



ADF INTERNATIONAL

*ECOSOC Special Consultative Status (2010)*

UNIVERSAL PERIODIC REVIEW – THIRD CYCLE

**Submission to the 35<sup>th</sup> Session of the Human Rights  
Council's Universal Periodic Review Working Group**

**July 2019, Geneva, Switzerland**

**KENYA**

**Submission by:**

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## Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people before national and international institutions. As well as having ECOSOC consultative status with the United Nations (registered name “Alliance Defending Freedom”), ADF International has accreditation with the Organization of American States, the European Commission and Parliament, and is a participant in the FRA Fundamental Rights Platform.

This report examines restrictions to the exercise of the right to freedom of religion and belief in Kenya, caused by the activities of terrorist groups within the country. It also underscores the need to implement measures aimed at protecting the right to life of all from conception to natural end.

### (a) Freedom of Religion or Belief

2. Kenya is a majority Christian country. The Muslim population sits at under 10%, while Hindus, Sikhs, and Bahai account for less than 2% of the population. Much of the remaining 4-5% of the population adhere to various traditional religious beliefs.<sup>1</sup>
3. While Christians comprise 80% of the population, they find themselves in danger on account of their faith at the hands of extremist groups. In particular, Somali-based militant group Al-Shabaab – one of the four deadliest terror organisations worldwide<sup>2</sup> – have particularly targeted this faith group in violent attacks during the reporting period.
4. In January 2019, al-Shabaab launched an attack on an upscale hotel complex in Nairobi, killing 21 people. In a statement, the group declared that the violence was in response to religiopolitical developments in Israel.<sup>3</sup> In October 2018, the group militants hurled an explosive device into the housing of Christian teachers at a local secondary school, killing two.<sup>4</sup> In April 2015, the same group targeted Garissa University, bursting into student dormitories with open fire in what was deemed the deadliest attack on Kenya in the 21<sup>st</sup> century.<sup>5</sup> Captured students were separated out into faith groups, with 148 Christians being singled out for execution.<sup>6</sup>
5. Other militant groups, such as the Mombasa Republican Council (MRC) have been linked to the radicalization and mobilization of coastal minorities.<sup>7</sup> Similarly, the al’Hijra movement (also known as the Muslim Youth Center (MYC)) has emerged with a twofold aim: to respond firstly to the perceived marginalization of young Muslims, and secondly, to grievances connected to Kenya’s invasion of Somalia. Linked to al-

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<sup>1</sup> Open Doors, *Country Dossier: Kenya* (Report, 2019) 4.

<sup>2</sup> Dominic Dudley, ‘The deadliest terrorist groups in the world today’ *Forbes* (5<sup>th</sup> December 2018).

<sup>3</sup> Halima Gikandi, ‘The group behind Nairobi’s recent terror attack recruits young people from many faiths. Officials can’t stop it.’ *PRI* (25 January 2019).

<sup>4</sup> Doreen Ajiambo, ‘In Northern Kenya, al-Shabab militants target Christian teachers’ *Religion News Service* (14 January 2019).

<sup>5</sup> Siobhán O’Grady, ‘For Kenyans, militant group al-Shabab is a deadly threat that won’t back down’ *The Washington Post* (15 January 2019).

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

<sup>7</sup> Open Doors, cited above (n1).

Qaeda and al-Shabaab, the group has claimed responsibility for several violent attacks throughout the country.<sup>8</sup>

6. Al-Shabaab's attacks have been particularly grievous due to their exploitation of the country's refugee system. This system takes responsibility for over 473,000 migrants fleeing persecution,<sup>9</sup> placing Kenya as the tenth largest refugee-hosting country in the world, and fourth-largest in Africa.<sup>10</sup> Militant cells are known to be hiding within the Dadaab Refugee Camp on the Kenyan-Somali border; recruiting unemployed youths primed for radicalization, and attacking the Christians who left their Somali homes to flee that very same danger. The preservation of a strong, safe and efficient refugee system is of paramount importance, given that Somalia's output of 809,273 refugees places it as the 6<sup>th</sup> largest producer of refugees worldwide, with almost one third of such migrants fleeing to Kenya.<sup>11</sup> Indeed, Somalia ranks 3<sup>rd</sup> on the World Watch List of countries in which Christians are most persecuted for their faith; thus highlighting the significance of tackling faith-based violence in their place of refuge.<sup>12</sup>
7. While the terrorist threat within Dadaab Camp is genuine, a solution must be found that not only ensures national security, but also the protection of incoming migrants fleeing their homes due to a well-founded fear of religious persecution.
8. Meanwhile in the coastal city of Mombassa, Muslim minority groups based in under-developed urban areas face societal hostility and political and economic exclusion, thus leaving their youth prey to radicalisation.<sup>13</sup> Al-Shabaab have fanned local tensions by proppagating historic narratives of land-occupation grievances, and linking them to competition against Christians over economic opportunities today.<sup>14</sup> Religious tensions between Christian and Muslim groups have erupted in violent clashes between criminal gangs as well as militant groups, resulting in the targeted assassinations of religious leaders on each side.<sup>15</sup>

#### **(b) Right to life**

9. Kenya's constitution affirms the right to life of every person from conception until natural death.<sup>16</sup> Abortion is not permitted except for when, "in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother

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<sup>8</sup> *Id.* 4-5.

<sup>9</sup> UN High Commissioner for Refugees (UNHCR), *Kenya Operational Factsheet* (March 2019).

<sup>10</sup> Alexander Betts, Naohiko Omata and Olivier Sterck, *Refugee Economies in Kenya* (Report, Oxford: RSC 2018) 6.

<sup>11</sup> UNHCR, 'Horn of Africa Somalia Situation' <<https://data2.unhcr.org/en/situations/horn>>; Chris Huber and Kathryn Reid, 'Forced to Flee: Top Countries Refugees are Fleeing From' *World Vision* (Press Release, 14 May 2019).

<sup>12</sup> Open Doors, *World Watch List 2019* (Report, 2019).

<sup>13</sup> Tom Jackson, 'Al-Shabaab Capitalises on Muslim Grievances in Kenya' *Institute for Global Change* (3<sup>rd</sup> October 2014).

<sup>14</sup> International Alert and Kenya Muslim Youth Alliance (KMYA), *We Don't Trust Anyone: Strengthening Relationships as the Key to Reducing Violent Extremism in Kenya* (Report, 2016) 13-15.

<sup>15</sup> *Id.* 18.

<sup>16</sup> Constitution of Kenya, Art. 26.

is in danger.”<sup>17</sup> A 2019 High Court ruling interpreted that such laws encompass the permissibility of abortion in circumstances of rape.<sup>18</sup>

### *The right to life in international law*

1. Kenya ratified both the International Covenant on Civil and Political Rights (ICCPR) in 1972, and the Convention on the Rights of the Child (CRC) in 1990. In 2008, it also ratified the Convention on the Rights of Persons with Disabilities (CRPD).<sup>19</sup>
2. Article 6(1) of the ICCPR stipulates that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”<sup>20</sup>. The ICCPR’s prohibition of the death penalty for pregnant women implicitly recognizes the right to life of the unborn.
3. Although the ICCPR allows for the death penalty to be imposed on both adult men and women, it explicitly prohibits applying the death penalty to pregnant women. Article 6(5) states that the “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”<sup>21</sup> This clause must be understood as recognizing the unborn child’s distinct identity from the mother and protecting the unborn child’s right to life.
4. The travaux préparatoires of the ICCPR explicitly state that “the principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child”<sup>22</sup>. Similarly, other early UN texts note that the intention of the paragraph “was inspired by humanitarian considerations and by consideration for the interests of the unborn child”<sup>23</sup>.
5. The protection of unborn life is also found through an ordinary reading of the language in the preamble of the Convention on the Rights of the Child (CRC). The preamble states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>24</sup>
6. Article 1 of the CRC defines a child as “every human being below the age of eighteen years.”<sup>25</sup> This provides an upper limit as to who is a child, but does not provide a lower limit on when the status of “child” attaches. Moreover, Article 6 of the CRC holds that

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<sup>17</sup> *Id.*

<sup>18</sup> Sarah Bowler, ‘Kenya High Court: Women experiencing trauma of rape have a ‘right’ to abortion’ *Live Action* (9 July 2019) <<https://www.liveaction.org/news/kenya-high-court-trauma-rape-right-abortion/>>.

<sup>19</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR), ‘Status of Ratification Interactive Dashboard’, *OHCHR*, <<http://indicators.ohchr.org/>>.

<sup>20</sup> International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 6.

<sup>21</sup> *Id.*

<sup>22</sup> A/C.3/SR.819 ¶¶17, 33;; In accordance with the Article 32 of the Vienna Convention, the travaux préparatoires are considered to be a “supplementary means of interpretation.”

<sup>23</sup> 6 Commission on Human Rights, 5th Session (1949), 6th Session (1950), 8th Session (1952), A/2929, Chapter VI Art 10.

<sup>24</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), preamble.

<sup>25</sup> CRC (n29) Art 1.

“States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>26</sup> Viewed in the context of the preamble, both Articles 1 and 6 of the CRC indicate recognition and protection of unborn life.

### *Maternal health*

7. According to the World Health Organization, Kenya was among the 10 countries that comprised 58% of all global maternal deaths in 2015.<sup>27</sup>
8. Access to high quality midwifery care has been recommended by global health studies as a key solution to preventable maternal and neonatal deaths.<sup>28</sup> Laudably, the Kenyan government has abolished out-of-pocket fees for skilled delivery in all public health facilities since 2013. Such action doubtlessly contributed to the country’s maternal mortality rate falling from 540 deaths per 100,000 live births in 2013, to 510 deaths per 100,000 live births in 2015.<sup>29</sup> While there is still much room for improvement, this is a positive step in the right direction for caring for women and neonates. Experts advise better publicizing the availability of this service; eradicating delays in referral systems; and improving transport to and from the facilities in order to contribute further to reducing the maternal mortality rate. Furthermore, the availability of essential pregnancy-related supplies at maternal healthcare clinics must be improved, including *inter alia* the provision of oxytocin and magnesium sulfate injectables.<sup>30</sup>
9. Pro-abortion activists argue that liberalizing abortion laws is necessary to respect and fulfill women’s human rights, and that, for the sake of improving maternal health and reducing maternal mortality, Kenya should fully decriminalize abortion and make it available on demand. However, women who receive abortions will still face the same poor conditions faced by women who give birth and deal with similar complications, such as bleeding and infection. Providing more access to abortion will mean more women will suffer from abortion complications.
10. Attention focused on the legalization of abortion detracts from the need to further invest in quality obstetric care, nurse-practitioners and medical provisions for Kenyan women, particularly in remote and poor areas. Haemorrhage, hypertensive disorders and sepsis account for more than half of maternal deaths throughout the country.<sup>31</sup> Furthermore,

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<sup>26</sup> CRC (n29) Art 6.

<sup>27</sup> Véronique Filippi et al., ‘Level and Causes of Maternal Mortality and Morbidity’ in R E Black et al. (eds) *Reproductive, Maternal, Newborn and Child Health: Disease Control Priorities* 3<sup>rd</sup> ed. (The International Bank for Reconstruction and Development & The World Bank, 2016) 5.

<sup>28</sup> Britt McKinnon et al., ‘Removing user fees for facility-based delivery services: a difference-in-differences evaluation from ten sub-Saharan African countries’ (2015) 30, 4 *Health Policy and Planning* 432-441.

<sup>29</sup> World Bank, ‘Maternal Mortality Ratio’

<<https://data.worldbank.org/indicator/SH.STA.MMRT?end=2015&locations=KE&start=1990&view=chart>>.

<sup>30</sup> C M Gitobu et al., ‘The effect of Kenya’s free maternal health care policy on the utilization of health facility delivery services and maternal and neonatal mortality in public health facilities’ (2018) 18,77 *BMC Pregnancy and Birth*.

<sup>31</sup> Annetta Gacheri, ‘Tackling High Maternal Deaths in Kenya’ (Policy Brief, SECURE Health Programme 2016).

abortion can never be safe because it takes the life of the unborn child, and harms the mother through the loss of her child.

11. Therefore, Kenya must focus on introducing further measures to reduce recourse to abortion, instead of focusing on legalizing it, in line with paragraph 8.25 of the Program of Action of the International Conference on Population and Development.<sup>32</sup> Measures to reduce recourse abortion include improving access to education, which empowers women and leads to social and economic development.

### **(c) Recommendations**

In light of the aforementioned, ADF International suggests that the following recommendations be made to Kenya:

- a. Ensure that the right to freedom of religion or belief is fully protected and promoted;
- b. Continue efforts to ensure that all of Kenya's religious communities, and particularly Christians, are able to practice their religion without fear of persecution by terrorist groups;
- c. Take steps to dissolve inter-religious tensions by promoting an atmosphere of tolerance and respect for religious diversity; advancing peaceful co-existence and guaranteeing religious freedom for all by facilitating and supporting interfaith dialogue;
- d. Intensify cooperation at both the national and international level in order to guarantee effective protection of the human rights of refugees and asylum seekers, including those fleeing from religious persecution;
- e. Address root causes of religious radicalization by improving conditions to promote tolerance towards and among religious communities, including through education and public-awareness programmes;
- f. Continue to improve maternal health-care access for women from poor and rural backgrounds, in order to reduce the maternal mortality rate.

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<sup>32</sup> United Nations Population Fund (UNFPA), 'Programme of Action of the International Conference on Population and Development: 20<sup>th</sup> Anniversary Edition' *International Conference on Population and Development* (2014) 89.



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