBTI ASYLUM SEEKERS AND REFUGEES FROM A LEGAL AND POLITICAL PERSPECTIVE: PERSECUTION, ASYLUM AND INTEGRATION* (2019).

<sup>29</sup> See further Norwegian Refugee Council and Harvard Law School, International Human Rights Clinic, *Supporting Kakuma’s Refugees: The Importance of Freedom of Movement* (2017)

<sup>30</sup> Moore, *supra* at 328.

## **We respectfully urge the Committee to ask the Kenyan Government:**

1. Please provide information on enacted or proposed legislative and administrative measures to combat all forms of discrimination based on sexual orientation and gender identity as required by the Covenant.
2. Please provide information on HIV/AIDS prevention, detection, and care measures, including access to medication for HIV/AIDS. What protections are in place for LGBTQI+ persons seeking medical care? What efforts are being made to ensure that refugees can access health services, with special attention to the particular needs and obstacles for LGBTQI+ individuals?
3. How does SOGI status impact housing options and eviction rates of LGBTQI+ individuals?

### **C. Effective Remedies**

Access to remedy is an individual's last resort in protecting their rights under the ICCPR. Article 2(3)(a) requires state parties to ensure that any person whose rights or freedoms (under the ICCPR) are violated shall have an effective remedy.<sup>34</sup> General Comment 31 states "[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."<sup>35</sup> "Cessation of an ongoing violation is an essential element of the right to an effective remedy."<sup>36</sup> The access to remedy requirement is vital to the ICCPR, because "the purpose of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant."<sup>37</sup> Rampant impunity for violence and discrimination against LGBTQI+ individuals, and against refugees in particular, contravenes the Covenant and undermines efforts to protect and promote related rights. Access to remedy for violence and discrimination based on SOGI status should be included as a priority concern for the List of Issues and subsequent review.

The 2012 Concluding Observations recommended investigation of violence by law enforcement and adequate compensation to asylum seekers at the Dadaab refugee camp who were subjected to physical and sexual violence.<sup>38</sup> In its 2019 state report, the Kenyan Government alluded to potential investigations but did not confirm, stating that "any allegations of crime by law enforcement officers is promptly investigated and where found liable prosecuted."<sup>39</sup>

In terms of developments since the previous review, the Government reports that allegations of extrajudicial killings are investigated, that the 2017 National Police Service Standing Orders

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<sup>34</sup> ICCPR, *supra* at art. 2.

<sup>35</sup> General Comment 31, *supra* at ¶ 15

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 17.

<sup>38</sup> 2012 *Concluding Observations*, *supra* at ¶ 12.

<sup>39</sup> Kenya State Report, *supra* at ¶ 79.

provides guidance on the use of force, and that law enforcement officers are trained on fair just and humane treatment and are vetted.<sup>40</sup>

Nonetheless, as described in the following sections, violence against LGBTQI+ Kenyans and refugees continues. As detailed below, our interviews confirm that this violence continues to occur in the Kakuma camp and in other parts of Kenya, and LGBTQI+ persons report a failure to investigate. The Penal Code's prohibition on same-sex sexual behavior makes LGBTQI+ Kenyans and non-citizens more vulnerable to violence and extortion by the police and the general public.<sup>41</sup> As one researcher has described, "LBQ refugees experience violence on interrelated physical, psychological, and structural platforms. Because violence is also entrenched in legal structures, LBQ refugees do not consistently report instances of violence."<sup>42</sup> Interviews with community leaders indicate that refugees fear going to the police to report crimes because of abuse by police and security officials when they seek help. LGBTQI+ refugees have reported harassment, including extortion, where authorities seek bribe in exchange for not reporting those who do not have proper documentation of their legal status.

An example from a recent GALCK report shows the issues LGBTQI people face when trying to report crimes to the police. "There are incidents where individuals go to the police seeking help only to have the police attack them. In one such case where [their] client tried to report a robbery, he was pushed into a cell by police officers, forcibly undressed, beaten, choked and had his hair shaved and burnt off because he 'was dressed very gay.'"<sup>43</sup> In another example, one woman summarized, "Of course I cannot go to the police, first I am a woman, and then I am a lesbian and a refugee! They will not listen to me. They will rape me again and throw me in jail. I am nobody here...I know that and they know that too."<sup>44</sup>

Additional examples of obstacles to accessing justice are discussed below in the sections on sexual and gender-based violence; the right to life; torture and cruel, inhuman or degrading treatment; arbitrary arrest and detention; and freedom of movement.

**We respectfully urge the Committee to ask the Kenyan Government:**

Please provide information about investigations and/or prosecutions of alleged law enforcement violence or threats against LGBTQI+ Kenyans or refugees in Kenya. Please include information about findings and compensation provided, if any.

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<sup>40</sup> Kenya State Report, *supra* ¶¶ 63–66.

<sup>41</sup> RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA, *supra* at 20–21, 24–25.

<sup>42</sup> Moore, *supra* at 16.

<sup>43</sup> Gay and Lesbian Coalition of Kenya, *Decriminalization of Consensual Same Sex Sexual Conduct in Kenya* (Feb. 2, 2018), <https://www.galck.org/repeal162/>.

<sup>44</sup> RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA, *supra* at 25.

## II. SEXUAL AND GENDER-BASED VIOLENCE (Articles 2, 3, 6, 7, 26)

LGBTQI+ persons in Kenya face high rates of sexual and gender-based violence and face obstacles accessing justice and rehabilitative mental health services. This is especially true for LGBTQI+ refugees.

In its last Concluding Observations, the Committee expressed concern about the rates of sexual and gender-based violence throughout Kenya.<sup>45</sup> The Committee recommended finalizing the Prosecution Guidelines on Sexual Offences and Gender Based Violence and enacting legislation against domestic violence in response.<sup>46</sup>

Likewise, in 2017 the Committee for the Elimination of Discrimination against Women (CEDAW) called on the Government to protect all women from violence, including lesbian, bisexual, and transgender women.<sup>47</sup> The Committee expressed concern that there is not full legislative protection against intersectional discrimination and that homosexual acts remain criminalized.<sup>48</sup> The Committee urged the State to adopt a comprehensive anti-discrimination law and reminded the Government the expectation that homosexuality be included in that.<sup>49</sup> CEDAW also recommended that the Government “[i]ncrease the investigation, prosecution and conviction rates in cases of sexual and gender-based violence throughout the State party, including in informal settlements and in camps for internally displaced persons and refugees.”<sup>50</sup>

The Kenyan Government reported on the development of the Prosecution Guidelines, amendments to the Sexual Offences Act and a number of other mechanisms and programs.<sup>51</sup> A study and analysis by the Women’s Refugee Commission (WRC) cites several other positive developments, such as: “the development of national guidelines and protocols; legislation mandating free post-sexual violence care at government health facilities; the lack of mandatory reporting for service providers; and an inclusive definition of sexual assault under the Sexual Offences Act (2006).”<sup>52</sup> To ensure tangible progress for LGBTQI+ individuals, these measures need to include explicit consideration of diverse sexual orientation and gender identity or expression.

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<sup>45</sup> 2012 *Concluding Observations*, *supra* ¶ 15.

<sup>46</sup> *Id.*

<sup>47</sup> *Concluding observations of the Committee on the Elimination of Discrimination against Women- Kenya*, CEDAW/C/KEN/CO/8, at ¶ 11, (Nov. 22, 2017); see U.N. General Assembly, *Convention on the Elimination of all forms of Discrimination Against Women*, at ¶¶ 10-11, Dec. 18, 1979, U.N.T.S. 1249.

<sup>48</sup> *Concluding observations of the Committee on the Elimination of Discrimination against Women- Kenya*, CEDAW/C/KEN/CO/8, at ¶ 10, (Nov. 22, 2017);

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at ¶ 23.

<sup>51</sup> Kenya State Report, *supra* at ¶¶ 80-82.

<sup>52</sup> Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), 2, <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf>.

LGBTQI+ refugees in Kenya continue to face high rates of sexual and gender-based violence.<sup>53</sup> In its recent study the Women’s Refugee Commission reported that every refugee research participant of diverse sexual orientation and gender identity reported having suffered sexual or other gender-based violence upon their arrival in Kenya and many on more than one occasion.<sup>54</sup> In another study, 42% of LGQ women refugees interviewed indicated that they had experienced sexual violence and an addition 16% indicated they had been the victim of intimate partner or domestic violence.<sup>55</sup>

The WRC report confirmed that trans women, trans men, LGBTQ+ adolescents, unaccompanied boys and young men, refugees selling sex, and detainees appear particularly vulnerable to sexual violence, exploitation, and abuse.<sup>56</sup> The study documents how dire living conditions, discrimination, and deprivations in social and economic rights including housing and health increase the vulnerability among refugee youth and refugees with diverse sexual orientation and gender identity to sexual exploitation.<sup>57</sup>

The experience of members of this coalition and interviews carried out for this report also suggest a troubling level of sexual and gender-based violence deserving of the Committees attention. Many LGBTQI+ refugees fleeing to Kenya go to local police stations upon arrival to get transportation and help. Several interviewees recounted that refugees are often met with extortion and violence during these interactions. Violence by State actors is discussed further below in the section on torture.

In addition to the prevalence of sexual and gender-based violence, rehabilitative services are in short supply and with numerous obstacles to access. In Nairobi, there are examples of highly regarded mental health care service providers who are specially trained to care for female and male refugee survivors of sexual violence, including LGBTQI+ survivors.<sup>58</sup> Unfortunately,

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<sup>53</sup> Lucas Ramon Mendos, *State-Sponsored Homophobia*, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World), 13th edition, at 395 (2019). [https://ilga.org/downloads/ILGA\\_State\\_Sponsored\\_Homophobia\\_2019.pdf](https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf);

see also Women’s Refugee Commission, ‘*We Have a Broken Heart*’: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf>.

See Hebrew Immigration Aid Society, *Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel and Kenya* (2013). <[https://www.hias.org/sites/default/files/invisible-in-the-city\\_0.pdf](https://www.hias.org/sites/default/files/invisible-in-the-city_0.pdf)>.

<sup>54</sup> Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), 2, <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf>.

<sup>55</sup> Moore, *supra* at 328.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> One excellent example is the Minnesota-based Center for Victims of Torture, See Generally Innovative New Aftercare Program Helps LGBTI Survivors in Nairobi, The Center for Victims of Torture (2018), <https://www.cvt.org/sites/default/files/documents/newsletters/CVT18%20NC%20NL%20web%20-%20FINAL%20-%2005.18.2018.pdf>.

community members report that there is not nearly enough coverage in Nairobi given the significant need of the large urban refugee population. Additionally, the services available in the Kakuma camp are also very limited and the challenges for LGBTQI+ survivors to seek care are even greater.

Several important barriers remain for LGBTQI+ refugees that both make them vulnerable to sexual and gender-based violence and keep them from accessing care. The Women’s Refugee Commission concisely summarized these: “limited access to urban refugee documentation (particularly for refugees with camp-based documents); economic hardship and scarce livelihood opportunities (especially for refugees with diverse SOGIESC and unaccompanied adolescents); legislative barriers, particularly the criminalization of same-sex sexual activities; negative provider attitudes and practices; poor awareness of service availability among the studied refugee communities; and socio-cultural barriers.”<sup>59</sup>

**Given the importance of these issues, we respectfully urge the Committee to ask the Kenyan Government:**

1. What measures are the Kenyan Government taking to eradicate violence against LGBTQI+ Kenyans and non-citizens?
2. Please provide information about the number of reports of SGBV against LGBTQI+ individuals, investigation and prosecution efforts, and remedy.
3. What measures are the Kenyan Government taking to streamline the process for LGBTQI+ refugees to obtain the documentation that will allow them to access critical rehabilitative physical and mental health care?

### **III. RIGHT TO LIFE (Article 6)**

LGBTQI+ persons have faced violence by State actors and private individuals and are often revictimized if they attempt to report crimes committed against them. Article 6 of the Covenant imposes duties on the State to refrain from violence and to protect people from violence committed by non-state actors. As this Committee has clarified, this right does not permit derogation, concerns acts and omissions, and includes the right “to enjoy a life with dignity.”<sup>60</sup> General Comment 36 emphasized that the state must “take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats<sup>61</sup> or pre-existing patterns of violence” and gave as examples “victims of

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<sup>59</sup> Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf>.

<sup>60</sup> *Id.* at ¶ 3.

<sup>61</sup> *General Comment 36*, CCPR/C/GC/36 (30 Oct. 2018) (citing Inter-American Court of Human Rights, *Barrios Family v. Venezuela*, Nov. 24, 2011, at ¶ 124.)

domestic and gender-based violence ... lesbian, gay, bisexual, transgender and intersex persons,<sup>62</sup> asylum seekers, refugees.”<sup>63</sup>

In its Concluding Observations from 2012, the Committee recognized that State security forces have used excessive and unlawful force and recommended training programs.<sup>64</sup> Additionally, in regards to refugee camps, the Committee expressed its concern over reports of physical and sexual violence against asylum seekers.<sup>65</sup> To combat such violence, the Committee recommended diligent investigation of violence by law enforcement and adequate compensation to victims.<sup>66</sup>

LGBTQI+ refugees are vulnerable to abuse by the police and private individuals. Studies have shown that LGBTQI+ refugees are more likely than the rest of the population to be victims of sexual and gender-based violence.<sup>67</sup> A 2013 study documented how LGBTQI+ refugees in Kenya are in a vicious cycle of violence and vulnerability:

Several participants in Kenya reported various levels of violence, such as violence from neighbors or relatives of romantic partners who accused gay refugees of corrupting their sons, husbands, or fellow workers. Two of these participants were arrested by police. The formation of dependent relations is most apparent in Kenya, where many participants found shelter with local men, fellow refugees (including one female refugee), and foreign visitors in exchange for sexual favors, with at least two kept as sexual slaves.<sup>68</sup>

Our interviews confirm this cycle of private and State-inflicted violence: violence and discrimination forces LGBTQI+ refugees into precarious conditions, which in turn increases their vulnerability to further violence and exploitation. Among their fellow immigrant and refugee population, LGBTQI+ individuals are frequently rejected and attacked by groups who are fiercely homophobic and emboldened by anti-gay laws and sentiment in their countries of origin. Instead of serving as a protection for these vulnerable individuals, there are reports that LGBTQI+ refugees have been victimized by Kenya police.

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<sup>62</sup> *Id.* (citing CCPR/C/COL/CO/6, at ¶ 12.)

<sup>63</sup> *Id.* (citing CCPR/C/KEN/CO/3, at ¶ 12.)

<sup>64</sup> 2012 *Concluding Observations*, *supra* at ¶ 11.

<sup>65</sup> *Id.* at ¶ 12.

<sup>66</sup> *Id.*

<sup>67</sup> Hebrew Immigration Aid Society, *Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel and Kenya*, at 6 (2013), [https://www.hias.org/sites/default/files/invisible-in-the-city\\_0.pdf](https://www.hias.org/sites/default/files/invisible-in-the-city_0.pdf).

<sup>68</sup> *Id.* at 10.

**We respectfully urge the Committee to ask the Kenyan Government to:**

2. Please provide information about incidents of physical violence against LGBTQI+ refugees that have been reported to the Kenyan Government, along with the status of any government investigation, the result if completed.

**IV. TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT (Article 7)**

In its last Concluding Observations, the Committee expressed concern about the use of excessive and unlawful force by law enforcement<sup>69</sup> As described above this includes a high incidence of sexual and gender-based violence.<sup>70</sup> These concerns remain particularly acute for LGBTQI+ refugees in Kenya who are particularly vulnerable to physical and sexual violence from law enforcement because of their insecure status. LGBTQI+ refugees and Kenyans report fear or experience of rape, physical abuse, and arbitrary imprisonment by law enforcement if they report being victims of crimes.<sup>71</sup>

As the Independent Expert on SOGI has explained regarding much of the violence suffered by LGBTQI+ individuals, “[c]onsidering the pain and suffering caused and the implicit discriminatory purpose and intent of these acts, they may constitute torture or other cruel, inhuman, or degrading treatment or punishment in situations where a State official is involved, at least by acquiescence.”<sup>72</sup>

In 2012, the Committee recommended the Kenyan Government implement training programs for law enforcement, investigate allegations of excessive unlawful force, and compensate victims.<sup>73</sup> In its most recent report, the Government noted the adoption of standards, training measures, and investigations of allegations.<sup>74</sup> In a positive development in March of 2018, petitioners before the Mombasa Court of Appeal were successful in convincing the court that forced anal examinations on people who are accused of same-sex relations is unconstitutional.<sup>75</sup>

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<sup>69</sup> 2012 *Concluding Observations* ¶¶ 11, 12, 15.

<sup>70</sup> *Id.*

<sup>71</sup> RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA, *supra* at 25; *Decriminalization of Consensual Same Sex Sexual Conduct in Kenya, supra.*

<sup>72</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN doc. A/HRC/38/43, ¶ 28 (11 May 2018).

<sup>73</sup> 2012 *Concluding Observations.*

<sup>74</sup> Kenya State Report, *supra* at ¶ 63, 65–66, 69–78.

<sup>75</sup> For more, see the Press Release, National Gay and Lesbian Human Rights Commission, Kenya Appeals Court Moves to End Forced Examinations of Men Suspected of Being Gay (22 Mar. 2019).

Despite these efforts and advances, there are continued reports of serious violence committed by law enforcement, and LGBTQI+ persons and especially non-citizens face particular vulnerabilities and obstacles for accessing justice.

Treatment in detention is an important concern. In one incident that garnered the attention of international media,<sup>76</sup> 20 LGBTQI+ refugees were arrested near the UNHCR headquarters in an upscale Nairobi neighborhood on February 22, 2019. Those arrested said that they were falsely charged with public nuisance, trespassing, and defecating in public. Their detention was reported after nearly a month. During their detention, it was alleged that they were subjected to sexual assault and other abuse. Six trans women detainees were detained in a men's prison. One, Lutaya Benon, recounted to a journalist that guards ripped out her earrings and that other prisoners came at night and sexually assaulted her and other prisoners. Another prisoner, Sabam Kimbugwe, showed a reporter that at least four teeth were knocked out; he said in an attack by a prison guard. Other prisoners reported that HIV-positive detainees could not access antiretroviral medication.<sup>77</sup>

**We respectfully urge the Committee to ask the Kenyan Government to:**

Please provide information on the measures, including specific training the Kenyan Government has implemented to combat torture and CIDT and on what independent review mechanisms are in place to investigate reports of malfeasance and provide compensation for victims.

**V. RIGHT TO LIBERTY AND SECURITY; NO ARBITRARY ARREST (Article 9)**

Article 9 of the Covenant protects all individuals' rights to liberty and security and prohibits arbitrary detention and arrest. In General Comment No. 35, the Committee has explained that while liberty concerns freedom from physical confinement, security of persons concerns freedom from injury to the body and the mind, or bodily and mental integrity.<sup>78</sup> The Committee has made the point to confirm that Article 9 rights extend to "lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers."<sup>79</sup> The Committee explains that "[t]he term 'arrest' refers to any apprehension of a person that

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<sup>76</sup> Max Bearak, *These LGBT refugees came to Kenya seeking freedom. Now they say they've been imprisoned and abused.*, Wash. Post (March 19, 2019), <https://www.washingtonpost.com/world/2019/03/19/these-lgbt-refugees-came-kenya-seeking-freedom-now-theyve-been-imprisoned-abused/>.

<sup>78</sup> Human Rights Committee, *General Comment No. 35 on Article 9*, CCPR/C/GC/35 (Dec. 16, 2014). (citing *Wackenheim v. France*, Communication No. 854/1999 ¶ 6.3).

<sup>79</sup> *Id.*

commences a deprivation of liberty, and the term ‘detention’ refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.”<sup>80</sup>

In its last Concluding Observations, the Committee noted its concern of reports of arbitrary arrest of refugees for the purposes of extortion.<sup>81</sup> The Committee expressed further concern that the Constitutional provision requiring that all arrested persons be brought before a judge within 24 hours was not always followed. The Committee, as a result, recommended that the Government of Kenya increase reform efforts and that the 24-hour rule be “respected in all cases.”<sup>82</sup>

In its State Report, Kenya discussed police reforms as a “major agenda”<sup>83</sup> and cited efforts to promote the effectiveness and efficiency in the administration of justice.<sup>84</sup> The report cites to legislative and policy initiatives to protect arrested persons: the Persons Deprived of Liberty Act, the Bail and Bond Task Force, the Victim Protection Act, the Prevention of Torture Act, and habeas corpus cases heard by the courts.<sup>85</sup>

However, a disturbing pattern of arbitrary arrests and detentions has continued. In 2018, Amnesty International reported that refugees were still “disproportionately targeted in counter-terror operations and face arbitrary arrest, harassment, extortion, ill-treatment, forcible relocation within Kenya, and even deportation.”<sup>86</sup> Human Rights Watch reported that the lack of accountability of security forces’ perpetration of human-rights violations remains a major concern.<sup>87</sup> Reports that we have received from local community members indicate instances of LGBTQI+ refugees being arbitrarily arrested and extorted for sexual acts and financial payments. There are also reports of cases where those arrested are prevented from contacting anyone outside the detention facility and people are routinely held longer than the 24 hour maximum.

On this basis, all inquiries and evaluation of the State’s efforts to protect the rights to liberty and security must include a differential focus on the experience of LGBTQI+ individuals in Kenya, with particular consideration of especially marginalized groups such as LGBTQI+ non-citizens.

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<sup>80</sup> *Id.* at ¶ 13.

<sup>81</sup> 2012 *Concluding Observations*, *supra* ¶ 18. .

<sup>82</sup> *Id.*

<sup>83</sup> Kenya State Report, *supra* ¶ 87.

<sup>84</sup> *Id.* at ¶ 88.

<sup>85</sup> *Id.* at ¶¶ 90-96.

<sup>86</sup> Amnesty International, *Kenya: Global Compact on Refugees must be quickly anchored in national policy* (Dec, 24, 2018). <https://www.amnesty.org/en/latest/news/2018/12/kenya-global-compact-on-refugees-must-be-quickly-anchored-in-national-policy/>

<sup>87</sup> Kenya Events of 2018 Human Rights Watch (2019), <https://www.hrw.org/world-report/2019/country-chapters/kenya>.

**We respectfully urge the Committee to ask the Government:**

Please describe measures taken to prevent unlawful or arbitrary arrest of LGBTQI+ people by the police, as well as related abuses such as violence and extortion. Please identify the remedies that have been provided to victims of unlawful or arbitrary arrest and cases where arrested persons were brought before a judge.

Please describe measure taken to ensure the personal security of refugees in refugee camps.

**VI. RIGHT OF LIBERTY OF MOVEMENT AND FREEDOM TO CHOOSE RESIDENCE (Article 12)**

The ICCPR codifies the right to liberty of movement and freedom to choose a residence restricted only for reasons of national security, public order, public health or morals or the rights and freedoms of others.<sup>88</sup> The ICCPR and the General Comment on Article 12 explain the interrelatedness within other articles of the Covenant, such as Article 2 banning discrimination.<sup>89</sup> General Comment 27 on Article 12 articulates that no one shall be forced to overcome obstacles to move and further places a restriction on excessive applications for permission to seek alternative residence.<sup>90</sup>

The issue of freedom of movement is multifaceted and also involves the international community. The most recent review of Kenya's compliance with the Convention for the Elimination of Racial Discrimination (CERD) issued extensive recommendations on the treatment of refugees and asylum seekers but first praised the Kenyan Government for hosting refugees. CERD emphasized the need for the international community to increase their role in caring for refugees. Rights concerns by the Committee for the Elimination of Racial Discrimination included the restrictions on freedom of movement and the substandard conditions in the camp. Policy recommendations for the Kenyan Government were to develop "in consultation with the groups concerned and in partnership with the Office of the United Nations High Commissioner for Refugees and other relevant organizations, a long-term strategy for the durable solution of local integration of the refugees, especially with regard to education and access to decent livelihoods, as residence in camps does not represent a durable solution for their inhabitants."<sup>91</sup>

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<sup>88</sup> ICCPR, *supra* at art. 12.

<sup>89</sup> See Human Rights Committee, General Comment No. 27: Freedom of Movement, CCPR/C/21/Rev.1/Add. 9 ¶ 18 (Nov. 1, 1999). (reaffirming that the implementation of Article 12 must be consistent with the entire Covenant especially on the grounds of non-discrimination).

<sup>90</sup> *Id.*

<sup>91</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, ¶¶37-38.

The number of refugees living in the urban centers of Nairobi and Mombasa is estimated at up to 150,000.<sup>92</sup> The Government states in its 2019 Report that “[t]here is no impediment for foreigners who have obtained all necessary documentation to be in the country, to move and reside anywhere in Kenya.”<sup>93</sup> However, like other refugees, LGBTQI+ refugees face long and cumbersome hurdles when they attempt to obtain the necessary documentation to allow them the freedom to move. This impediment is especially grave for this population given the particular difficulties faced by people living in camps who identify or are identified as LGBTQI+.

The Kenyan Government has a heightened responsibility towards refugees in its territory as it has recently assumed authority over refugee status determination.<sup>94</sup> All of the changes implied by the transfer of authority has led to a problematic backlog of cases.<sup>95</sup> This in turn has the discriminatory effect of keeping asylum seekers from accessing health services, work, and education because they lack a refugee alien identification card.<sup>96</sup>

Kenya’s 2010 Constitution provides for freedom for all refugees to enter, remain, and reside anywhere in the country. However, since 2014, Kenya’s encampment policy “effectively prohibits refugees from leaving the camps.”<sup>97</sup> In contravention of international and national protections for the freedom of movement, Kenya’s new encampment policy requires refugees to have a movement pass to move beyond certain designated areas.<sup>98</sup> This policy makes those who do flee the camps especially vulnerable to harassment, exploitation, and violence by police or private individuals. The Humanitarian Policy Group has observed one of the most crucial consequences of this deprivation, which is that this “lack of freedom of movement fundamentally

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<sup>92</sup> Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf> (citing UNHCR, *Statistical Summary: Refugees and Asylum Seekers in Kenya as of 31 May 2019* (2019), <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2019/06/Kenya-Statistics-Package31-May-2019.pdf>; UNHCR, *Navigating Nairobi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in Kenya’s Capital City* (2011), UNHCR ¶ 26; Danish Refugee Council, *Kenya*, <https://drc.ngo/where-we-work/east-africa/kenya>).

<sup>93</sup> Kenya State Report, ¶ 100.

<sup>94</sup> For additional information, see African Centre for Migration & Society - University of the Witwatersrand & Samuel Hall, *Free and Safe Movement in East Africa: Research to promote people’s safe and unencumbered movement across international borders* 35 (2018).

<sup>95</sup> *Id.*

<sup>96</sup> See e.g. Norwegian Refugee Council, *Recognizing Nairobi’s Refugees: The Challenges and Significance of Documentation Proving Identity and Status* (2017), available at <https://www.nrc.no/resources/reports/recognising-nairobis-refugees--the-challenges-and-significance-of-documentationproving-identity-and-status/>.

<sup>97</sup> Sorcha O’Callaghan and Georgina Sturge, *Against the odds: refugee integration in Kenya*, 6 (HPG Working Paper) (December 2018); see also Robert Doya Nanima, *An Evaluation of Kenya’s Parallel Legal Regime on Refugees, and the Courts’ Guarantee of Their Rights*, 21 *Law Democracy & Dev.* 42, 54 (2017) (“The refugees are obliged to remain in areas, which have traditionally been insecure, where the rule of law is weak, and where the perpetrators of violence can act with a high degree of impunity.”).

<sup>98</sup> For additional information, see African Centre for Migration & Society - University of the Witwatersrand & Samuel Hall, *Free and Safe Movement in East Africa: Research to promote people’s safe and unencumbered movement across international borders* 40-41 (2018).

curtails their ability to access employment.”<sup>99</sup> A lack of documentation also causes people to live in fear and restricts their ability to access goods and services such as banking.

An extensive study by the Norwegian Refugee Council and the Harvard International Human Rights Clinic has documented that refugees have had increasing problems obtaining documentation for internal travel since 2014.<sup>100</sup> This report found four key factors in the process conducted by the Kenyan Government’s Refugee Affairs Secretariat that ought to be addressed: 1) stalled or suspended registration and registration processes; 2) process inconsistencies; 3) lack of clear information; and 4) burdensome administrative issues and travel costs associated with registration processes.<sup>101</sup>

The 2017 study reported that over the previous five years, Kenyan authorities had added layers of complexity to the process, making it more difficult for refugees to access documentation. Bureaucratic inefficiencies in assessing refugee claims result in unnecessary delays in resettlement. Nongovernmental leaders have reported that UNHCR and Kenyan Government officials used to consult on a working committee to coordinate. Unfortunately, the Kenyan Government has added bureaucratic steps – the current procedure is that UNCHR submit requests for resettlement, and multiple Kenyan Government agencies need to approve various statuses.

LGBTQI+ refugees face unique and additional obstacles in terms of life within a refugee camp. For that reason, in the Kakuma camp there is a separate physical space for LGBTQI+ refugees. The reasoning behind this solution is that officials have to date been unable to guarantee the safety of LGBTQI individuals from attacks within the camp. In some cases, LGBTQI+ refugees in Kakuma have been relocated outside of the camp due to safety concerns. In December 2018, for example, LGBTQI+ individuals were attacked following the pride parade in Kakuma. Following the attacks, UNHCR transported individuals to Nairobi with the intention of keeping them safe. However, living conditions in Nairobi are also very difficult for LGBTQI+ non-citizens. In its October 2019 report, the Women’s Commission on Refugees concluded, “[a]lthough Nairobi is comparatively more tolerant than Kakuma or Kampala, refugees still grapple with homophobia and transphobia, insecurity, exploitation, harassment, and violence.”<sup>102</sup>

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<sup>99</sup> O’Callaghan & Sturge, *supra* at 6.

<sup>100</sup> Norwegian Refugee Council and International Human Rights Clinic at Harvard Law School, *Recognising Nairobi’s Refugees: The Challenges and Significance of Proving Identity and Status* (November 2017), [https://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees\\_nrc\\_ihrc\\_november2017\\_embargoed.pdf](https://hrp.law.harvard.edu/wp-content/uploads/2017/11/recognising-nairobis-refugees_nrc_ihrc_november2017_embargoed.pdf) .

<sup>101</sup> *Id.*

<sup>102</sup> Women’s Refugee Commission, “*We Have a Broken Heart*”: *Sexual Violence against Refugees in Nairobi and Mombasa, Kenya* (October 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/SVMB-Kenya-Report-10-2019-FINAL.pdf>.

For refugees who are not safe in the camp, the lack of freedom of movement guaranteed by an urban refugee policy seriously endangers their safety. Current limits on travel outside camp are that to move beyond 25 km from the camp, a refugee must have approval, which is difficult to get. Our interviews suggest that there are only three common reasons why permission is granted: if medical attention is not available at camp; if education not available at camp; or at the prerogative of UNHCR. Security concerns inside the camp fall under the third and the most common request by LGBTQI+ refugees is to move to Nairobi or other urban centers.

Despite the glaring deficiencies in protection of LGBTQI+ Kenyans from interference of their freedom of movement, Kenya's most recent state report discusses the proposed amendments to the 2017 Refugee Bill. The bill only applies to refugees that have valid identification paperwork. As of the drafting of the Government's report to this Committee, the President had referred the bill back to Parliament for further review and public participation and the lawmakers were reviewing the bill.<sup>103</sup> Since then, the Refugee Bill 2019 was gazetted through the Kenya Gazette Supplement No 126 (National Assembly Bills No 62).<sup>104</sup>

A robust Refugee Bill would be an important step in advancing refugee rights, however it is critical that a gender and sexual orientation lens is prominent and cross-cutting.

**We respectfully urge the Committee to ask the Kenyan Government:**

1. Please provide information on the number of travel passes the Kenyan Government has issued for LGBTQI refugees and the criteria for issuing the passes.
2. To improve the treatment of LGBTQI+ refugees, what steps can the Kenyan Government take to restore urban refugee policy and where advisable facilitate movement from Kakuma to urban areas for security, employment and mental health reasons.

**VII. RELIGION (Article 18)**

This Committee has read Articles 18 and 20 together to mean that “no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>105</sup> States party to the ICCPR have the obligation to prohibit such acts and to take measures to eradicate harmful stigmas and stereotypes that fuel discrimination and violence.

Politicians in Kenya turn to religious institutions to popularize themselves with voters, and frequently make speeches there<sup>106</sup>These speeches often include homophobic rhetoric, that drive

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<sup>103</sup> Kenya State Report, *supra* at ¶ 62.

<sup>104</sup> Available at: [http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019\\_compressed.pdf](http://www.parliament.go.ke/sites/default/files/2019-08/Refugees%20Bill%2C%202019_compressed.pdf).

<sup>105</sup> Human Rights Committee, General Comment 22 CCPR/C/21/Rev.1/Add. 4 at ¶ 7.

<sup>106</sup> RESEARCH ON THE LIVED EXPERIENCES OF LESBIAN, BISEXUAL AND QUEER WOMEN IN KENYA, *supra* at 15.

LGBTQI+ congregants away.<sup>107</sup> For example, in 2015 Deputy President William Ruto said that there was “no room for gays” in Kenya during a political speech to a church.<sup>108</sup> One report described this as “Africans in power spreading hate in church on a Sunday.”<sup>109</sup> There are also reports that religious and political leaders coordinate to attack the LGBTQI+ community, which has resulted in the beating of SOGI individuals.<sup>110</sup> When added to the xenophobic statements made by politicians, this experience is likely amplified for LGBTQI refugees.<sup>111</sup>

**We respectfully ask the Committee to ask the Kenyan Government:**

Please inform the Committee of efforts by the Kenyan Government to prevent, counteract or censure manifestations of religion or belief that incite or promote violence and discrimination against LGBTQI+ individuals and/or refugees including exclusion from religious spaces.

**CONCLUSION**

We urge the Committee to take into special consideration the particular human rights situation of diverse groups of LGBTQI+ individuals in Kenya, including both native Kenyans and non-citizens. An explicit inclusion of a sexual orientation and gender identity lens in the List of Issues will facilitate a robust and constructive review and open the dialogue to marginalized sectors.

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<sup>107</sup> *Id.*

<sup>108</sup> ‘No Room’ for Gays in Kenya, Says Deputy President, *Reuters* (May 4, 2015), <https://uk.reuters.com/article/uk-kenya-gay/no-room-for-gays-in-kenya-says-deputy-president-idUKKBN0NP10620150504>.

<sup>109</sup> *Id.*

<sup>110</sup> Gay and Lesbian Coalition of Kenya, *Kenya’s Anti-Gay Laws Hurting the LGBQ Community* (Oct. 17, 2016), <https://www.galck.org/kenyas-anti-gay-laws-hurting-the-lgbq-community/>.

<sup>111</sup> Daniel Mumbare, *Politicians Fuel Xenophobic Sentiments in Kenya, Ivory Coast and Mauritania*, *Africa News* (Jan. 7, 2019), <https://www.africanews.com/2019/07/01/politicians-fuel-xenophobic-sentiments-in-kenya-ivory-coast-and-mauritania/>; see also Amina Wako, *Tanzania Summons Kenyan Envoy Over MP’s ‘Xenophobic’ Remarks*, *The East African* (June 26, 2019), <https://www.theeastafrican.co.ke/news/ea/MP-Njagua-remarks-cause-storm-in-Tanzania-/4552908-5171916-lhxcsez/index.html>.