

CENTRE ON
HOUSING RIGHTS
AND EVICTIONS



Civil and Political Rights in Kenyan Informal Settlements

Submission to Human Rights Committee

Articles 2, 3, 6, 7, 9, 17, 23 and 26

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1. Introduction

The Centre on Housing Rights and Evictions (COHRE) is an international non-governmental organisation mandated to protect and promote housing rights throughout the world. COHRE has special consultative status with the Economic and Social Council of the United Nations (UN) as well as Observer Status with the African Commission on Human and Peoples' Rights.

Since the *majority* of urban Kenyans live in informal settlements in slum-like conditions,¹ their precarious legal, social and economic position has made them particularly vulnerable to violations of the International Covenant on Civil and Political Rights. And while those living in informal settlements, mostly tenants, have no positive right under current Kenyan law to reside on the land, they have in almost all cases no alternative option since informal settlements represent the only means by which they can realise their civil and political rights, in particular rights to life and security of person, in the absence of sufficient formal housing stock. Moreover, the Kenyan authorities have acquiesced in, and many government officials have profited from, the development of the informal settlements. Since the informal settlements are home to millions of Kenyans, it is critical that the rights under Article 17 to the protection of the home and other relevant provisions of the ICCPR are fully respected in Kenya.

A fact-finding mission to Kenya was undertaken by COHRE in July 2004 in order to, *inter alia*, investigate threats of mass forced evictions in the informal settlements of Nairobi. The COHRE fact-finding team focused in particular on the settlement of Kibera, where pending evictions were announced in January and February 2004. The mission also interviewed residents in Raila village of Kibera whose homes had been demolished without due process or redress on 8 February 2004, three weeks before a suspension of evictions was announced on 1 March 2004. In addition to the issue of mass forced evictions, COHRE examined the closely related issues of access to water and sanitation, rights of women to housing and land, rights of Nubian community to land in Kibera, harassment of tenants and participation rights within housing programmes.

In the opinion of COHRE, there is evidence of a determination in the new government, which replaced the Moi administration in early 2003, to tackle the many socio-economic problems facing Kenya. However, as land and housing officials openly acknowledge, there is a great deal that still has to be done.²

A draft fact-finding mission report was presented to Government Ministries in December 2004 and COHRE held a consultation meeting with the Ministry of Lands and Housing on 9 November 2004. While COHRE has received some positive responses, it does not yet feel

¹ In 1983, it was estimated that 35 per cent of all urban households lived under slum conditions in informal settlements. In 1993, the figure was calculated to be 55 per cent of a proportionately much larger population. The Government acknowledges that, in the settlement of Kibera for example, 'About 94 per cent of the households lack basic physical and social infrastructure and security of tenure.' Government of Kenya, 'Kibera-Soweto Slum Upgrading Project', December 2004 at 1.1. See discussion under Article 6 on conditions in slums.

² Meeting of COHRE with Ministry of Lands and Housing, 9 November 2004. *See also* Government of Kenya, 'Kibera-Soweto Slum Upgrading Project', December 2004 at 1.1.

that the situation is satisfactory or in compliance with the International Covenant on Civil and Political Rights. COHRE's full report is due to be released on 1 March 2005.

2. Constitutional and domestic legal framework (Art. 2 of the Covenant)

Since the International Covenant on Civil and Political Rights (ICCPR) has not been incorporated into the constitutional and domestic legal framework of Kenya, difficulties remain in invoking these rights in Court, although the application of the fundamental rights in the constitution, and the Children's Act,³ are yet to be fully tested.

For example, cases relating to protection against arbitrary interference with the home have been relatively unsuccessful in Kenya. Courts often display a tendency to only examine whether procedures for an eviction conforming with national legislation were followed, as opposed to the fundamental constitutional right of Kenyans to the 'protection for the privacy of his [or her] home'.⁴

During the mass eviction threat of February 2004, two cases were separately launched. In the first case, *Nderu & Others v Kenya Railways Corporation*,⁵ the High Court at first instance granted an injunction against the eviction, but only to the effect of extending the 30-day notice period by an additional ten days. This ruling cannot be considered consistent with the two elements of Article 17 ICCPR – or the aforementioned constitutional right to protection of the home – for the following reasons. First, the eviction was *unlawful under domestic law*, as the provisions of the National Railways Act were not followed and the Provincial Administration, the authority given the responsibility of physically evicting residents, does not have legal authority to carry out such activities.⁶ Second, the eviction notice was *arbitrary* since the residents and traders had lived and operated on the railway lands in Kibera for up to 20 years in some cases; there was no consultation with residents, including consideration of alternatives to the eviction; no compensation for loss of property;⁷ and no accounting for

³ In *Nyumbani Children's Home & Anr. v Education Minister & Anr.* (9 January 2004) children from a children's home living with HIV/AIDS sued the government in the Kenyan High Court over discriminatory practices displayed by some public schools, 'which adamantly and unreasonably refused to admit children living with HIV.'³ Following the Court's direction that counsel, education officials and representatives from the children's home should meet and work out an amicable solution in the best interest of the children, a consent agreement was reached under which all the children were granted places in public schools: see 'Landmark Suit a Big Victory for the Kenyan Child', *The Children Act Monitor*, January 2004, Issue No, 0013/04.

⁴ See, Opiata Odindo, 'Litigation and Housing Rights in Kenya' in Malcolm Langford and Bret Thiele (eds.) *Current Issues in Litigation of Economic, Social And Cultural Rights* (forthcoming University of NSW Press, 2005).

⁵ (Civil Suit. No. 189 of 2004, High Court of Kenya).

⁶ COHRE conducted an interview with the Provincial Commissioner, the official responsible for the oversight of the Provincial Administration. He was clear that officials under his authority had no mandate to allocate land or to carry out evictions without authority. It is noted that the Provincial Administration under the Chiefs' Act 1998 has no express authority to carry out evictions.

⁷ It is notable that the European Court of Human Rights recently ruled that the property of informal dwellers – for example structures - was protected under Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms. In *Önerildiz v. Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002, compensation was awarded to the settlers due to the failure of the government to protect their possessions from a methane gas explosion. Pecuniary damages of 4,000 euros were awarded to the individual applicant. The Constitution of Kenya prohibits deprivation of property in Article 70.

the fact that most residents would be left homeless as a result of the order. It was estimated at the time that up to 108,000 persons would be evicted from railway lands in the Kibera settlement.⁸

In an almost identical case affecting another informal settlement, the High Court in the Lugari District was, however, prepared to consider these arguments during the application for an injunction. The Court concluded in *Kirwa and Nine Ors v. Kenya Railways Corporation*⁹ that

The plaintiffs [residents] are likely to establish that the notice was issued unprocedurally and unlawfully. They are also likely to establish at the hearing of suit that the notice was arbitrary and unreasonably inadequate.¹⁰

However, the Kenya Railways Corporation was not represented at the hearing so it is difficult to determine the direction of future jurisprudence.

3. Provision of effective remedies; impunity (Art. 2)

The difficulties of obtaining judicial remedies, including those consistent with human rights standards, have been noted above. While Kenya has taken positive steps with the creation of

⁸ The figure was later revised downwards as NGOs were given more time to assess the situation: see Centre on Housing Rights and Evictions, *Listening to the Poor: Housing Rights in Nairobi*, (forthcoming 2005).

⁹ Civil Suit No. 65 of 2004, High Court of Kenya – Bungoma).

¹⁰ The court went on to state:

The Managing Director of the defendant should have heard the plaintiffs before issuing the notice. It should be noted that human compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

I am of the view that squatters who settled and have been in existence for a long time, say for twenty years or more, and who have improved and developed the land on which they stand is required for a public purpose, in which case, alternative site or accommodation should be considered. Of course the land which the plaintiffs occupy is owned by the defendant. It is required by the Respondent for the use provided for under the Kenya Railways Corporation Act.

From the above analysis and findings it is in my humble view that the plaintiffs have established that they have prima facie case with a probability of success....

[I]t is clear that plaintiffs are likely to suffer irreparable loss. No one can quantify the amount of loss when children miss the benefit of free primary education or when their homes are demolished and their parents are evicted from the only known home....

The applicants have shown in their averments that they have ploughed their farms and have even planted crops on it. They have also shown that they have been in occupation of the railway land reserve for over 30 years and the owner has not disturbed them.

It has also been shown by the notice issued that the Defendant [Railways] did not attach any reasons to it. I find that the plaintiffs are likely to be more inconvenienced if the order of injunction is not granted.

The other matter which has struck my attention is that the conduct of the defendant has not been impressive. They have allowed the plaintiffs to occupy its land for a period of over 30 years without removing them. Why would it now give such citizens a 30 days notice to remove what they have invested for such a length of time? Why has the defendant failed to comply with Section 16 (3) of the Kenya Railways Corporation Act?

the Kenya National Commission on Human Rights (the Commission) in 2003,¹¹ a number of obstacles remain.

The newly-established Commission has powers to receive complaints and is able to institute procedures which may lead to timely provision of remedies. After receipt of a complaint, the Committee may, in its discretion, call for information from the government and institute an inquiry into the complaint.¹² If the inquiry discloses a violation of human rights, the Commission can recommend to the relevant authority that persons be prosecuted or that other appropriate action be taken against such authorities; commence legal proceedings in its own name before the High Court; or recommend to the claimant a course of action other than judicial proceedings.¹³

Yet, the ability of the Commission to respond effectively is largely dependent on its resources, and these are unfortunately very limited. The Commission has yet to initiate a single inquiry, even though it has received thousands of complaints. Without sufficient resources, the Commission is unlikely to take up worthy cases; or it may close initial investigations after receiving an ostensibly satisfactory response from the government.

One of the other major obstacles in access to justice is intimidation of victims. For example, the 1,000 - 2,000 victims of the Kibera demolitions of 8 February 2004 initially approached lawyers to take their case to Court, in order to seek compensation and adequate resettlement. However, intimidation by youth 'militia' associated with the Ministry that carried out the eviction resulted in the former residents withdrawing under duress their instructions to their lawyers to file a claim. Former residents, many now destitute, have so far been provided with no assistance by the government: See further below in discussion under Article 17.

4. Gender equality, discrimination (Arts. 2(2), 3, 23(4) and 26)

4.1 Women

4.1.1 Lack of Women's Land and Housing Rights

Customary laws and practices, traditionally held beliefs of patriarchy, and inadequate and discriminatory laws combine to create a highly unequal system of land and housing distribution. The UNDP Human Development Report of 2001 cites women's insecure property rights as a major cause of Kenya's economic troubles, contributing to low agricultural production, food shortages, underemployment and little income for most rural residents.

Informal settlements in Nairobi are therefore often home to thousands of women who were driven by in-laws out of their rural and urban homes and land upon the death of their husband. In two separate missions to Kenya, as well as through research on women's

¹¹ The Kenya National Commission on Human Rights Act, 2002.

¹² Section 22, The Kenya National Commission on Human Rights Act, 2002.

¹³ Section 25, The Kenya National Commission on Human Rights Act, 2002.

inheritance rights in sub-Saharan Africa,¹⁴ COHRE found that family pressure, social stigma, physical threats and often extreme violence directed at the widow force her to seek shelter elsewhere, often with children. In addition, a Human Rights Watch (HRW) report on Kenya states:

Adhiambo Nyakumabor, whose husband died of AIDS in 1998, and left her HIV positive with five children, went from being relatively affluent to destitute after her husband's family took her property. Her in-laws grabbed household items from her Nairobi home and took over her house and land on the island of Runisga, even though Nyakumabor helped pay to construct the house. Soon after her husband's death, Nyakumabor's father-in-law called a family meeting, told her to choose an inheritor, and ordered her to be cleansed by having sex with a fisherman. Nyakumabor refused, causing an uproar. She felt ostracized and went to Nairobi ... She now struggles to meet her family's needs and her landlord in Nairobi's Kibera slum has threatened to evict her because she cannot always pay the rent on time.¹⁵

Property grabbing takes places regardless of age (girls are commonly denied any share in their father's estates), and affects all economic classes.

Women are still subjected to discriminatory widowhood practices such as 'widow inheritance' or 'widow cleansing', especially prevalent in western Kenya, and in particular ethnic groups. In such case, widows are told that unless they undergo such rituals, they will not be allowed to stay on their matrimonial house and land. Widow inheritance refers to a union of the widow and a male relative of the deceased and widow cleansing refers to the forced sex between the widow and a man paid to have sex with her, which is thought to cleanse her of her dead husband's spirit. It has been reported that one in three women in western Kenya is forced to undergo the cleansing process.¹⁶ Even undergoing such practices, however, does not ensure a widow housing and land. Indeed, many stories exist where women underwent the process but were still pressured off the land. It should be noted that there is no such practice for widowers. In addition to being contrary to Article 26, and Article 2(2) and 3 read in conjunction with Article 23(4), these practices are inconsistent with the right to security of the person, guaranteed under Art. 9 of the Covenant. In so far, as these practices create a high risk of women contracting life-threatening diseases such as HIV/AIDS, they also violate Art. 6.

Besides the impact on a women's rights to security of person and the enormous health risks, such practices are also symptomatic of a much larger issue, that of women being seen as property and thus not worthy of themselves owning property. This is a prevailing attitude in Kenya, one found even in the Courts and among government officials. Human Rights Watch reports: 'A government appointed senior chief in Kajiado district spelled out

¹⁴ The Women and Housing Rights Programme (WHRP) of COHRE travelled to Nairobi in February 2003 and January 2005 to conduct interviews with women in Mathare slum, as well as to meet with women's rights NGO's concerned with these matters. COHRE has been working closely with Education Center for Women's Development, ECWD, a Nairobi based NGO on the issue of inheritance rights in Kenya.

¹⁵ Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003) page 22. All names used in the report are not the interviewees real names for privacy reasons.

¹⁶ Beatrix Nyakisumo, "A vile custom that must go", *Africanews*, May 1997, online http://www.peacelink.it/afrinews/14_issue/p6/html (retrieved January 14, 2002, as reported by Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003) page 13.

women's status as chattel: 'A woman and the cows are a man's property.'¹⁷ The Human Rights Committee has previously stated that the right to equal legal capacity, as set forth in Article 16, means that 'women may not be treated as objects to be given together with the property of the deceased husband to his family.'¹⁸

The HRW report goes on to explain that officials, whether police or government, do not like to get involved in women's property rights cases, rather leaving that as a personal and 'normal' matter, not one that requires legal attention.¹⁹

COHRE met with several women who had been disinherited and were now residing in Mathare slum. Each one stated that local officials, traditional leaders and police ignored their pleas. One woman reported that a local lawyer attempted to help some women with their inheritance rights cases, but was later killed, reportedly for this action. The local police took no action to investigate the murder.²⁰ In interviews with some Kenyan women's rights NGO's, allegations were made that Courts are biased in their handling of women's inheritance and property dispute cases.²¹

It is not clear that the government has taken sufficient action to eliminate this discrimination against women in law and in fact. The current Constitution, while outlawing discrimination on the basis of gender, goes on to permit discrimination in certain customary laws, including among other things, 'devolution of property on death or other matters relating to personal status.'²² This is clearly incompatible with the ICCPR, in particular Article 23(4) which provides that governments must guarantee the equal rights of spouses as to marriage, during marriage and at its dissolution.

The Constitution of Kenya is currently under review and we welcome the draft of the Constitutional Review Commission which provides: 'Women and men have an equal right to inherit, have access to and manage property' and 'Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.'²³ Despite promises by the President of Kenya to introduce this new constitution by 30 June 2004, there is no indication as to when the new constitution will be adopted.

Equally problematic, the Law of Succession, which is meant to provide housing and land to the surviving spouse, holds certain exceptions for women that have a discriminatory effect on women. For instance, property rights in the marital property terminate at the remarriage of the surviving widow, but not at the remarriage of the surviving widower. Thus, men have

¹⁷ Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003) page 34.

¹⁸ Human Rights Committee, General Comment No. 28 Equality of rights between men and women (article 3) UN Document CCPR/C/21/Rev1/Add.10 (2000) Paragraph 9.

¹⁹ Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003) page 36.

²⁰ As reported by Pamela (name changed upon request), a woman living in Mathare slum, COHRE Interview, 15 January 2005.

²¹ COHRE interview with Ann Njogu, Centre for Rehabilitation and Education of Abused Women, Nairobi, February 2003.

²² Constitution of Kenya Article 82(4), last amended 1998.

²³ Sections 37(2) and (3).

greater rights under this Act, in contravention to ICCPR provisions, and in particular Articles 2(2), 3, 23(4) and 26.

Lack of effective remedies for women in accordance with Article 2(3) remains a problem. It has already been noted that women who seek assistance from the Court around housing and land disputes encounter many difficulties in accessing justice.

4.1.2 Women in Informal Settlements:

Women face particular challenges in the informal settlements of Kenya. The absence of street lighting and the presence of normal police force means they are vulnerable to sexual assault and other violations of the security of person under Article 9 of the Covenant. The small number of special police allocated to informal settlements fall under the Provincial Administration, a separate arm of government accounting directly to the President and a very powerful actor in informal settlements. The absence of Kenya Police in the settlements is alarming considering that at least half of the urban population reside in the informal settlements.

Women often suffer the most as a result of forced evictions, since they often run small businesses from their homes, rent out a small number of rooms in their structures, and are responsible for children and their school fees. COHRE interviewed one woman who had been evicted on 8 February 2004:

She is currently a resident of Gatwikira, where she pays Kshs 800.00 a month for a two-roomed shack. She is a single mother of four, with two daughters attending secondary school. She was amongst those evicted from Raila Village, to make way for the Northern Bypass. She was previously a structure owner, thus she did not have to pay any rent. But after her eviction she became a tenant. She initially managed to secure some resources and rented a room in the nearby middle income Langata Estate, as an emergency measure, where she paid Kshs 5000.00 – *e.g.*, ten times the rent paid in Kibera. She could not pay for the second month so she had to look for alternatives within the slum. A friend agreed to rent her one room at Kshs 800.00. However, her situation remains precarious and her two children in secondary school have started defaulting in their fees.²⁴

The majority of women in informal settlements are single mothers who have left the rural areas or other urban centres in search of a means of survival. In 2002, women headed 37 per cent of all households in Kenya, and that number has most likely grown due to the prevalence of HIV/AIDS.²⁵ In the informal rental market in informal settlements, single women face particular difficulties in finding rental accommodation. A Kenyan study concluded:

What is significant are the unique housing preferences of single and female-headed households, and the reluctance of structure owners to rent their housing units to them ... In

²⁴ An interview with a woman, at St. Charles Lwanga Primary School, Raila Village, on the 9th July 2004: See Centre on Housing Rights and Evictions, *Listening to the Poor: Housing Rights in Nairobi*, (forthcoming 2005).

²⁵ Republic of Kenya, *Economic Survey 2002* (Nairobi, Government Printer, 2002) p. 2, as cited by Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003) page 9.

Kenya, the stereotype notion of women, especially single women as unreliable renters is held not only by formally housing landlords, but also structure owners.²⁶

The prevalence of HIV/AIDS in informal settlements is also a large risk for women. It has been found that one in five Kenyans living in urban areas is infected with the HIV/AIDS virus, with many not knowing their status. Women are often forced by violence or other means of coercion, such as in exchange for small amounts of money or temporary accommodation, into risky sexual behaviours. Infected women, often having been driven from the rural areas after traditional widowhood practices as mentioned above, also contribute to the spread of the virus.

COHRE has received reports that women with HIV/AIDS are often shunned, and kicked out of housing in the slums. In the Mathare settlement, there were cases of women left homeless after being thrown out of the house by family or landlords after they have been diagnosed with the virus.²⁷ One woman, Ann, a widow infected with the virus, was evicted with her three children from her small dwelling she rented in Mathare (after having been earlier driven by her in-laws from her rural home that she had shared with her husband prior to his death) after she could no longer afford the rent. She was homeless for a period and has since passed away. Her children now live in a one room mud shack, next to an open sewer drain, with their grandmother.²⁸

4.1.3 Slum Upgrading and Women

Another concern has been the tendency of some slum upgrading programs – for example in Mathare 4A²⁹ and Kibera – to ignore small structure owners, often women, who survive on a small number of rental payments for survival. The focus on tenants is very commendable since the larger Kenyan informal settlements are dominated by a small group of structure owners, or ‘slum lords,’ often with strong political connections,³⁰ and tenants are often neglected in, and evicted during, such programs. But the smaller group of impoverished structure owners should not necessarily be ignored. COHRE therefore welcomes the acknowledgement, in a recent document produced by the Government of Kenya shortly after a COHRE consultation, of the existence of poorer structure owners and the need to protect their livelihoods.³¹ We look forward to the development of criteria for their protection as envisioned in the document.

²⁶ See Paul Syagga, Winnie Mitullah and Sarah-Karirah, *Nairobi Situation analysis supplementary Study: A Rapid Economic Appraisal of Rents in Slums and Informal Settlements*, Prepared for Government of Kenya and UN-Habitat, August 2002.

²⁷ *General discussion with group of community women, COHRE Interview, Mathare slum, February 2003.*

²⁸ COHRE Interview with Joyce, Mathare slum, Nairobi, 15 January 2005.

²⁹ In the Mathare 4A project, the majority of structure owners in Mathare 4A were single mothers, renting out rooms in their homes as their only source of income. Compensation to these structure owners was determined by the implementing agency with no mechanisms for appeal, and did not reflect the real investment and loss of livelihood.

³⁰ *See generally*, See UN-Habitat, *Rental Housing: An essential option for the urban poor in developing countries*, UN-Habitat, Nairobi, 2003 at chapter IV.

³¹ The document states that, While the project will address the issue of single-family headed households, it will pay particular attention and devise strategies by which women are empowered to support their households and improve their living conditions’ and ‘In certain circumstances, displaced structure owners may be invited to claim compensation.’

4.2 Nubians in Kibera Settlement

The Nubians³² are descendants of Sudanese soldiers used by the British in their military campaigns early last century. Kibera was approved as a site of settlement for Sudanese soldiers after active service. It constituted 4,198 acres of ‘reserve shamba,’ but European settlers began to complain of crime and disorder. These appeared to be common arguments against any well-located African settlement.

Several plans were made to move the ex-soldiers but they all floundered. Even the newly independent government declared in 1969 that what remained of Kibera was state land, thereby attempting to extinguish Nubian claims to it.³³ Meanwhile the Nubians continue to assert their claim to Kibera, despite many attempts at moving them.

The Nubians in Kibera expressed frustration at their inability to obtain security of tenure. Many are structure owners, and argue that the failure to provide them with legal title after a century of occupation has prevented them from improving their houses. In addition, the land to which they claim title has over the years been eroded by the influx of people who saw it as an attractive location to obtain work during and after the colonial period.

At the same time, the tenants renting from the Nubians – many of them Luos – are fearful that they may suffer as a result of the provision of legal title to Nubians. Regularisation of the land could lead to higher rents and therefore evictions of those tenants who cannot afford it. Any solution will therefore need to take account of various conflicting interests. Some government officials reported that plans are apparently proceeding to provide Nubians with 300 acres of land within Kibera, held in trust for their use. But no further information is available and while many promises have been made in the past, the Nubian community is still waiting for legal guarantees of their right to the land.

4.3 Homeless and Informally Housed

Discrimination is commonly practised against the homeless and those living in informal settlements. Unreasonable distinctions between these groups and those living in the formal sector should be viewed as a form of discrimination under Article 2(2), read in conjunction with Article 17, and Article 26 of the ICCPR. This is important since the majority of government laws and services are directed towards assisting those in the formal sector.

All persons, including those living in informal settlements, should enjoy a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other

³² The term ‘Nubian’ which is the common name for these Sudanese descendants is incorrect. It arose out of the need for them to portray themselves as an indigenous Kenyan group after independence, and has no reference to the 14th century Christian Kingdom of Nubia.

³³ T. Parsons, ‘Kibera is our blood’: The Sudanese Military Legacy in Nairobi’s Kibera Location’, 30 *The International Journal of African and Historical Studies* (1997) 1.

threat.³⁴ This is required by Article 17 of the ICCPR, in particular paragraph 2 of the provision.³⁵

Additionally, the Government of Kenya is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises the right to adequate housing. Article 26 of the International Covenant on Civil and Political Rights requires that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁶

Consequently, the lack of such a minimum degree of security of tenure as required by both Article 17 ICCPR and Article 11 ICESCR constitutes a violation of Article 26 of the ICCPR, since Article 26 prohibits discrimination on account of ‘property status’ as well as ‘other status’ such as poverty.

Residents of informal settlements, even those who have been living there for long periods, can be arrested under the criminal provisions of the Vagrancy Act. Despite recommendations in 1997 by the Nairobi Informal Settlements Coordination Committee, of which the government was a member, that the informal settlements be recognised, and a moratorium on evictions declared, the government has taken no steps to provide substantive protections against forced evictions.

A similar violation of Article 26 may arise if persons of Nubian descent described above lack such security of tenure based on racially discriminatory grounds. Residents of informal settlements also suffer discrimination with respect to rights to access water, sanitation, garbage disposal and education under Kenya law (see further discussion under Article 6 below).

³⁴ This language is taken from the Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing, paragraph 8(a), (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

³⁵ Article 17 reads ‘1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the *right to the protection of the law against such interference or attacks.*’ [Emphasis added]

³⁶ International Covenant on Civil and Political Rights, Art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976.

5. Right to life (Art. 6);



Kibera

The Government of Kenya has acknowledged the extent of the impact of poor housing on living conditions. An official report from December 2004 stated that:

The main problem is that the urban centers and the authorities responsible for their developments have not been able to cater for the basic needs of the increasing population resulting in many negative developments accompanying the urbanization process. The negative developments have manifested themselves in the forms of unemployment, widespread poverty, deficient housing and homelessness, among others. The problem is more acute in the urban areas where more than five million residents now live in deficient health threatening houses and conditions. Deficient housing manifests itself in the rapid formation and growth of informal settlements and tenement structures matched by deficiencies in the supply of the most basic infrastructure and public facilities required for human habitation. Therefore the living conditions tend to deteriorate at an alarming rate.³⁷

The challenge of ensuring living conditions consistent with the right to life is therefore a daunting, yet immediate, challenge for the government. There are, however, a number of obstacles that the government could immediately remove in order ‘to reduce infant mortality and to increase life expectancy’ in informal settlements in order to comply with Article 6.³⁸

³⁷ *Kibera – Soweto Slum Upgrading Project*, December 2004 (document on file with COHRE).

³⁸ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003).

Measure 1: Recognise Settlements

The first critical measure is to legally recognise the existence of informal settlements. This measure was recommended by a multi-stakeholder group, that included the government, but no action has yet been taken. Recognition would provide a number of immediate effects, including:

1. Grant residents the ability to demand essential services, such as water, sanitation, garbage disposal and basic health care, from the local authorities. *The lack of water supply and sanitation services in the informal settlements is the greatest threat to the right to life of residents.* Indeed, residents frequently identify this lack of basic services as the most urgent development priority;
2. Protection of residents and small informal businesses from forced evictions; and
3. Allow children living in informal settlements to access government schools, where free primary education is provided.

Measure 2: Access to Essential Services

The second measure is to assist, and demand that, local authorities provide essential services to the settlements. Until roads are regularised in the settlement, the government could establish bulk water points where water quality and prices are monitored. Within Kibera for instance, there are visible water pipes criss-crossing the various villages, which provide water at central points where it is sold to the community by entrepreneurs at an exorbitant cost (*as much as three to thirty times* the ordinary charge by the council). The high cost of this water means that residents sometimes have to use polluted water, for example from the Nairobi dam. High incidences of diarrhoea, dysentery, typhoid and cholera (to which children and those with HIV are acutely vulnerable) were reported to COHRE.

In the short term, sanitation services could be provided through the extension of low-cost toilet and shower blocks in the settlements. Mechanisms, including financial incentives, could also be developed to enable local residents to collect garbage. The government could support the expansion of health care facilities in the settlements, particularly since this is where most of the urban population lives and transport to major hospitals, particularly for outlying settlements, is often unaffordable.

Measure 3: Protection Against Forced Eviction

Increasing the protection of informal homes and businesses from forced and arbitrary eviction through, *inter alia*, the provision of security of tenure, will be highly effective in ensuring that Kenyans are better protected from threats to their means of their survival. See further discussion under Article 17.

6. Prohibition of torture, cruel and degrading treatment (Art. 7)

International jurisprudence increasingly recognises that forced eviction, and in particular when accompanied by demolition of housing, can constitute cruel, inhuman or degrading treatment.³⁹ The majority of Raila village in Kibera was demolished on 8 February 2004 with the resulting displacement of 1,000 to 2,000 persons. The village is located in the west of Kibera, bordering Soweto West and Gatwikira. The eviction was ostensibly for a 60-metre wide southern bypass road, which was planned in 1973, but was never executed. On 8 February 2004, tractors began demolishing those structures within the path of the proposed bypass.



Demolition of Raila Village, 8 February 2004

The demolitions constitute cruel and degrading treatment for the following reasons:

- Many evictees stated they had not been given notice of the evictions.⁴⁰ One interviewee stated that he had believed the bypass would not affect his house. Some of the interviewees did not understand the term ‘bypass’ which is often used when referring to the road. Government officials claim that notice was given but no documentary evidence of this was found;

³⁹ The Human Rights Committee has stated that ‘The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim’: see *General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, Article 7*, (44th Session, 1992). For cases concerning forced eviction and housing demolition, see UN Committee Against Torture, *Hijirizji et al. v. Yugoslavia*, Communication No.161 (2000) (holding that a forced eviction constituted cruel, inhuman and degrading treatment in violation of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and the following cases of the European Court of Human Rights: *Mentes and Others v. Turkey*, 58/1996/677/867 and *Selcuk and Asker v. Turkey*, 12/1997/796/998-999. The Court had earlier stated that the prohibition on torture, inhuman or degrading treatment or punishment included ‘the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.’ See, *Ireland v. United Kingdom*, Report of 5 November 1969, Yearbook XII.

⁴⁰ One interviewee noted that the residents claimed this because the notices were in the unreachable mass media, most of which is in English.

- The eviction took place on a Sunday morning when many of the evictees were in church. They were therefore not able to salvage much of their personal property. Property was also stolen and looted;
- There was no consultation with the affected communities;
- There was no provision of alternatives to forced eviction;
- Legal remedies have not been provided. Victims have been unable to obtain legal redress because of intimidation⁴¹ and compensation has not been offered;
- The rights of disadvantaged and vulnerable people were not protected. *See, e.g.*, Box 1 below for the account of bed-ridden resident with AIDS who was rescued by friends moments before his house was demolished;
- There has been no post-eviction support of any kind. Instead, institutions like the churches have been left to provide assistance;⁴²
- The evictions have negatively affected the neighbouring communities. For example, the demolitions included a clinic that had served the community;⁴³
- The evictions impoverished the affected persons. The precarious situation of the evictees has been made worse by the evictions. An interviewee relates that upon a visit to the area, he found people living in extremely inhuman conditions, with up to ten people (of all sexes and ages) in one room;
- Families have been separated and social ties strained.⁴⁴ Rents within the surrounding area of the demolitions increased, effectively creating more economic hardships for other poor residents; and
- A year after the eviction, the road building had not yet begun, and the sites of the demolitions remain green fields.

Box 1 Aggravating Circumstances: Resident of Raila village

‘It was Sunday and I was bedridden. When they began the demolition I was too weak to get up from bed. I heard the rumble of a bulldozer and I had no idea what was happening. The bulldozer reached

⁴¹ In an interview with Dalmas Owino, secretary of the Kibera Rent and Housing Forum, he indicated that his efforts at mobilising the affected community have been hampered by intimidation by youths linked to a local politician.

⁴² In an interview with Rev. Richard of the Anglican Church in Gatwikira, he suggested that the fact that the government does not deal with the evictees after the eviction makes them resort to it that much more easily.

⁴³ Joseph Mwendwa who worked as a caretaker of the clinic has been jobless five months since the evictions.

⁴⁴ Two interviewees had their children go to the rural areas after the evictions as the victims could not support them in town.

my wall. My friend had the sense of mind to come to my aid, and he found me in bed. He entered the house and carried me from my bed and brought me to this house.’

‘On trying to go back and save some of my belongings, I found that the house had already been demolished, with everything else I owned inside. The only things I recovered are the clothes you see me wearing. From then, I have been suffering and I rely on food handouts from my neighbours.’

‘I cannot afford to pay the Ksh 400 rent of the current house I am staying, where my friend put me. The landlady comes requesting the rent but I tell her I have nothing. My wife died and my children are staying with my aunt. I am currently on medication which I obtain from the DO’s office. It is very strong, and makes me very sick especially when I have nothing to eat.’

7. Security of person (Art. 9)

Many residents reported harassment by the Provincial Administration, an arm of Government that reports directly to the President and is frequently entrusted with the oversight of informal settlements. COHRE received statements that members of the Provincial Government, particularly the area chiefs, sub-chiefs and their agents (for example, the Provincial Administration police), had perpetrated violence against residents of slums and squatter settlements.

In many parts of Kibera, residents reported that the chiefs and the so-called Village Elders, known as ‘Wazee Wa Vijiji,’ had pulled down structures and confiscated building materials whenever people try to improve their houses in Kibera.⁴⁵ After the completion of the mission, the District Officer for Kibera allegedly shot a resident of Kibera after a group had protested that some residents had been evicted in order that a developer could purchase a plot of land.⁴⁶ According to the Korogocho Evictions Committee, the area Chief evicted tenants by night. He also prevented structure repairs, thus contributing to the physical degeneration of the settlements.⁴⁷ In the settlement of Kiambiu, residents who tried to initiate community development projects or protest about illegal land-grabbing by speculators were physically harassed by groups associated with the provincial administration.

Intimidation is extended to non-construction activities. In Mitumba, the Chief arrested community members who were carrying out enumerations and had the process stopped.⁴⁸ In the same settlement, the local Chief was said to have used some community members to evict others, thereby creating unnecessary tension amongst the dwellers.⁴⁹ There is evidence that community meetings are disrupted by the Provincial Administration or simply not allowed to go ahead, especially if they are to be held by factions that do not support the chiefs. Such scenarios were observed particularly in Kiambiu. Politicians have also reportedly hired youths to disrupt meetings.

⁴⁵ This issue was raised in all of the community consultations conducted across Kibera.

⁴⁶ Telephone conversation with Julius Ochieng, 12 September 2004; See Patrick Nzioka, ‘Leave Us Out of Kibera Land Dispute, Says Oxfam’ *The Nation*, 1 September 2004.

⁴⁷ Meeting with community members in Kariobangi Social Hall, 12 July 2004.

⁴⁸ Contributions from Mitumba residents in meeting with community members organized by Pamoja Trust, at Pamoja Trust, Ole Dume Road, 12 July 2004.

⁴⁹ *Ibid.*

At the same time, many residents stated that they were forced to rely on the protective powers of the Provincial Administration since the institution wielded a significant amount of power in the settlements. But the legitimacy of this institution is questionable and is to be abolished under the draft Constitution.

One government official acknowledged that there was rampant abuse of power by the Provincial Administration, which started in the previous government, but which has more or less continued unabated. Most officials from this institution that COHRE interviewed denied involvement in such activity but one chief was more candid.⁵⁰ He noted that while the informal settlement of Kibera is largely government land, it operates on a 'free market' and admitted that he allocates land and owns houses in the settlement. For his efforts he expects to be '*given a goat*' for the permission to build.⁵¹ He commented that evictions were a straightforward matter, 'Removing someone from the railway line or power line is a small thing.' He justified forced evictions for the AMREF Medical Centre on the basis that health services were now provided to the settlement. According to him, the 'tenant is flexible; he can just go anywhere' although interviews with victims of evictions indicated this was not the case.

In a number of settlements it was clear that some councillors sought to represent the interests of the residents, particularly tenants where they formed a majority of residents. In others, there was an absence of such intention and action. Some councillors, however, appear to be closely associated with members of the Provincial Administration in land speculation and physical harassment and intimidation of community leaders, as is demonstrated by the case of Kiambiu. A current councillor in Kibera is alleged to have engaged in a number of intimidatory activities in order to take control of the slum-upgrading project in Soweto.

Residents of smaller settlements located in the wealthier suburbs – *e.g.*, in Westland's, Deep Sea – also complained of police harassment.⁵²

8. Freedom from interference with privacy, family and the home (Art. 17)

With the election of a new government in 2002, there was a strong sense of urgency to reverse the abuses and excesses of the previous regime, especially with regard to land. 2004 saw the focus turning to evictions that were carried out ostensibly to reclaim state land. But further research indicates that the pressure for these particular evictions appears to stem from the proposed privatisation and corporatisation of the railway and electricity parastatals and a funding drive for the construction of the southern bypass. It should be stated from the onset that the demolitions in Nairobi and other places in Kenya, such as Timari and Migori, were not confined to informal settlements – a number of middle and upper class houses were also the targets of these demolitions. The focus of the COHRE investigation on the

⁵⁰ Interview conducted with Peter Muyala, Chief of Laini Saba, Kibera, 14 July 2004.

⁵¹ Directly translated from a common Kiswahili euphemism for a bribe 'kupewa mbuzi'.

⁵² Contributions from Virginia Wanjiru, community leader, Deep Sea, during a meeting with community members organized by Pamoja Trust, at Pamoja Trust, Ole Dume Road, on the 12th of July 2004.

informal settlements has been necessitated by the sheer numbers to be evicted, and the relatively larger impact that they have on what are essentially very poor people.

A number of planned evictions were announced in late January 2004. The Ministry of Public Works, Roads and Housing declared that it would evict all structures illegally built on land set aside for road reserves in order to build a bypass road.⁵³ The Minister for Local Government announced that all road reserves would be cleared. No eviction notices appeared to have been issued at the time and confusion reigned regarding exactly who would be affected. The exact route for the link road through the middle of Kibera was only ascertained by COHRE during the fact-finding mission.

The Kenya Power & Lighting Company (KPLC) gave notice on 29 January 2004 that it would evict all persons residing on power-line wayleave traces and KPLC land in the 'interest of public safety and provision of reliable power supply.'⁵⁴ The Kenya Railways Corporation announced on the same day that it would evict all persons within 100 feet of the railway and on other railway lands.⁵⁵ The notice for these two evictions expired on 2 March 2004.

Eviction notices were also issued, according to some sources of information, by the Ministry of Water, particularly in relation to settlements near waterways and sewer lines.⁵⁶ These notices appear to have been temporarily revoked even before the other notices were suspended. Similarly, the Local Government also appears to have given eviction notices to residents near sewer lines. COHRE was unable to confirm whether such notices were issued.

Due to the large numbers of people affected, a national and international campaign to stop the remainder of the evictions was commenced. The Government of Kenya then suspended eviction plans. This presidential decision was announced by the then Minister for Roads, Public Works and Housing announced at a rally in Kibera 29 February 2004.

Accompanying the suspension were statements that the evictions would not proceed without alternative shelter being provided to evictees. Some uncertainty resulted, nevertheless, when various Ministers declared that the suspension was not applicable to their departments. Such statements suggested that the suspension of the planned evictions amounted to a postponement rather than a cancellation of the announced plans, leaving a lingering fear that it was just a matter of time before the evictions would proceed.

The following sections provide further information on the threatened and actual evictions, evidence on why they are unlawful and arbitrary, the response of the government and proposed alternatives to the evictions.

⁵³ The announcement of the construction of the bypass – which had been planned for over 30 years – may have been prompted by promises by donors and creditors to provide funding for the project.

⁵⁴ See Notice in Daily Nation, 29 January 2004. Jeff Otieno, 'I will not be cowed, energy minister says', Daily Nation, 10 February 2004.

⁵⁵ The notice was carried in a number of Kenyan daily newspapers yet most Kenyan have no access to such newspapers.

⁵⁶ Discussion with communities in Kiambiu.

8.1 Settlements affected

Kibera

NGOs estimated at the time that 330,000 to 400,000 people would be evicted in Kibera alone. These figures have since been revised downwards, as the organisations were able to ascertain the precise areas designated for eviction and as follow-up surveys were carried out. There was significant confusion over the evictions on account of the bypass – due to the absence of eviction notices. Similarly, in relation to power line wayleaves, the Provincial Administration in Kibera – entrusted to carry out the eviction – apparently declared that all those within 30 (instead of the typical 6) metres of power lines, would be evicted. The COHRE team noted that different measurements for KPLC land were used in different settlements.

The *railway line* in Kibera runs from east to west affecting the villages of Laini Saba, Mashimoni, Kambi Muru, Kisumu Ndogo, Gatwikira, Soweto West and Kianda. The numbers of those affected vary markedly. A survey done at the time of the eviction notice estimated that 20,000 structures (108,000 residents) would be affected. A later survey estimated 5,247 structures (51,000 residents).⁵⁷

However, it is likely that the figure is not as high as 51,000 since the density of the structures along the railway lines varies significantly. Moreover, many of the structures are not residential homes, but it should be noted that demolition of kiosks raises issues of the right to life since livelihoods provide the economic base for obtaining shelter. The precise number affected by the proposed railway line evictions would have been verified by an enumeration that was planned for July 2004. However, this has not yet proceeded.

A number of salient issues need to be raised concerning the threatened railway evictions:

- According to residents the notice was only distributed through radio and the print media, although some did indicate that they had been personally served with notices.
- The railway track is an important mode of access for pedestrians coming from the East of Kibera, providing a direct route to the industrial area. This is natural, given the lack of access routes into the informal settlement. The track also provides good business opportunities and access to Kenyatta market and Ngumo Estate, where middle class customers live.
- The railway authorities had leased out the plots adjacent to and 30 feet from the line upon the payment of a fee. Their conduct thus precludes them from claiming the right to evict, at least on the basis that the encroachers are there illegally.

⁵⁷ The breakdown amongst the six villages affected was as follows: Soweto (1863); Laini Saba (1586); Mashimoni (578); Kambi Muru (292); Gatwikira (279) and Kianda (652).

- The structures along the railway serve as business premises and places of habitation. The potential of evictions to disrupt livelihoods and family life is enormous. Further, many schools, hospitals and churches are within the reserve.
- No alternative locations were provided by the railway authorities.
- Technological alternatives need to be considered.

While some people did demolish their businesses, the majority found space made by their fellow traders. This was after negotiations with the Kenya Railways reduced the distance to 15 feet on either side of the railway line, from an initial statement that the minimum distance would be 100 feet.⁵⁸ A case was also taken, as discussed in section 2 above, by 88 residents and kiosk owners on the railway reserve against the Kenya Railway Corporation to prevent the eviction.⁵⁹ They purported to represent all those affected by the railway notices.

There are indications that the Kenya Railway Corporation is taking positive steps, including planning detailed enumerations in the area, to ensure the adequate resettlement of those living on the railway line, potentially as part of the Kenya Slum Upgrading Program (KENSUP). However, it does not appear as if Kenya Railways Corporation has yet attempted to consult local communities to devise solutions to the problem.

The *link road* is supposed to connect with the southern bypass and to cut through Kibera with Mashimoni and Lindi on one side and Kambi Muru on the other. It emerges north at Makina and passes through the outermost eastern fringes of that settlement, continuing north until it emerges at the Kibera DO's office. It is provisionally estimated that 10,000 persons are affected. No eviction notices appear to have been issued. Also, very little is known on the ground about this planned road.

The structures under *power lines* in Kibera fall within Soweto East, Silanga and parts of Lindi. The number of people affected is put at 76,175, living in 3,255 structures.⁶⁰ Regulations require that a 6-metre buffer exist from the footprint of a high-tension power line. The requirement for power line wayleaves is reasonable because of the potential danger they pose to those living under them. Without the wayleaves, access for repairs to the power lines is very difficult, while the potential for fires is also real. However, as in other instances, there was no sufficient notice provided to the affected residents, nor any consultation process for consideration of alternatives to evictions. According to interviewees, they just found crosses painted on their structures the next morning. The potential negative socio-economic impact of the evictions is unquestionable. Soweto Baptist School, which falls right

⁵⁸ Indeed, in many meetings, it was common to hear that rather than relocate during the upgrade, residents would rather squeeze within the available space pending the building of the section they are from. This sentiment is especially heard from structure owners.

⁵⁹ *Nderu & Others v. Kenya Railways Corporation* (Civil Suit. No. 189 of 2004, High Court of Kenya).

⁶⁰ These estimates were obtained from a memorandum presented by Christ the King Church Laini Saba, Kibera to Mrs. G. N. Wanyonyi, Director of Housing. The exact definition of a structure in this instance is not clear; it most likely refers to a building that is divided into many single rooms – a common practice in Kibera.

under the power lines, has up to 200 primary and secondary school students. The school caters for the poor, including AIDS orphans.⁶¹

Mukuru

The Mukuru informal settlement abuts the industrial area to the south of Nairobi with a population of 200,000 people. Enumeration figures available for the places threatened by railway evictions indicate that the numbers to be affected are as follows:⁶² Kwa Njenga (5,129); Quarry (658); Kwa Reuben (991) Kingstone (1,382) Uchumi (1,177) The following points were noted with regard to the threatened evictions:

- There were no personal notices served; the mass media was used as the method of disseminating information. The only form of direct notification was the 'X' sign placed on the houses.
- The land under threat of evictions was settled with the active participation of the Chief.
- Many people indicated that they were prepared to voluntarily demolish their structures before the demolitions commenced. This is an indicator that there is space for negotiation.
- The railway authorities conducted themselves in an inconsistent manner; they frequently made inspections of the railway line but did not mention the encroachment or inform people what the applicable rules were.
- Evictions within the settlement purportedly caused rents to rise in neighbouring settlements where the evictees moved.⁶³

Mukuru is also traversed extensively by ***power lines***. There are the high voltage power lines from Jinja as well as the three-phase power lines to the industrial area. There is a particular need to move the residents away from the high voltage lines but the question is how, by what procedures, and what alternatives are being offered. Areas affected most by power lines within Mukuru area and the number of structures affected are:⁶⁴ KwaNjenga (1,365); Quarry (365); and Kwa Reuben (500). The number of people to be affected is therefore more than 11,000 people. The number was initially put at 900, and included numerous community facilities such as a church, classrooms, the church community hall and over 25 public toilets.⁶⁵

Korogocho

⁶¹ Interview with Festus Mathenge, headmaster Soweto Baptist school.

⁶² Pamoja Trust, Railway enumeration, 2004.

⁶³ Interview with Mr Fredrick Mbika, Catechist St Mary's Church Mukuru Kwa Njenga

⁶⁴ The following are figures provided by a local community organisation, the Quarry Garbage Collectors Organisation. It represents number of structures not people.

⁶⁵ Campaign Against Forced Evictions, Joint Paper, 17 March 2004.

The total number of households in Kibera has been enumerated at 18,537. There is a struggle between structure owners and tenants over land and tenure rights, and some residents appear to have been evicted as a result of this conflict. **Some have stated that** virtually the entire settlement was included in the eviction announcements of early 2004, particularly in relation to power lines. The Catholic Church in Korogocho estimates that 2,500 people are living on power line wayleaves.

Kiambiu

Kiambiu is an informal settlement in Eastleigh South Location, Nairobi. It has been occupied since 1950 and rapidly expanded to 10,000 persons during the 1990s. Many residents were evictees from other settlements. Kiambiu also reportedly represents an extreme case of land-grabbing and abuses of power by the chief, the former councillor and absentee structure owners, who account for at least 75 per cent of the structure owners. Residents estimated that 400 people (63 structures) are affected by the February 2004 eviction notice from Kenya Power Light to dwellers living under power lines. Three churches are also affected. A significant number are also affected by an eviction notice from Ministry of Water to those living close to the river. However, the community was unable to accurately count the structures affected, since the Chief continued allocating land next to the water to the structure owners even during the eviction threat.

8.2 Evictions justified?

Many of the arguments for the evictions were sound on face value but the prospect of massive homelessness and the availability of alternatives sheds doubt as to whether these evictions – actual and threatened – are not arbitrary under Article 17. Moreover, it has already been noted (in section 2 above) that the evictions are potentially unlawful under national law.

The high voltage power lines are an obvious hazard to the people living under them. On many occasions, it was observed that the poles often end up inside the informal structures themselves, and the potential for accidents is very high. The power lines can easily cause a fire through sparks, given that the structures below them are often flammable. Further, accessibility both for emergency services and infrastructure repairs is difficult, given the density of the settlements. However, alternatives are potentially available (see section 8.4 below).

The railway line encroachment, while less of a hazard, still has the real potential for fatal accidents given the proximity of settlements to the line. However, the concern to clear the railway reserve appears to be largely motivated by the upcoming privatisation in July 2005. Alternatives are available (see further section 8.4 below).

The bypass road is perhaps the most questionable given the age of the design – designed in 1958 according to one official⁶⁶ and in 1974 according to others – and the subsequent growth of the city. On the other hand, there is a case for more infrastructure to ease the

⁶⁶ Meeting with Omar Salat, District Officer, Kibera.

often crippling congestion on Nairobi's roads. However, it is doubtful whether the link road needs to pass through the middle of Kibera (see further, section 8.4 below).

8.3 Subsequent Government Action

The decision by the Government of Kenya to suspend evictions on 29 February 2004 represents a positive step in avoiding what could have been a catastrophic sequence of forced evictions. Statements from some government ministers suggested that evictions would not proceed without resettlement and that the international (and some national) requirements for evictions may be satisfied.

COHRE is aware that an Inter-Ministerial Committee headed by Vice-President Moody Awori is developing an evictions policy or programme in response to the suspension of the evictions.⁶⁷ This document is not currently public and no information is available as to when it will be approved by Cabinet. The formulation of such a document is welcome although COHRE has a number of concerns:

1. Has there been any consultation with affected communities on the proposals contained in the document? Or, will the document include such consultation as an essential step prior to planning any eviction?
2. Will there be an opportunity for public comment on the proposed evictions document?
3. Will the document provide a set of principles and procedures to be followed by all Ministries in order to prevent forced evictions? Addressing only those effected by eviction notices issued in January and February 2004 is a good step forwards. However in the long-term a policy that applies to all of Kenya would be needed.
4. Will the policy be in full compliance with international law, including the provision that forced evictions will occur only under the *most exceptional* circumstances, and in accordance with the relevant principles of international law?
5. Will the relevant department(s) be required to pursue all possible alternatives prior to any thought of forced eviction, for example, reconfiguring existing development projects, amending regulations for wayleaves, and *in situ* upgrading?
6. If individuals and families are to be resettled will the location be adequate in terms of access to livelihoods and social services?
7. Will there be adequate compensation for losses occasioned by the relocation?
8. Will the policy include a process for providing assistance and redress to those who were evicted in February and April 2004?

⁶⁷ Meeting with civil society representatives, 12 July 2004.

Kenyan legislation regulating forced evictions, particularly of people living in informal settlements, is fragmented and certainly does not presently comply with international human rights law. While some protections do exist – for example the need for a court order for evictions from government land – there is an urgent need for comprehensive legislation regulating forced evictions to ensure Kenya’s compliance with article 17(2). Moreover, the current Housing Policy does not mention evictions – it only briefly refers to the need for security of tenure and to minimise displacement during slum upgrading.

One study concluded that 17 Kenyan laws are ‘outrightly hostile and unaccommodating’ in relation to informal settlements.⁶⁸ This conclusion applies to security of tenure, building standards (now partially amended), access to services, and ability to conduct economic and cultural life. Further, residents face harassment and summary arrest by law enforcement agencies since they fit the statutory definition of a vagrant.

The likelihood that a legislative framework on forced evictions could be adopted in the short-term is low since there is a significant parliamentary backlog in the passing of legislation. Given the urgency of the issues that need to be resolved, however, the government would do well to consider fast-tracking the urgently needed legislative review. In the meantime, ***it is necessary for the government to immediately reinstate the moratorium on evictions issued by the Nairobi Informal Settlements Coordination Committee in 1997.*** There is, as a next step, an urgent need for a clear policy statement on forced evictions, in full compliance with international law. The Inter-Ministerial document discussed above could serve as a basis for such a policy.

There is also a pressing need to develop appropriate short- and long-term tenure regularisation processes within the informal settlements. In the short-term, interim protection could be provided through measures such as the declaration of secure tenure areas, or perhaps the temporary occupancy licences provided for in Kenyan land law or certificates of occupancy as were adopted in Botswana. In the medium-term appropriate tenure models will hopefully be addressed by the current National Land Policy Process. With specific reference to any absolutely necessary resettlement processes, it is important that before any temporary or permanent resettlement occurs, the tenure system for the decanting site, and, where relevant, the return to the original site, or any alternative site(s), should be agreed upon by the residents. In the meantime, the abovementioned moratorium will add an important layer of protection in the short-term.

Furthermore, legislation should be adopted to provide sustained protection from forced evictions. This could either take the form of separate legislation, or the provisions could be incorporated in the new process underway to draft a new Housing Act. Such a process should also seek to ensure consistency within the many pieces of legislation that affect

⁶⁸ These include Chapter IX Trust Land, of the Constitution of Kenya; Town Planning Act (Cap. 134); Land Planning Act (Cap. 303); Public Health Act (Cap. 242), Local Government Act (Cap. 265); Governments Land Act (Cap. 280); Trust Lands Act (Cap. 288); Registered Land Act (Cap. 300); Land Control Act (Ca. 302); Land Acquisition Act (Cap. 295); Valuation for Rating Act (Cap. 283); Rent Restriction Act (Cap. 266); Housing Act (Cap. 296); Vagrancy Act (Cap. 117); Trust of Lands Act (Cap. 58) and the Building Codes 1968 – Grade I and II (pursuant to the Local Government Act).

informal settlements. This would include reform of the Rent Restriction Act to ensure that informal settlements are covered and that there are effective mechanisms for redress.

It is important to note that Kenyan civil society groups have already made proposals for legislation on evictions and a housing law. These proposals should be considered and incorporated as appropriate.⁶⁹

It is also critical that an institutional cross-ministerial framework for regulating any evictions be adopted. It was clear from the implementation of eviction notices in February 2004 that there was little coordination or consistency between the relevant Ministries who issued the notices and the Provincial Administration who were given the orders to carry out the evictions. For example, in Mukuru KwaNjenga the area marked for demolitions under electricity lines appeared different from that marked in Korogocho.

8.4 Alternatives

Railway reserves

The encroachment on the railway wayleaves and reserves is in part due to the lack of pedestrian accesses. In Kibera for instance, the railway line is a convenient access from the east and leads to the heart of the settlements like Soweto West, Kisumu Ndogo and Gatwikira. Since pedestrian traffic is heavy on this route, it is only natural that businesses will encroach on the reserves. Lack of space in Kibera has also contributed to this encroachment; any 'empty' spaces in Kibera inevitably are encroached upon due to the high densities.

In a meeting with the Kenya Railways Corporation, officials noted the possibility of a train derailment and the consequent safety risks for residents and traders living and working along the railway lines.⁷⁰ The loss of lives resulting from an explosion of LPG gas on a train passing through an Athi River settlement was noted. The health risks to railway workers from waste and garbage on or nearby the tracks, was also raised together with the problem of adequately maintaining the tracks; for example providing sufficient ballast. The officials were of the opinion that the construction of a 200 feet (60.96 metres) corridor together with an immovable wall was therefore an urgent priority. However, plans for a wall on this rail corridor are strongly opposed by communities.

⁶⁹ In the draft National Housing Bill 2004, prepared by Civil Society in Kenya, the following is included:

21(1) No person shall be evicted from premises covered under this Act and no demolition of premises covered under this Act shall be carried out except in the following situations:

(a) where a person or persons occupy railroad tracks, garbage dumps, river banks, shorelines waterway or any other area as the Minister may determine,

(b) where land has been gazetted under section 18 of this Act, or

(c) where a court has issued an order for eviction and demolition.

(2) No eviction or demolition orders shall be issued involving underprivileged and homeless persons unless:

(a) notice has been effected upon the affected person at least 30 days prior to the date of eviction or demolition

(b) there has been adequate consultation on the matter of resettlement with the duly designated representatives of the affected community,

(c) there is presence of local government officials or their representatives during the eviction or demolition,

(d) there is proper identification of all persons taking part in the demolition, and

(e) adequate provision has been made for the relocation of the affected persons.

⁷⁰ Meeting, 19 July 2004.

The KRC expressed hope, however, that affected residents could be resettled within a year as part of the KENSUP process. This seems consistent with the consent order that was agreed upon between the parties in *Njoroge v. Kenya Railways Corporation*.

It is clear that the current situation is dangerous but it is not axiomatic that evictions or resettlement are the only options available. With respect to the prescribed width of the wayleaves, a report conducted by a World Bank consultant noted:

In their maps, the KRC draws a corridor of 30.48 m (100 feet) on each side of the rail (measured from the centre). This distance is apparently based on tradition. Reportedly, court cases have been pending since 1982 regarding KRC obligations to pay rates and taxes from railway reserve (track) land. These obligations are sometimes related to 100 feet, sometimes to 70 feet.⁷¹

Significantly, the Kenya Railways Corporation was also collecting rent from some settlers on the railway reserve (up to 31 December 2004 in the case of at least one temporary occupancy licensee), thereby indicating implied consent to occupancy or an implied waiver of any regulations proscribing occupancy.

While there are clearly a number of legitimate concerns about people living on the rail reserves, in the long term, the sudden concerted push for the eviction of all people living in the rail reserves, cannot be fully explained without taking into account the pending privatisation of the Kenyan Railways Corporation, due to be completed by 1 July 2005.

Nonetheless, the willingness displayed by the Kenyan Railways Corporation to take positive steps to find a humane solution is most welcome. The KRC is reported to be cooperating or supporting the current enumeration process that is taking place under the KENSUP initiative. Recent reports unfortunately indicate significant community resentment about the process of the enumeration.

Temporarily, the possibility of fencing off the railway line poses the problem of splitting Kibera in half, given that the settlements of Makina and Kianda are on one side of the railway. Also, access to the southern parts of Kibera by people who enter the settlement from the north necessitates crossing the railway line. The alternative of providing multiple footbridges across the railway line is a possible long-term solution. However, past experience in the Nairobi area, for instance in the Industrial Area and parts of Landhies, has shown that many of these barriers are breached within time. Footbridges are also not used and they have the potential of becoming crime spots at night. The railway police also have no capacity for enforcement, an important prerequisite for the effectiveness of barriers and footbridges.

The question of enforcement capacity also arises in another context. Had the evictions been implemented, and had all the railway reserves been effectively cleared, who would have ensured that they all remained this way, if not the railway police?

⁷¹ 'Social analysis – Operational Safety' at 5.2.2.

A much more effective solution clearly lies in working with the community and negotiating an approach that is to the mutual benefit of all. Once minimum distances have been agreed on, and any necessary relocation has been done in a way that satisfies the needs of the community, then the community could be directly involved in ensuring compliance in keeping the agreed minimum distances. Some groups have already agreed to move back from the railway line as part of the settlement of the court case against Kenya Railways Corporation. Railway wardens can be employed from the community to patrol the line, and to ensure that people respect distances and safety regulations. They may be paid by the railway corporation itself, or even by the traders. The danger posed by passing trains can also be mitigated by controls over the flow of human traffic along the line as the train passes, and this can be enforced by the same wardens. Since the train is regular, the times to do this can be predicted.

In the long term, the creation of proper access routes into the settlement from the outside will be necessary. This can be done in the context of an overall upgrading programme. The Kenya Railways Corporation should also consider the possible of *in situ* upgrading for those affected by the railway lines and the possibility of communities to come up with plans and solutions in this regard. Another possibility is to build a permanent market for traders near Kenyatta market; it is to be noted that the non-commercial part of the railway reserves is sparsely settled.

Power lines

The power lines represent a more immediate danger and provide less flexibility in terms of alternatives. Technological alternatives like underground cables (with access points for repair), or providing for overlapping routing (*e.g.*, the possibility of routing different combinations of power lines, railway lines, sewer lines, pipelines along the same reserves) can be explored. Wealthy residents residing on irregularly located land in other parts of Nairobi were able to pay for the re-routing of power lines and it is unclear why residents on informal settlements should be denied alternatives on account of their poverty. Costs and technical feasibility with all of these alternatives will obviously be an issue. The most important thing is that the alternatives should be exhaustively considered and publicly communicated.

Where relocation of people from under high voltage power lines is absolutely necessary, this needs to be done in a way that conforms to the requirements of international law. Eviction should be avoided as much as practicable, and replaced with voluntary relocation in accordance with a plan negotiated with the residents. Thus:

- The communities should be genuinely involved throughout the process;
- All feasible alternatives should be explored;
- Adequate and reasonable notice should be provided;
- Alternative resettlement (both sites and houses or provision of means to construct housing) should be provided, and such resettlement must include security of tenure, public infrastructure such as potable water, reasonable access to social amenities like schools and hospitals, and be within reasonable distances from job opportunities. Alternative resettlement will have to be preceded by some form of land audit; and

- The needs of the vulnerable such as children, the terminally ill, the physically disabled and the elderly should be considered and catered for in the plan.

Again, the important role of working with the residents to prevent future encroachment is vital. The remaining residents should thus be involved in post-relocation monitoring.

Roads and bypasses

During the interview process for the COHRE fact-finding mission, the relevance of the bypass and link road reserves was often questioned. This is a valid concern, given the time lapse since their design and the rapid growth of the city within the same period. Given the number of people settled in Kibera, and the difficulties associated with relocating them, it may be necessary to weigh the relative effects of social and economic disruption on different communities. A land audit to determine whether suitable alternative land for road building, that will cause less disruption, should be conducted. The potential for compulsory acquisition with compensation as provided for under the Constitution⁷² needs some consideration with regard to privately owned land. Further, should the process of an exhaustive consideration of alternatives come up with a similar route, then the requirements of international law with regard to evictions as discussed above need to be complied with in full. It is critical that the Government not repeat the Raila village experience.

In Situ Upgrading and Resettlement

The Government of Kenya committed itself in February 2004 to resettle those affected by the eviction notices. This should require as far as possible ‘adequate alternative housing, resettlement or access to productive land, as the case may be, is available.’⁷³ Additionally, rents or housing costs in any new settlement must be affordable.

The issue of locating adequate land is obviously difficult, particularly due to massive irregular and illegal allocation of land. Ownership of some vacant land around Kibera, for example, remains unresolved and embroiled in legal disputes. However, some experts and government officials said that sufficient public land is in fact available. Various Ministers have referred to plans to purchase 100,000 acres for resettling informal settlers. Moreover, the government has the power to acquire land under the Land Acquisition Act. Budgetary resources should be obtained and allocated for this purpose.

As far as possible, it is important to allow for *in situ* resettlement to minimise the disruptive effects of relocation upon access to employment, schooling and socio-economic networks. Slum upgrading projects, however, are by no means easy to organise, resource, implement or replicate, particularly not in a context of poverty and underdevelopment. To be successful, slum-upgrading projects require careful design and management. In particular, local conditions need to be considered; housing affordability and project finance must be sustainable in the long-term; consultation and direct, meaningful and sustained community involvement are vital; and residents must be effectively protected from evictions and

⁷² Section 75(1) provides that this may be for reasons of ‘town and country planning ...and public benefit’.

⁷³ Committee on Economic, Social and Cultural Rights, *General Comment No. 7 on Forced Evictions (1997)* at para. 16.

violence. In this context, it is to the immense credit of the Government and its development partners that slum upgrading features prominently in Kenya's recent housing policy: 'Upgrading of slum areas and informal settlements will be given high priority'.⁷⁴ A major project has commenced in Kibera, the largest and socially most complex informal settlement in Nairobi.

Unfortunately, not many of the people interviewed in Kibera by the COHRE fact-finding team expressed significant positive sentiments about the design of the initiative. The team was struck by the frequency and emotion with which the issue of slum upgrading was raised and the issue dominated the consultations conducted in Kibera. Tenants voiced fears over potentially unaffordable rents and evictions. Structure owners were worried about compensation and loss of livelihoods. Community leaders were concerned that the immediate social priorities – sanitation and water – would be ignored. All residents were apprehensive about potential violence. The most common and consistent complaint was the absence of sufficient participation and information in the process. These concerns are set out in more detail in a forthcoming report that will be available in March 2005 and it will include an analysis of the response by the Government to these concerns.

9. Recommendations

COHRE submits that recommendations should be made that the Government of Kenya:

Incorporate the International Covenant on Civil and Political Rights into the domestic law of Kenya.

Make stronger efforts to pass the draft Constitution, which provides stronger protections against arbitrary evictions.

Urge upon their courts an interpretation of the law that is consistent with the constitution of Kenya and the International Covenant on Civil and Political Rights, and that does not deny any protection of Covenant rights that would lead to the arbitrary or unlawful deprivation of the homes of those living in Kenya's informal settlements.

Provide adequate funding to the Kenyan National Commission on Human Rights to ensure the provision of effective remedies.

Establish mechanisms to ensure that victims are protected from intimidation or other forms of harassment when attempting to seek legal and other remedies.

Amend the Constitution and the Succession Law to ensure equal rights to inheritance for women.

Take steps to educate police, government officials and courts on the equal rights to inheritance for women and the need to protect widows from violence and

⁷⁴ Paragraph 30, National Housing Policy of Kenya.

disinheritance. These steps should be complemented with education and awareness campaigns directed towards women and their communities.

Eliminate the practice of widow cleansing, including through legislative means.

Recognise the historical land rights of the Nubian community within Kibera as promised to them by the British and Kenyan authorities.

Systematically increase the accountability of local authorities – particularly the Provincial Administration while it exists – to local communities. Complaint and dispute mechanisms should be established within informal settlements to allow residents to bring complaints about the abuses of power and violations of human rights by the Provincial Administration or any other government or elected official.

Urgently reinstate and enforce the moratorium on forced evictions declared by the Nairobi Informal Settlements Coordination Committee in 1997. Such a moratorium should only expire upon the: (a) adoption of a policy and law to prevent forced evictions; (b) adoption of an appropriate tenure model for informal settlements; and (c) institution of genuine consultative procedures in order fully to involve affected communities in all projects that affect their right to adequate housing.

Investigate, in genuine consultation with affected communities, alternatives to evictions.

Urgently provide all victims of forced evictions with tangible assistance and compensation. Such victims would include, amongst others, those affected by the following evictions that occurred in 2004: Raila Village (February); Mukuru kwa Njenga (February); evictions of tenants in Soweto, Kibera, by structure owners in anticipation of slum upgrading (July – September) as well evictions that have occurred elsewhere in the country, such as in Migori (April).

Urgently develop and adopt a *policy* and *law* to prevent forced evictions that are consistent with international human rights standards. The law and policy should ensure full compliance with international human rights law, including, *inter alia*, that: (a) Eviction is in all cases an exceptional measure of last resort, when all other feasible alternatives have been tried and exhausted; (b) Genuine consultations first occur with affected communities in order to find mutually acceptable alternatives; (c) Evictions may only be carried in certain prescribed circumstances; (d) Any eviction must be carried out humanely and with appropriate procedural protections; and (e) Evicted persons must be adequately resettled, under circumstances leaving them (at least) no worse off than before.

Existing legislation should be thoroughly reviewed and urgently harmonised with the new policy and law in order to prevent forced evictions in Kenya. Such review and harmonisation would include, *inter alia*: (a) Amending Section 130 of the Government Lands Act, in particular to ensure that evictions of occupants from public land only occurs if residents have access to alternative and appropriate accommodation; (b) repealing or amending the Vagrancy Act, in particular so that

being 'without fixed abode' is no longer a criminal offence; and (c) Amending Section 61 Trust Land Act to ensure protection from forced eviction.

Eliminate discrimination in the provision of housing and land tenure by providing security of tenure to the residents of informal settlements.

Establish an institutional framework for the prevention of forced evictions to ensure that all arms of government adopt a coordinated approach.

Provide legal recognition to informal settlements, as proposed by the Nairobi Informal Settlements Coordination Committee in 1997.

Provide clear budgetary allocation for the realisation of recent undertakings by government ministers to acquire 100,000 acres for slum-dwellers. Since Kenya's urban population will rapidly expand in the coming years, urgent consideration should be given to providing serviced land for the urban poor.

Take immediate steps to provide access to basic services in informal settlements – in particular water, sanitation, garbage disposal and energy – as well as access to health care and free primary education for children.

Take steps to ensure better respect for right to life in the informal settlements through, *inter alia*, schemes to improve livelihoods and access to health care and information, particularly on HIV/AIDS.

Adopt a comprehensive national policy for the improvement and upgrading of informal settlements, as anticipated in the Kenya National Housing Policy and Memorandum of Understanding with UN-Habitat. This should be accompanied by an institutional framework and budgetary support that allows communities to organise upgrading, with government support for the process. Residents should be able to choose appropriate tenure systems, access necessary credit and receive protection against possible violence and harassment from other actors during the process.

Increase efforts to ensure that the KENSUP slum-upgrading initiative in Kibera will be successful – for the residents of Kibera and as a best practice for Kenya and beyond – by implementing the original plans for the project and taking into account community concerns.

Urgently develop and adopt a policy and law requiring thorough human rights and social impact assessments for all major projects and provide the right of communities to participation as well as access to relevant information concerning government decisions in housing and development.

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